



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 21 OF 2006

REUBEN NZUVE MWANGANGIPLAINTIFF

VERSUS

MUKENE MUSAU.....1ST DEFENDANT

NDELE MUTUKU2ND DEFENDANT

RULING

1. In the Notice of Motion dated 16th March, 2018, the Defendants are seeking for the following court reliefs:

a. This Honourable Court be pleased to set aside the Ex parte Judgment dated 21st October, 2008 and decree dated 17th November, 2008 and all consequential orders thereunder in respect of the suit lands Plot Nos. Mbitini/Mutiswa/1878 and 1879 including execution thereof under the eviction orders of 15th May, 2017 and the consequential orders thereof for police security.

b. That Defendants do have leave to file a Defence to the suit as well as copies of Witness Statements and list of documents and that the suit be heard a fresh in the presence of all parties upon its merits.

c. A consequential preservative orders do issue directing the Land Registrar, Makeni County to enter a restriction or inhibition against any dealings with plot numbers Mbitini/Mutiswa 1878/1879 pending final hearing and determination of the said suit on its merits.

d. Costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Defendant who has deponed that she is the widow of the late Musau Kakuta who died on 1st June, 1985; that the 2nd Defendant's husband died on 27th August, 1986 and that after the death of the two brothers and their mother-in-law, the Kakuta family decided to share the family land in 1988-1989.

3. According to the 1st Defendant, until 7th March, 2018, she was not aware of the existence of this suit and the Judgment; that she was never served with the Summons to Enter Appearance or any other court papers and that she only became of the dispute on 5th March, 2018 when she was summoned by the OCS, Emali Police station.

4. The 1st Defendant deponed that the process-server, Jacob M. Muthenya, had returned false Affidavits of Service; that she does not reside at Yale Market as deponed by the process-server and that the 2nd Defendant does not reside at Kithatha village.

5. The 2nd Defendant deponed that all the wrong places of purported service as appears in the Affidavits of Service are a clear proof that the Judgment and the orders of the court were all issued upon false Affidavits of Service.

6. According to the Defendants, plot numbers 1878 and 1879 were never meant for the Plaintiff; that the Plaintiff's plot is number 1149 and that the Plaintiff concealed material facts.

7. In reply, the Plaintiff deponed that the Applicants were served with Summons to Enter Appearance by one Jacob M. Muthenya, a process-server, on 11th March, 2006 and that on 16th September, 2006, the process-server served the Defendants with a hearing notice.

8. The Plaintiff deponed that the Defendants were again served with the Application dated 24th March, 2010 on 17th June, 2011 and that they were once again served with a hearing notice on 12th May, 2012 and 18th June, 2012 before being served with the orders of the court on 15th November, 2012.
9. In the said Replying Affidavit, the Plaintiff challenged the Defendants to call the process-server for cross-examination and that the Defendants do not live far away from where he lives.
10. The Plaintiff finally deponed that the Application, the draft Defence and Counter-claim do not raise any triable issue and that there has to be an end to litigation.
11. In the Further Affidavit, the 1st Defendant deponed that nowhere does the Plaintiff claim ever dealing with the alleged service by the process-server; that the Plaintiff never accompanied the process-server at the time of his several returns of service and that the Plaintiff did not play any role in identifying the Defendants who are his relatives.
12. In his submissions, the Defendants' advocate submitted that the Plaintiff's narrative about plot numbers 1147, 1148 and 1149 cannot be true in respect of land within one Adjudication Section; that the three parcels of land were independent parcels in the register and that plot numbers 1147 and 1148 could not have been created from Plot No. 1149.
13. The Defendants' advocate submitted that there is no documentary evidence to show how plot numbers 1147 and 1148 changed to plot numbers 1878 and 1879.
14. The Defendants' advocate submitted that the Defendants were never served with the Summons to Enter Appearance; that the places of service indicated in the Affidavit of Service were not the Defendants' homes and that the Plaintiff never identified the Defendants to the process-server and that the process-server refused to attend court for cross-examination on the alleged service.
15. The Plaintiff's/Respondent's advocate submitted that it was the Defendants to avail the process-server for cross-examination; that the Defendants have been aware of the suit after being served on numerous occasions and that the delay in filing the Application is unreasonable. Both counsels relied on numerous authorities which I have considered.
16. This suit was commenced by way of a Plaint dated 1st March, 2006 which was filed on 2nd March, 2006. In the Plaint, the Plaintiff averred that both him and the Defendants are descendants of their grandfather, the late Kakuta; that the land belonging to Mr. Kakuta was registered as Mutiswa Adjudication Section No. 1149 in 1978 and that before the adjudication exercise of 1978, several family members were allocated their distinct portions of lands by the late Kakuta Nganda.
17. According to the Plaintiff's, the Defendant's late husband's sold their portions of land in 1974 and 1975 respectively; that during the adjudication process, the purchaser of land of the Defendants' husbands, Samuel Kimuyu Ndolo, was allocated Plot number 1148 and 1147 and that the Plaintiff's family refunded to the said purchaser the entire purchase price.
18. The Plaintiff finally averred in the Plaint that after refunding to the purchasers the purchase price for the two portions of land, the adjudication officers cancelled plot numbers 1148 and 1147 and combined the two with parcel number 1149; that he has always been in occupation of the then plot numbers 1148 and 1147 and that when clan members sub-divided the land in 1988, they deprived the Plaintiff the said land.
19. According to the Plaintiff, parcels of land number 1148 and 1147 were renamed parcels number Mutiswa Adjudication Section No. 1879 and 1878 respectively; that the two parcels of land were unlawfully allocated to the 1st and 2nd Defendants and that the Defendants are holding the two parcels of land in trust for him.
20. According to the Affidavit of Service filed in court on 27th April, 2006, both the 1st and 2nd Defendants were served at Yale Market, Kasikeu Division and at Kithatha village, Mutiswa location respectively. The Defendants neither entered appearance nor filed a Defence. The court proceeded to hear the Plaintiff and allowed his Plaint vide a Judgment dated 21st October, 2008.
21. The Defendants have claimed that they were never served with the Summons to Enter Appearance and that in any event, they have a Defence to the Plaintiff's claim that raises triable issues.
22. It is trite that the court has the discretion to set aside or vary a default Judgment upon such terms as are just and on the basis of evidence placed before it. While doing so, the court is obligated to bear in mind the principles of setting aside default Judgment enunciated in the case of *Mbogo vs. Shah (1968) EA 93*. In the said case, the court held that the discretion to set aside a default Judgment is exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.
23. On the basis of the evidence before it, this court is required to establish if the default Judgment of 21st October, 2008 was regular or irregular. Where the court finds that the Judgment was irregular, it ceases to have discretion in the matter. The court must proceed to set aside such Judgment *ex debito justitiae*. The distinction between a regular and an irregular Judgment was stated by the Court of Appeal in the case of *James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another (2016) eKLR* as follows:

“From the onset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file Defence,

resulting in default Judgment. Such a Defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or Defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended Defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default Judgment among others.”

24. In the above matter, the Court of Appeal addressed an irregular Judgment as follows:

“In an irregular default Judgment, on the other hand, Judgment will have been entered against a Defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default Judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own Motion. In addition, the court will not venture into considerations of whether the intended Defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such a Judgment is set aside as of right, and not as a matter of discretion is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates over the entire justice system. (See *Onyango Oloo vs. Attorney General (1986 – 1989) EA 456.*”

25. The Defendants have deponed that the 1st Defendant’s home is at Kasioni village, Lumu sub-location, Katani location in Makueni county, while the 2nd Defendant’s home is at Mbulutini village, Katani sub-location, Mutiswa location, Makueni County.

26. According to the 1st Defendant, he does not reside at Yale Market as deponed in the process-server’s Affidavit of Service of 26th April, 2006, neither does the 2nd Defendant reside at Kithatha village as alleged by the process-server.

27. In his Replying Affidavit, the Plaintiff, who is a nephew to the 1st and 2nd Defendants’ late husbands, does not deny that indeed the Defendants have always resided in Kasioni village and Mbulutini village respectively. Indeed, the Plaintiff did not indicate in his Replying Affidavit that he is the one who pointed out to the process-server the homes of the 1st and 2nd Defendants for the purposes of serving them with the Summons to Enter Appearance.

28. The unchallenged evidence before me shows that the 1st and 2nd Defendants’ home are at Kasioni village and Mbulutini village respectively and not in Yale market and Kithatha village as alleged in the Affidavit of Service. Indeed, the inconsistency of where the 1st and 2nd Defendants’ homes are is captured in the Further Affidavits of Service of 24th November, 2012 and 26th September, 2006.

29. The Plaintiff never identified the Defendants to the process-server. In his subsequent services, the process-server interchanged the names of Defendants’ respective homes and indicated the names of strangers as the persons who had assisted him in identifying the Defendants for service.

30. Having found that the alleged places of service of the summons on the 1st and 2nd Defendants were not the Defendants’ respective homes as alleged by the process-server, and the Plaintiff who is related to the Defendants having not pointed to the process-server the Defendants or their respective homes, I find that the 1st and 2nd Defendants were never served with Summons to Enter Appearance.

31. Indeed, my conclusion that the 1st and 2nd Defendants were never served with the Summons to Enter Appearance is fortified by the fact that even after being ordered by the court to appear in court for cross-examination on his Affidavits of Service, the process-server declined to attend court.

32. The refusal by the process-server to avail himself for cross-examination is one of the clearest indication that he filed in this court false Affidavits of Service. The purported service of the Summons to Enter Appearance on the 1st and 2nd Defendants cannot stand.

33. Having not been served with the Summons to Enter Appearance, the default Judgment that was delivered by this court on 21st October, 2008 was an irregular Judgment. Being an irregular Judgment, the same must be set aside *ex debito justitiae* to allow the Defendants to defend the suit unconditionally.

34. For the reasons I have given above, I allow the Defendants’ Application dated 16th March, 2018 as follows:

a. The Ex parte Judgment dated 21st October, 2008 and the decree dated 17th November, 2008 and all consequential orders thereunder in respect of parcels of land known as Mbitini/Mutiswa/1878 and 1879, including execution thereof be and are hereby set aside.

b. The Defendants have leave to file their respective Defences to the suit within fourteen (14) days of this Ruling.

c. The Plaintiff to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE