



REPUBLIC OF KENYA



Kimaru & 2 others (Suing in their capacity as joint administration & legal representation of the Estate of the Late Mary Wangui Kimaru) v Phanes & 3 others (Environment & Land Case 93 of 2011) [2024] KEELC 829 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 93 OF 2011
AA OMOLLO, J
FEBRUARY 15, 2024**

BETWEEN

**NAFTALI WANGWA KIMARU & 2 OTHERS PLAINTIFF
SUING IN THEIR CAPACITY AS JOINT ADMINISTRATION & LEGAL
REPRESENTATION OF THE ESTATE OF THE LATE MARY WANGUI
KIMARU**

AND

**AGNES KAJUJU PHANES 1ST DEFENDANT
PAUL MUTHOKA NDIVO 2ND DEFENDANT
BENJAMIN WANJOHI 3RD DEFENDANT
BENSON BUHURU MABINDA 4TH DEFENDANT**

RULING

1. The Applicants filed a Notice of motion dated 22nd June 2023 seeking for the following orders;
 - a. Spent
 - b. That Benson Buhuru Mabinda the interested party be joined in this case as a defendant and be granted leave to enter appearance and file pleadings.
 - c. That Hydah Gaiti M'muriithi the administrator of the estate of the deceased 1st Defendant be joined and or substituted as the 1st defendant and granted leave to file her pleadings.
 - d. That pending the inter parties hearing and or determination of this application the *ex parte* judgment decree herein be stayed, and or *status quo* order issue to restrain the plaintiffs from evicting executing and enforcing the decree herein against the Benson Buhuru Mabinda against



his property known as Plot No. C49 Embakasi Njiru United Self Help Group as per eviction letter issued by the plaintiffs.

- e. That the *ex parte* judgment decree herein issued on 21/07/22, and all consequential proceedings attendant thereon be set aside, reviewed and or varied and the matter be heard afresh.
 - f. That such further orders be issued for *status quo* to restrain the plaintiff using the decree herein as a vehicle and tool for eviction against the Applicants – Benson Buhuru Mabinda, and his tenants and agents at Plot No. C49 Embakasi Njiru United Self Help Group.
 - g. That the process server be summoned for cross examination to verify the validity of service of summons to enter appearance and hearing notice upon the deceased 1st Defendant who had died at the time of hearing of the suit.
 - h. That such further ancillary orders be issued in the interest of justice as the decree herein has no order for eviction against Benson Buhuru Mabinda.
 - i. That costs be in the cause.
2. The motion was supported by affidavits sworn on 22nd June 2023 by Benson Buhuru Mabinda and Hydah Gaiti M’uriithi which gave grounds relied on in detail. Ms. Hydah Gaiti M’uriithi acting as the administrator of the estate of the deceased 1st Defendant, seeks to be joined and substituted in ongoing legal proceedings. The 1st Defendant passed away in 2012, a year after the suit commenced. Ms. Hydah stated that she sold the plot in dispute to the 4th Defendant and that she is alarmed by an impending eviction notice contrary to the existing decree.
 3. She challenged the legitimacy of service of summons to enter appearance and hearing notices upon the deceased 1st Defendant by the Plaintiffs and expressed an intention to cross examine the process server. Furthermore, she asserts that the 4th Defendant has been in lawful possession of the plot and urges for his inclusion in the case proceedings.
 4. The 1st Defendant contends that the Plaintiffs’ cause of action and decree relate to plot Number 34 Embakasi Njiru which on the face of the record is completely different from plot number C49/34A she sold to the 4th Defendant. Consequently, does not align against the execution raised of the decree issued. Further, the Ms. Hydah contended that the Plaintiff suit and cause of action against the deceased 1st Defendant, and plot No. 34 abated in 2013, and no cause of action existed against the deceased 1st Defendant after her death
 5. The 1st Defendant also stated that the Plaintiff’s ownership documents are suspect and full of alterations, cancellations and variations and needs investigation. Also, that non-joinder of the allotting entity to the suit was a procedural illegality that affects the Plaintiff claim and disentitled them to the orders sought.
 6. The 4th Defendant who is the Applicant in this motion stated that the Plaintiff hired individuals to act swiftly in evicting him on the suit land and notes the discrepancies in Decree and Eviction Notice as the decree alludes to plot 34, the eviction notice is for plot C49/34A. Moreover, that there are no specific eviction orders against C49/34A in the decree.
 7. The 4th Defendant raised concerns about legal proceedings against a deceased 1st defendant, emphasizing that the individual had passed away before the suit was heard and challenged the service of summons on the deceased, suggesting procedural irregularities.



8. Mr. Benson claimed that he lawfully purchased plot C49/34A from Hydah Muriithi for a consideration of Kshs 2.1 million with valid documents, due process diligence with Embakasi Njiru Self-help group approval, took possession, erected a permanent storey building with tenants. In support he annexed sale agreement, certificate of ownership, beacon certificate, receipts, Embakasi Njiru Self Help Group register, survey map extract, and paying current land rates with Nairobi City County.
9. The 4th Defendant added that he has viable and arguable defence that discloses triable issues as per the draft defence annexed in to merit a full hearing and that the interest of justice necessitates setting aside the judgment decree.
10. In opposing the application, the 2nd Plaintiff filed a replying affidavit sworn on 3rd October 2023 by Judith Wanjiku Kimaru. She stated that she is the Legal representatives of the Estate of the late Mary Wanjiku Kimaru-deceased and who is the owner of all the parcels of land known as Plots 17 and 34 both of Embakasi/Njiru Self Help Group. She deposed that the deceased purchased the two properties on 19th July 2002 and 24th July 2002 from Njoroge Ngugi and Charles Mwaura respectively. She averred that in the year 2007, she discovered encroachment on Plot 34 and Plot 17 by the 1st and 2nd Defendants, and despite a warning by the DCIO, they continued with construction on the same.
11. The Plaintiff/Respondent deposing to filing this suit on 3rd March, 2011, seeking to be declared the legal owner of the properties and despite being served with summons, the Defendants failed to enter appearance or file a defense. That due to the land-related nature of the matter, the court granted permission to serve summons by advertisement in the Nation Newspaper in April 2011 and when the Defendants did not respond, default judgment was entered. The case proceeded for formal proof after an advertisement in January 2017 notifying the Defendants of the hearing date.
12. The 2nd Plaintiff narrated that on September 29, 2017, the court delivered a judgment in their favor allowing the prayers sought. However, they were unable to take possession of the property, seeing that there was no order for eviction of the Defendants from the suit land but non the less issued a three months' notice to the Defendants, as advised by their advocates. The 2nd Plaintiff asserted that proper legal procedures were followed, including appropriate notifications to the Defendants. She disputes the validity of documents presented by the interested party/4th Defendant stating that the same were obtained suspiciously in 2017, 15 years after the plaintiff-deceased acquired the property.
13. She posited that the application is frivolous, vexatious, an abuse of court process, and aimed at obstructing justice. That the Applicant's claim of possession is false and malicious, intended to unlawfully deprive the deceased of her legally acquired property but still claims that the Defendants' occupation and development of the suit land is against the court orders issued.

Submissions.

14. The Applicants filed submissions dated 13th October 2023 and the 2nd Plaintiffs filed theirs on 19th October 2023. The Applicants submitted that the main contention revolve around their proprietary interest in the suit land which the 4th Defendant claim to have purchased, erected a storey building, and is currently in actual possession. The Applicants asserted that they were not party to the original suit, were not served, and were not heard. They elaborated that the 4th Defendant derive his title and possessory interest from Hydah, an administrator of the 1st Defendant, who died in 2012. Further, that the suit abated one year after her death, rendering the consequent proceedings invalid.
15. The Applicants submitted further that they were not party to the suit and have raised the issue of want of proper legal service in view of death of the 1st defendant in 2012 while service was effected in 2017.



It is their contention that by then, the suit had abated and no valid proceedings could be sustained against him.

16. The Applicants assert their right to be heard under the rules of natural justice and so are entitled to the orders of setting aside the *ex parte* proceedings due to not being parties to the proceedings. While citing the case of *Patel vs. EA Cargo* [1974] EA 75 the Applicants argue that even if service is deemed proper, they have a triable and arguable defense and that being in possession of the suit land creates a presumption of ownership as provided in Section 116 of [Evidence Act](#).
17. The Applicants submitted that the 2nd Plaintiff admit their possession of the suit land, admit the death of the 1st Defendant in 2012, the service of the hearing notice in 2017 after her death and also that the planned eviction without specific orders against the Applicants, who were not party to the suit. The applicants invoked the citation of [Alton Homes Ltd v Daris Nathan Chelogoi](#) (2020) eKLR, [James Kanyũta Nderitu & Another v Marios Philotas Ghikas & Another](#) [2016] eKLR and [Rose Wakanyi Karanja v. Geoffrey Chege Kirindi](#) [2020] eKLR.
18. The 2nd Plaintiff submitted that the Applicants seek to set aside an ex-parte judgment obtained in the absence of their appearance or defense citing Order 10 Rule 11 and Order 12 Rule 7 of the [Civil Procedure Rules 2010](#). That they obtained a court order for substituted service, placing an advert in the Daily Nation Newspaper to notify Defendants about the suit thus they (Defendants) were properly served. She relied on the case of [Anjeli Limited v Kenga Simba 12 others; Chengo Omar & 19 others \(Intended Interested Parties\)](#) (2021) eKLR
19. The Plaintiffs submitted that they proved ownership of the suit land by producing receipts, beacon certificates, and ownership certificates all issued by Embakasi Njiru United Self-Help Group. Further she disputed over the challenge of their documents by the Applicants stating that they have not shown any legal steps taken to investigate or challenge their authenticity.
20. The 2nd Plaintiff submitted that the Applicants have not presented any substantial issues for trial that would warrant the Honourable Court to set aside the judgment and in support relied in the case of [Nyukuri & another v Omochar & 5 others](#) where the court held that even though the judgment was regular, it still obliges the Court to consider whether or not the intended Defence raises triable issues and that triable issues do not necessarily imply that the Defence be one that must succeed but must show that the Applicants have a Defence case which raises questions which would make the Court pause to say, "this issue calls for further investigation."
21. The Plaintiffs submitted that the court's proceedings took place in 2017, rendering the court *functus officio* and in reference cited the case of [John Gilbert Ouma v Kenya Ferry Services Limited](#), which defined *functus officio* as preventing the reopening of a matter after a final decision.

Analysis and determination:

22. It has been established that the decision whether or not to set aside *ex parte* judgement is discretionary. The discretion is intended so to be exercised to avoid injustice and 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- as set out in the case of *Shah vs. Mbogo & Another* [1967] EA 116.
23. The first step is for the court to establish whether the ex parte judgement issued is a regular or irregular judgement. The Court of Appeal in the case of [Yoosbin Engineering Corporation v Aia Architects](#)



Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment) discussed as follows;

- “26. What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.
27. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.”
24. In this case, the Plaintiffs averred that service was properly effected to the 1st to 3rd Defendants and annexed affidavit of service sworn by Francis N.Matu and copies of the Daily Nation advertisement dated 5th May 2011 and 25th January 2017 effecting the said service. Guided by the decision by the Court of Appeal in Shadrack arap Baiywo vs. Bodi Bach Ksm CA Civil Appeal No. 122 of 1986 [1987] eKLR that an affidavit of service is prima facie evidence that service has been conducted, it is my view that in addition to the report that service was undertaken, there are copies of the public advertisements effecting the said service. Thus the *ex parte* judgement entered was regular.
25. This court still has discretion to set aside even regular judgement on conditions that are just depending on the circumstances of each case. I note that the letters of administration intestate of all the estate of the 1st Defendant were issued on 3rd February 2014 and Certificate of confirmation of a grant of representation is dated 27th June 2014. It means that when the service upon the 1st Defendant was effected in the daily nation newspaper, the administrator of the estate ought to have taken up the matter.
26. The Applicants have annexed copies of certificates claiming that their property is C34/49 while the suit property refers to plot 34. Although both documents emanate from Embakasi/Njiru Self Help Group, the Applicants averred that they were different. It is the allegation of the plots being different that they want the *exparte* judgement set aside. The Applicants’ documents of ownership were issued much later in March of 2017. To persuade this court that the two plots refer to different parcels of land, and so the judgement should be set aside, the Applicants ought to have presented a copy of an expert report to corroborate such an averment.
27. Possession per se does not confer any rights and in this case, the Applicants claim to have been in possession for 10 years which is less than the 12 year period of acquiring property by operation of the law. Despite the views expressed, this Court take cognizance of precedence that allows a party the right to be heard however clumsy the proposed defence may be. In *Sebei District Administration vs Gasyali & others* [1968] EA 300 Sheridan J. observed that:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether



the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

28. I find that it is in the interests of justice to allow the 1st Defendant and the Interested Party who has come on board albeit late the opportunity to probe the issues of ownership of the suit land. The court is guided further by the decision in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR, which cited the Supreme Court of India in *Sangram Singh v Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 and stated that:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

29. Although, I am amenable to grant the Applicants an opportunity to defend this suit, I take cognizance of the expenses incurred by the Plaintiff in serving the defendants including placing an advertisement in the newspaper. I also take cognizance of the fact of the delay in bringing this application. For these two reasons, I am obliged to hold that the Plaintiffs are entitled to compensation by way of thrown away costs which I assess in the sum of Kshs Seventy Thousand only (Kshs 70000).

30. The orders seeking joinder and substitution had been granted on the 18th September 2023. The further orders granted in the application is follows;

- a. That the *ex parte* judgment decree herein issued on 21/07/22, and all consequential proceedings attendant thereon be set aside, reviewed and or varied and the matter be heard afresh.
- b. That an order for *status quo* is issued restraining the plaintiff using the decree herein as a vehicle and tool for eviction against the Applicants – Benson Buhuru Mabinda, and his tenants and agents at Plot No. C49 Embakasi Njiru United Self Help Group.
- c. Thrown away costs to the Plaintiffs assessed at Kenya Shillings Seventy Thousand (Kshs 70000) only payable within 30 days hereof. In default, the Plaintiff at liberty to execute.
- d. Costs of the application to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH FEBRUARY 2024

A. OMOLLO

JUDGE

