Sewe v Ogutu (Environment and Land Case E022 of 2022)
[2025] KEELC 5380 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5380 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND CASE E022 OF 2022

AE DENA, J

JULY 17, 2025

BETWEEN

ERICK OCHIENG SEWE ..... PLAINTIFF

AND

MICHAEL OWINO OGUTU ..... DEFENDANT

RULING

1. The applicant is the defendant in this suit. By way of Notice of Motion dated 11/3/2025 he seeks interalia an order of stay of execution of the judgement of this court delivered on 19/9/2024, the decree and consequential orders thereto. That the said judgement be set aside.

2. The application is premised on the grounds on its face and the supporting of affidavit of Michael Ogutu the defendant.

3. The applicant states he is the registered owner of parcel Ugenya/Sega/350 having purchased the same from one Geoffrey Murabula Ogonda. A copy of the register is annexed as MOO1. That the parcel was the subject of the proceedings in Kisumu ELC Case No 477 of 2015(Formerly HCC No.51 of 2012) wherein the defendant Owino Sewe, is the brother of the plaintiff in the present proceedings. That judgement in the said proceedings was in favor of Geoffrey Murabula Ogonda the plaintiff therein for orders of eviction against the entire Owino Sewe family. A copy of the judgement and decree are attached.

4. That efforts by Owino Sewe the plaintiffs brother herein for orders of review of the said judgement including stay of its execution were unsuccessful the applications having been dismissed. Further that Owino Sewes application for joinder to the proceeding in the Kisumu case as well as its consolidation with the present proceedings was also dismissed for the reasons that the issues introduced were similar to the ones in the application for stay and setting aside of the judgement which had already been considered and dismissed.

5. It is asserted that the plaintiff preferred an appeal against the above decision and application for stay of the judgement and decree which he later withdrew on 20/3/2023. It is stated that the proceedings in the Kisumu court not-withstanding the plaintiff went ahead to prefer the present suit against the applicant.

6. The applicant depones he was not served with any pleadings or any notices in these proceedings. That no personal service was effected upon him thus the prayer for the process serve to be cross examined on the affidavits of service. That the deponent has never entered appearance in this matter and his address never made known to the court. That the judgement was made exparte and on the face of existing orders of eviction and injunction. That the plaintiff was aware of the said existing orders which directly affected him yet deliberately chose to mislead the court.

7. That the eviction orders in the Kisumu case are still in force. It is urged that as the registered owner he stood to suffer irreparable loss if the said exparte judgement is not set aside and the matter be heard denovo. That there is no prejudice to be suffered by the plaintiffs. Further that the suit ELC E023 of 2022 (OS) is res judicata Kisumu ELC Case No.577 of 2015 and or duplex. That the application has been brought without unreasonable delay and that he has a good defence.

8. In rejoinder vide a replying affidavit sworn on 20/3/2025 the plaintiff asserts that the defendant was duly served vide a number of processes served through his official contact number which the defendant has not refuted. The instances of service were enumerated and the affidavits of service attached. The deponent states that he had no involvement in ELC No. 577 of 2015 neither did it involve the applicant. That he was not claiming through Owino Sewe. That the call to have the process server cross examined was baseless service was not personal and subsequent services made the former otiose. The grant orders for cross examination are discretionary and should not be granted to a person who has not approached the court with clean hands and has not demonstrated clear basis for the request.

9. It is asserted that the applicant has failed to disclose any substantial grounds that could lead to a different judgement. No draft reply or response disputing the principles of adverse possession that informed the judgement had been provided. That there were no valid grounds to warrant setting aside the judgement which has been implemented. The court is invited to dismiss the application.

10. The application was canvassed by way of written submissions. The applicants' submissions are dated 16/04/2025 and the respondents 4/05/2025. The court has considered the submissions.

Analysis And Determination

11. Having considered the application, the response thereto, the submissions of the parties and the law, the main issue for determination in my view is whether the application dated 11/3/2025 is merited.

12. The application is brought under the provisions of Section 80, 3,3A and 20 of the *Civil Procedure Act*, 19(2) of the *Environment and Land Court Act*, Order 9 Rule 9, 12 Rule 7, 22 Rule 22 of the Civil Procedure Rule.

13. Prayers 1 and 2 of the Notice of motion are spent. Prayer No. 2 was for the leave of the court to allow counsel for the applicant to come on record post judgement. The court allowed this prayer on 13/03/2025.

14. Section 80 of the *Civil procedure Act* states that; -

> " Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or

order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

15. The present application basically seeks the setting aside of the judgement of this court for the reason that the applicant was not aware of the proceedings and the suit proceeded exparte. The applicant's case is that he was never served and impugns the various affidavits of service filed in proof of service upon him. It is not application for review of the judgement as envisaged under the provisions of section 80 above as read to together with the provisions of order 45 of the Civil Procedure rules. The provision does not apply.

16. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

> 'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'

17. It is noteworthy that the judgement in the instant case was rendered after the plaintiffs case was heard, that is upon formal proof. I found the following dictum of the Court of Appeal instructive in this regard.

18. The Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, stated thus:

> "…. 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 justiae, 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 issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such 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 our entire justice system." (Emphasis is mine)

19. Was the defendant duly served is the big question in the present case. One of the grounds of the application is that no service of the Originating Summons was ever effected as per the orders of 14/4/2023. That the applicant was not aware of the existence of the suit herein. At paragraph 8 of the supporting affidavit the applicant depones that he was not served with any pleadings, statements, documents, orders, hearing or mention notices including the amended Originating summons. The applicant then refers to the orders of 14/4/2023 which according to him required personal service of the amended Originating summons.

20. I took time to peruse the file on matters pertaining service. On 7/2/23 counsel for the plaintiff attended court. On noting the absence of the defendant, the court observed it was not satisfied with the service upon the defendant and directed that the 'Plaintiff to serve once more directly serve the Defendant'. The court set down the matter for Mention on 7/3/23 to confirm proper service.

21. On 7/3/23 Mr. Obiero informed the court they had done fresh service. From the court record this fresh service was undertaken by Clifford Otieno Obiero Advocate who swore the affidavit of service

on 6/3/24. He deponed he called the respondent who agreed that he should be served via his whatsapp number 0722332188.

22. It is important at this juncture to highlight on the amendments to Order 5 that were introduced by LN. 22 of 2020. Order 5 Rule 22C is on mobile- enabled messaging Applications that ;-

> ,"(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
>
> (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
>
> (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.
>
> (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service."

23. From the above provisions the court will therefore consider the last known and used telephone number. Proof of service is the receipt of delivery message which is expected to be annexed to the affidavit of service.

24. Now back to the affidavits of service noted herein before. My observation is that there is no disclosure of the mobile number that the respondent was called on for him to have agreed to be served on the said whatsapp number. I have also perused all the affidavits of service in the file. All were served through the above whatsapp number and seem to bear the narrative that Clifford Otieno Obiero counsel for the plaintiff called the applicant who agreed he could be served on the whatsapp number above. Still there was no way of ascertaining whether there was a last known number or used telephone number.

25. As to the proof of delivery of the whatsapp messages, the receipt of delivery message was indeed annexed to the affidavit of service showing the name Michael Agutu. But of utmost importance is that I have no confirmation from Safaricom that the number does not belong to the defendant applicant.

26. Then there is the direction by the court for direct service which the respondent is interpreting to mean personal service based on the provisions of Order 5. All I can state is that personal service has always been the preferred mode of service see Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR. In the present case there was no personal service except the attempt on 23/1/2023 which the court was not satisfied with.

27. Based on the foregoing this court forms the view that a lot of doubt has been cast as to whether there was service of the process upon the defendant. It is safe to conclude there was no service.

28. But assuming this court was wrong on the above, I think I must be guided further by the dictates of justice and the circumstances of this case. In Katuvi & another v Kire (Civil Appeal E187 of 2022) [2023] KEHC 25363 (KLR) (Civ) (17 November 2023) (Judgment) Justice Majanja (May his soul rest in eternal peace) had this to say;-

> 'Even where the judgment is regular, the court may yet proceed to set aside the judgment if justice of the case demands, particularly where the defendant demonstrates that it has a good defence and any prejudice caused by setting aside may be assuaged by an award of costs

(see Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another [1998] eKLR).

29. In the case of Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193 Platt, JA expressed himself as follows:

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, 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 ...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ...It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgement would be set aside in the exercise of the court's inherent jurisdiction".

30. Applying the foregoing the court will interrogate whether the justice of this case demands the setting aside; Has sufficient cause been demonstrated, is there a defense on the merits and would setting aside the judgement unduly prejudice the plaintiff.

31. The plaintiff contends that no draft defence has been attached and rightly so. The court has not come across the same. But is this fatal?

32. In the case of Odwesso v Nyaga alias Jason Nyaga (Civil Appeal E031 of 2020) [2024] KEHC 9123 (KLR) (Civ) (18 July 2024) (Judgment) the learned judge Kizito Magare persuasively had this to state; -

> '27. Secondly, an appeal from exercise of discretion must be shown that the decision is capricious and irrational. The court does not need to have a draft defence. However, there must be a defence to set aside a regular judgment. I have perused the affidavit in support of the application to set aside and note that it raises triable issues. The Respondent is entitled to defend. Lenaola J (as he then was) posited as follows in the case of Mandeep Chauhan vs Kenyatta National

> Hospital & 2 others (2013) eKLR:"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rule enjoys superiority over all laws made by humankind and that any law that contrives or offends against any rules of natural justice, is null and void and of no effect. The rule as captured in the Latin phrase 'audi alteram partem' literally translates into "hear the parties in turn", and has been appropriately paraphrased as, 'do not condemn anyone unheard'. This means that a person against whom there is a complaint must be given a just and fair hearing."

33. Based on the foregoing dictum in the absence of a draft defence attached to the supporting affidavit I looked at the totality of the entire case. Issues have been raised about the existence of ELC No. 577 of 2015 on its relevance or not to these proceedings. It is contended by the applicant that the case has a bearing to the present case as it involves the same suit property. That in the said case the entire family of the plaintiff was evicted from the said parcel and yet the plaintiff who is a son thereof has circumvented a valid judgement of the court by filing the present proceedings in action for adverse possession. The applicant urges he is a current registered owner and will suffer irreparable loss. On the other hand it is submitted on behalf of the plaintiff that the parties and underlying claims in that judgement are entirely distinct and any orders or findings therein do not bind or benefit the applicant or the respondent in this matter.

34. All the above issues seem to be emerging for the first time at this stage of the proceedings It would be wrong for this court to close its eyes to it. For me all these disclosures call for further interrogation and they raise triable issues as between the parties in the present suit. The court cannot at this juncture review the allegations without setting aside the judgement.

35. It is now established that a good defence need not be one that must succeed. I'm further emboldened by the following dictum which I find of good guidance;-

In Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR, the Court of Appeal posited summary judgment as follows: -

> 'Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company v Amalgamated Trade & Services LLR No 103 (CAK) this Court stated:As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. (emphasis added)

36. Will there be any prejudice that will be occasioned to the respondent plaintiff in this application. It has been urged by the plaintiff that the judgement in this case has since been fully implemented and is spent. That the orders now sought are incapable of affording any practical relief as ownership has

lawfully vested and the title to the suit property has been transferred in accordance with the decree. That no orders have been sought for setting aside or cancellation of the resultant title. That a party is bound by its pleadings and the court cannot award that which has not been sought.

37. In response to the above counsel for the applicant has referred this court to the provisions of order 10 Rule 11 of the Civil Procedure Rules. Indeed discretion is donated to the court and it extends to the consequential decree.

38. Additionally for me I think it is matter of logic. Where a court finds that the matter needs to proceed on its merit then the judgement must be set aside and consequently its setting aside is attached to the decree and its result which was the registration of the plaintiff as proprietor. Moreover, I see no hardship that will be occasioned. The plaintiff it appears is in occupation and no one is removing him from the suit premises at this stage as the balance of convenience tilts in him remaining thereon pending the determination of the suit herein on merits. A further order of inhibition may equally be imposed to maintain the status quo post this ruling. These would be just terms to deploy in my view.

39. The upshot of the foregoing is that taking into consideration that the rules of natural justice requires a party not to be condemned unheard and in exercise of my discretion, I find merit in the application and allow it on the following terms:

    I. The exparte judgement of Hon A.Y. Koross delivered on 19/09/2024, the decree issued thereof and all consequential orders thereto be and is hereby set aside.

    II. That leave be and is hereby granted to the defendant applicant to file and serve his defence and response to the Amended Originating Summons, Witness statements and documents within 14 days of the date of this ruling.

    III. That the Plaintiff/Applicant in the Amended Originating summons herein may respond further upon service in (ii) above within 14 days.

    IV. That the Plaintiff shall remain in occupation of the suit property L.R North Ugenya/Sega/350 and the status quo on the ground shall be maintained pending the hearing and determination of the suit on merits. The defendant shall not interfere with the occupation thereof in any manner.

    V. Pursuant to the implementation of (I) above there shall be no further registration of any dealings by the relevant land registrar against the suit property L.R North Ugenya/Sega/350 pending further orders of the court.

    VI. That the fact that judgement herein has been set aside shall not take away any defence a party may have against the same.

    VII. The costs of this application shall abide the outcome of the suit.

    VIII. Leave to appeal this decision is granted if required.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF JULY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

17/07/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Obiero for the Plaintiff Respondent

Mr. Were James for the Defendant applicant

Court Assistant: Ishmael Orwa