



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 634 OF 2017 (O.S)**

**(Formerly Kisii ELCC No. 293 of 2013)**

**MARTIN GUYA OUKO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**AGUGA ADUNDO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RICHARD OTIENO NDIGA....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ABAYO MIRIAM OCHIENG.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. By an application dated 17<sup>th</sup> May, 2017 and filed on 18<sup>th</sup> May 2017, the 3<sup>rd</sup> defendant (the applicant), **ABAYO MIRIAM OCHIENG** is seeking the following principal orders:-

*i. The interlocutory Judgment entered herein on 4<sup>th</sup> September, 2013, Judgment and decree made on the 29<sup>th</sup> May, 2015 together with all consequential proceedings and orders be and are hereby set aside.*

*ii. The Honourable Court be pleased to grant unconditional leave to the 3<sup>rd</sup> respondent to file her replying affidavit out of time.*

*iii. If prayer number (6) is granted, the annexed draft replying affidavit sworn by the 3<sup>rd</sup> respondent on the 17<sup>th</sup> May, 2017 be deemed to have been filed within time and to form part of this Honourable Court's record.*

*iv. The costs of this application be provided for.*

2. The application is anchored on grounds (a) to (L) on its face and they include that :-

*1. The 3<sup>rd</sup> respondent is the registered owner and in possession of the suit property known as West Kasipul/Kodera/Karabach/390.*

*2. The applicant has obtained eviction orders against the 3<sup>rd</sup> respondent on the suit property pursuant to a Judgment and decree made in this matter on the 29<sup>th</sup> May, 2015.*

*3. The Originating summons and all other pleadings were never served upon the 3<sup>rd</sup> respondent as alleged by the process server, one James Moracha Ntabo, who has fraudulently sworn false affidavits.*

*4. As held by the Court of Appeal in Paython Waweru Maina-Vs- Thuku Mugiria (1982-1988) 1 KLR 171, the court has no discretion at all but to set aside a judgment where there has been no proper service of summons.*

*5. As stated by the Court of Appeal in James N. Wa Wambu -vs- Republic and 7 other (1995) eKLR, registered owner of properties are persons directly affected and ought to be given a hearing and natural justice demands that they be informed of the allegations against them.*

3. The application is further anchored on the applicant's affidavit of even date, and accompanying documents, among them, a true copy of title to the suit property marked as "AMO1", copies of eviction order issued by the court marked as "AMO-2 and a true copy of the decree

and Judgment obtained herein and marked as “AMO-5”. The applicant averred, inter alia, that he is the registered owner and in occupation of the suit property having purchased the same for valuable consideration from the 2<sup>nd</sup> respondent (deceased) in the year 2012. That she first learned of the claim on 5<sup>th</sup> May 2015 when the auctioneers visited the suit property to effect eviction orders marked as “AMO-2”. That if stay is not granted, the auctioneers will proceed to evict her from the suit land.

4. The plaintiff (respondent) opposed the application in his replying affidavit sworn on 30<sup>th</sup> May 2017 and filed on 31<sup>st</sup> May, 2017. He averred, inter alia, that the application has no merit and should be dismissed with costs. That the applicant was properly served at all times service was required and that she properly followed the law to get the suit property.

5. The applicant is represented by learned counsel, Mr. S.N. Otinga of S.N. Otinga and company Advocates. The plaintiff is represented by learned counsel Mr. C.A. Okenye of C.A. Okenye and Company Advocates.

6. On 21<sup>st</sup> November, 2018, this court directed that the application be argued by way of written submissions; see **Order 51 rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

7. Learned counsel for the applicant filed submissions dated 28<sup>th</sup> January 2019 whereby two issues for determination were identified and analysed. The issues are whether; service of summons and subsequent pleadings were effected upon the applicant and whether the ex-parte Judgment entered herein and all the consequential orders and proceedings ought to be set aside. Counsel cited **Order 5 rule 15 (1) of the Civil Procedure rules, 2010** and **Order 10 rule 11 of the Civil Procedure Rules, 2010**. He also relied on **Said Abdala Azubedi –vs- Samwel Mbugua Ikumbu (2018) eKLR** to the effect that time of service and who pointed out the applicant to the process server should be indicated in the affidavit of service and **James Kanyiita Nderitu and another –vs- Marios Philotas Ghikas and another (2016) eKLR** on the distinction between a regular and irregular Judgment, among other authorities.

8. The authorities relied upon by the applicant are as per her list of authorities dated 26<sup>th</sup> January 2019 and filed on 30<sup>th</sup> January, 2019.

9. Learned counsel for the respondent filed submissions dated 28<sup>th</sup> January, 2019 wherein reference was made to Judgment delivered on 29<sup>th</sup> May, 2015 in favour of the respondent. The applicant’s counsel urged this court to dismiss the application with costs as the applicant has no good reasons to set aside the Judgment.

10. I have carefully considered the entire application, the replying affidavit and submissions of counsel for the 3<sup>rd</sup> defendant/applicant and counsel for the plaintiff/respondent. Thus, the issues for determination are as framed in the applicant’s submissions herein.

11. In respect of service of submissions, the applicant contended that the process server’s affidavits of service sworn on 12<sup>th</sup> August, 2013 and filed on 13<sup>th</sup> August 2013, 12<sup>th</sup> February 2014 and filed on 28<sup>th</sup> February 2014, 5<sup>th</sup> June 2015 and then filed on 10<sup>th</sup> June 2015, draw an inference of no service upon the applicant. That the process server failed to state the description of the applicant, the time and place of service, among other things, in the said affidavits.

12. On 22<sup>nd</sup> November 2018, the process server, James Moracha Ntabo was examined pursuant to the order of this court granted on 8<sup>th</sup> February 2018 and issued on 20<sup>th</sup> February 2018. The process server stated thus:-

***“I swore affidavits on 12/8/2013, 24/2/2014. 05/06/2015, 08/7/2015, 31/10/2016 and 28/1/2016. I signed them.***

13. During cross-examination by counsel for the applicant, the process server stated, inter alia,

***“I met the 3<sup>rd</sup> defendant at Langas estate . She was together with other people and it was a point for me to note in my affidavit. I did not indicate the time of service.”*** (Emphasis laid)

14. Counsel for the applicant contended that an affidavit of service must comply with **Order 5 rule 15 (1) of the Civil Procedure Rules, 2010** which provides that :-

***“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery of tender of summons. The affidavit of service shall be in form No. 4 of Appendix A with such variations as circumstances may require.***

***Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month’s imprisonment or both.”*** (Emphasis added)

15. Notably, in the Judgment rendered on 29<sup>th</sup> May, 2015, the court (Okongo J), observed at paragraph 3 that the defendants/respondents were served with summons to enter appearance but failed to enter appearance and file statement of defence. That the originating summons was thus not defended. The court was entitled to arrive at that conclusion on the face of affidavit of service sworn on 12<sup>th</sup> August 2013, by the process server, **James Moracha Ntabo**.

16. The said process server, was examined on oath in respect of his affidavits of service sworn on 12<sup>th</sup> August 2013 and 24<sup>th</sup> February 2014

pursuant to this court's order granted on 8<sup>th</sup> February 2018. I am in total agreement with Munyao J in *Saidi Azubedi case (supra)* that the such affidavits of service contravene **Order 5 rule 15 (1) (supra)**.

17. To that extent, can this court set aside the proceedings, the interlocutory Judgment, the exparte Judgment consequence of non appearance or default of defence entered herein on 4<sup>th</sup> September 2013 and 29<sup>th</sup> May, 2015 respectively and all the consequential orders? **Order 10 rule 11 of the Civil Procedure Rules** states :-

***“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree order upon such terms as are just”.***

18. The defendants including the applicant are entitled under the said Order to move the court to set aside the default Judgment and they be granted leave to defend the suit. In the circumstances, the court has unfettered discretion to do so upon consideration of several reasons including whether the intended defence has triable issues and whether it is in the interest of justice; see **Chemwolo and another –vs- Kubende (1986) KLR 492, CMC Holdings –vs- Nzioki (2004) 1 KLR 173** and **Kanyiita Nderitu case (supra)**.

19. It is settled law that where there is not service upon the defendant, the court has to set aside ex parte Judgment. That no procedural cock ups shall deter the court in doing so as recognized in the case of **Baiwo –vs- Bach (1987) KLR 89** and **Articles 23 (c), 50 (1) and 159 (2) (d) of the Constitution of Kenya, 2010**.

20. Similarly, in the case of **Kanwal Sarjit Singh Dhiman –vs- Kashavji Jivraj Shah (2015) eKLR**, the Court of Appeal held thus:-

***“The courts exist for the purposes of dispensing Justice, and that the sword of Justice cuts both ways. As a court, we have to balance the two divergent interests. Further it has been said time and again that a technical Judgment is not the best Judgment.” (Emphasis laid).***

21. In the instant matter, it has emerged that technical and not substantive Judgment was rendered on 29<sup>th</sup> May 2015. It has to be set it aside by this court as the application is full of merits in the interest of justice.

22. A fortiori, I allow the application dated 17<sup>th</sup> May, 2015 mounted by the 3<sup>rd</sup> defendant/applicant in terms of orders 5,6 and 7 sought therein. The applicant's draft replying affidavit sworn on 17<sup>th</sup> May, 2017 be served on the plaintiff/respondent's counsel within the next thirty (30) days from this date.

23. Throw away costs of **Kshs. 10,000/=** be borne by the applicant and be paid to the respondent's counsel on or before the next date for pre-trial directions in view of the nature and circumstances of this application.

24. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 30th day of JULY 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Agure Odera holding brief for Mr. Otinga learned counsel for the 3<sup>rd</sup> defendant/applicant.

Tom Maurice – Court Assistant.