



**Serem v Chelimo & 8 others (Environment and Land Appeal
E023 of 2022) [2024] KEELC 273 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E023 OF 2022
L WAITHAKA, J
JANUARY 24, 2024**

BETWEEN

CHRISTOPHER SEREM APPELLANT

AND

AMBROSE KIPTOO CHELIMO & 8 OTHERS RESPONDENT

*(An Appeal from the Ruling by Hon Kutwa SPM Iten in Iten SPM
Court in E&L Case No. E008 of 2021 delivered on 14th September 2022)*

JUDGMENT

1. This appeal arises from the ruling of Hon. Kutwa SPM delivered on 14th September 2022 in Iten PMC Environment and Land Case No E008 of 2021-Ambrose Kiptoo Chelimo v James Kangogo & others.
2. Through the impugned ruling, the learned trial magistrate dismissed the appellant's application dated 6th October 2021. In that application, the appellant inter alia sought to be added in the suit as the 9th defendant. The appellant also sought to set aside the judgment and decree issued in the suit on the ground that he had been in continuous occupation of the suit property for over 15 years; that the plaintiff had mischievously failed to join him to the suit and to serve him with summons to enter appearance.
3. Lamenting that owing to the plaintiff's failure to join him to the suit and to serve him with summons to enter appearance he was contemned unheard and claiming that he has a good defence to the plaintiff's suit, the appellant urged the court to grant him the orders sought.
4. The plaintiff/respondent opposed the application on the grounds that the applicant and the 6th defendant are one and the same person; that the applicant was served with summons to enter appearance but failed to enter appearance and that the issues raised in the applicant's draft statement of defence and counterclaim fall outside the jurisdiction of the court.



5. Upon considering the application and the response thereto the learned trial magistrate *inter alia* held/stated:-

“The issue for determination is whether the defendant’s application has merit. According to the proposed defendant he was not served with summons and hearing notices and therefore was not heard.

Setting aside an ex parte judgment is a matter of the discretion of the court...

In determining whether good cause has been shown for exercise of the discretion of the court in such matters, it is often helpful to make a discretion and determine whether the default judgment is regular judgment or irregular judgment as was done in *Fidelity Commercial Bank Ltd vs Owen Amos Ndung’u and Another* HCCC No. 24 of 1998 (uR)...

A perusal of the court record confirms that the proposed Defendant was duly served with Summons to Enter Appearance and Plaint. He has not denied the fact that he is the 6th defendant in the proceedings. All the defendants were served with hearing notices. In my view the default judgment that was entered herein on 30th June 2021 is, to my mind, regular judgment which can only be set aside if there is a defence on merit. ...

A careful consideration of the grounds set out in the notice of motion and its supporting affidavit does not give explanation as to why he did not file a defence within time. Further the Defence is a mere denial. The proposed defendant has not raised any triable issue in his defence.

The foregoing being my view of the matter, I would dismiss the defendant’s notice of motion dated 6th October 2021 with costs.”

Appeal

6. Aggrieved by that decision, the applicant appealed to this court on the grounds that the learned trial magistrate erred by failing to consider all the issues raised in the application; making a finding on an issue that was not pleaded, addressed and the appellant allowed to respond to before making a finding on it; failing to take into consideration matters he ought to have taken into consideration and taking into account matters he ought not to have taken into consideration thereby arriving at a wrong finding; exercising his discretion injudiciously; finding that the appellant had no arguable defence yet he had raised the question of limitation of actions against the title held by the plaintiff and by dismissing his application.
7. Pursuant to directions given on 4th October 2023, the appeal was disposed off by way of written submissions.

Submissions

Appellant’s Submissions

8. In the appellant’s submissions filed on 21st September 2023, the learned trial magistrate is said to have erred when he concluded that Christopher Serem and Christopher Cheruiyot are one and the same person as that ought to have been demonstrated by the process server in return of service. Based on the decisions in the cases of *Gerita Nasipondi Bukunya & 2 others v. Attorney General* (2019) eKLR; *CMC Holdings Ltd v Nzioki* (2004) KLR 173 and *Wachira Karani v. Bildad Wachira* (2016) e KLR quoted with approval in the case of *David Gicheru v. Gicheba Farms Ltd & another* (2020) Eklr, the appellant submits that the learned trial magistrate erred in law and fact by holding that the defendant’s defence



is a mere denial and has not raised any trial issue yet he raised weighty issues like fraud, limitation of actions and adverse possession.

9. The appellant urges this court to find the appeal with merit and allow it by setting aside the interlocutory judgment entered by the lower court and remit the matter back to the lower court for hearing de novo.

Respondent's Submissions

10. In his submissions filed on 18th October 2023, the respondent submits that the appeal is incompetent and fatally defective as no leave was granted by the learned trial magistrate to appeal; that under Section 75(1) of the Civil Procedure Act, an appeal does not arise as of right and that the claims set out in the memorandum of appeal are vague and do not form the appellant's arguments in the submissions.
11. The respondent further submitted that the appeal had been overtaken by events. According to the respondent, it was incumbent on the appellant to invite the process server to the trial court and attack the affidavit of service.
12. The 2nd to 9th respondents did not participate in the appeal.

Analysis and determination

13. The application raised pertinent issues touching on service of summons. In the circumstances of this case, it is the respondent who alleged that the person sued as the 6th defendant was same person as the person sued as the 6th defendant. In line with the provisions of Order 2 Rule 12 of the Civil Procedure Rules, it is the considered view of this court that there was joinder of issue on the issue as to whether the applicant was one and the same person who was sued and served as the 6th defendant. In that regard see the said section of law which provides as follows:-

“12(1) If there is no reply to a defence, there is a joinder of issue on that defence.

(2) Subject to subrule (3)-

- (a) there is at the close of pleadings a joinder of issue on the pleadings last filed; and
- (b) a party may in his pleadings expressly join issue on the immediately preceding pleading.

(3)

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleadings on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.”

14. Since the applicant claimed that he was not served and the respondent contended that the applicant was the person served as the 6th defendant, evidence was required to prove that fact. Such evidence cannot and could not be inferred from the applicant's failure to file a further or supplementary affidavit to respond to that issue.
15. I have also seen the draft statement of defence filed by the applicant. Contrary to the learned magistrate's observation that it raises no triable issue, it is the view of this court that it raises weighty



issues of law and fact namely whether the applicant had acquired title to the suit property by adverse possession and whether Sammy Kangogo caused the suit property to be registered in his name fraudulently and or by misrepresentation.

16. On whether the appeal is time barred, I note that by a ruling of this court delivered on 16th June 2023 this court addressed the issue of time bar in the following terms:-

“The court record shows that the application on which the notice of preliminary objection is premised was compromised on 15th March 2023 in the following terms:-

“...An order of status quo is hereby granted pending the hearing and determination of the appeal. The status on the ground shall be as follows:-

“There shall be no further felling of trees or construction of any structures pending the hearing and determination of the appeal.”

The Appellant/Applicant was directed to file and serve his record of appeal within 30 days. The matter was listed for directions on how to dispose off the appeal on 20th April 2023.”

17. The issue of the alleged time bar and want of leave of the court to file the appeal can therefore not be used to defeat the appeal.

18. The upshot of the foregoing is that the appeal has merit and is allowed as prayed.

DATED, SIGNED AND DELIVERED AT ITEN THIS 24TH DAY OF JANUARY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Korir for the appellant

Dr. Chebii for the 1st respondent

Christine Towett – Court Assistant

