



**Wanjohi v Lempaso & 2 others (Environment & Land Case
687 of 2017) [2024] KEELC 3953 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 687 OF 2017**

MN GICHERU, J

APRIL 30, 2024

BETWEEN

ISAAC GATHUNGU WANJOHI PLAINTIFF

AND

MOSES KIRUTI LEMPASO 1ST DEFENDANT

GRACE WAITHERA 2ND DEFENDANT

NIXON KIRUTI 3RD DEFENDANT

RULING

1. This ruling is on the notice of motion dated 8/11/2022. The motion which is by defendants is brought under Orders 17 Rule 3, 10 Rule 3 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A and 95 of the [Civil Procedure Act](#), Article 159 of [Constitution](#) and any enabling provisions of the law. The motions seeks the following orders.
 3. Setting aside of the ex parte judgment of 27/2/2020, proceedings, decree, execution and all consequential orders thereof.
 4. That the defendants be granted leave to file a statement of defence and the annexed draft be deemed as duly filed subject to payment of court fees.
 5. That costs of this application be provided for.
2. The motion is based on eight (8) grounds and is supported by an affidavit sworn by the third defendant which has four annexures which include pleadings in ELC 579 of 2017, a draft defence, a copy of decree in Land Disputes Tribunal Case No. 69 of 2009 and an order dated 4/10/2022.
3. The gist of the above material is as follows.

Firstly, none of the defendants has ever been served even though the process server alleges service.



Secondly, the defendants had filed ELC No. 377 of 2015 (later 579 of 2017) in which they sought cancellation of LR Kajiado/Kitengela/27302 which is the subject matter of this suit. The plaintiff lacked candour in filing the current suit by failing to disclose the existence of ELC 579/2017.

Thirdly, the plaintiff has never been in possession of the suit land.

Fourthly, the defendants have never been served with notice of entry of judgment as required by the law.

4. The motion is opposed by the respondent who has sworn a replying affidavit dated 30/11/2022 in which he replies as follows.

Firstly, it is not true to say that the defendants were not served because there is an affidavit on record which explains in great detail how service was effected on the defendants on 22/5/2017 in the presence of two police officers from Tuala Police Station which is close to the defendants' home.

Secondly, the third defendant has no proprietary interest in the matter and the 1st defendant who is the proper party to plead in the matter has refused to sign any affidavits in support or against any suit relating to the suit land.

Thirdly, the defendants have been violent and have always resisted service of court processes. For example on 5/3/2022, they tore the copies of court decree. They also assaulted the plaintiff and his workers and damaged his vehicle which he had to repair at a cost of Kshs. 178,840 as a result of which they were charged with a criminal offence.

Finally, the plaintiff followed all the requisite procedures from service to application for interlocutory judgment and formal proof before the judgment on record was delivered on 8/2/2021. The motion by the defendants should therefore be dismissed with costs.

5. Learned counsel for the parties filed written submissions on 27/11/2023 and 1/3/2024 respectively. None of the said submissions identifies the issues for determination in the motion. The submissions by the plaintiff's counsel relate to the notice of preliminary objection and cite order 9 Rule 7 [Civil Procedure Rules](#) as relates to the filing of a notice of change of advocate where a party has previously sued or defended in person. The defendants' counsel has however submitted in the following areas.

- i. Want of service of summons.
- ii. Good and bonafide defence.
- iii. Concealment of material facts.
- iv. No prejudice.
- v. No delay in the filing of the application.

6. I have carefully considered the motion in its entirety including the grounds, supporting affidavit and annexures, replying affidavit and its annexures, the submissions by the learned counsel for the parties and the issues and the law and I make the following findings.

Firstly on service, I find that the defendants were duly served with the pleadings on 22/5/2017 as per the affidavit of service by George Okwemba dated 30/5/2017. The affidavit is very elaborate and it states that the first defendant threatened the process server with a club and a spear and it is the third defendant who calmed him down. It is therefore not sufficient for the third defendant to plainly deny service when there is sufficient evidence to show that he is actually the one who received the process on his behalf and that of his parents who are the 1st and 2nd defendants.



Secondly on this issue, it is clear that the defendants are generally violent people as can be seen from the uncontroverted deposition by the plaintiff about the tearing of the copy of court decree, assault on the plaintiff's employees and malicious damage to property in the presence of police officers from Tuala Police Station.

7. On the second issue of the draft defence being good and bonafide, I find that it does not raise triable issues. While the suit sought an order of injunction restraining the defendants from entering LR 27302, the defendants have not averred anywhere in the defence that they own the said land or how they acquired it. Instead they aver that the 2nd defendant was allocated LR Mavoko Municipality Block 45/59. The nexus between this land in Mavoko and the suit land is not disclosed in the pleadings.
8. Thirdly, on concealment of the existence of ELC Case No. 579/2017 by the plaintiff, I find that the defendants too have in this case concealed the progress or the outcome of the same suit. They ought to tell us if the said suit was concluded and how it was concluded. It was also necessary to disclose when the suit was concluded and whether the decision therein conflicts with the one arrived at on 8/2/2021. It is my finding that failure to make all the above disclosures is fatal to the entire motion because the court might make orders which contradict those made in ELC No. 579 of 2017.
9. On whether or not the plaintiff will suffer prejudice if the application is allowed, I find that he would suffer great prejudice by the revival of the suit. This suit was filed on 9/5/2017. In less than a month, it will be seven years old. The defendants were served in the year 2017 in the presence of two police officers and instead of receiving service peacefully, the first defendant threatened violence on process server. When the decree was being executed the defendants again caused violence. These are the same people saying that starting the case afresh will not cause prejudice. How much longer should the case last?

The law requires that land cases should be determined expeditiously. See Section 3(1) of the *Environment and Land Court Act*. This early determination of land rights enables land owners to develop their land. Great prejudice is caused to compliant parties by recalcitrant parties. There is no doubt that the defendants in this case are highly recalcitrant and have deliberately delayed this case.
10. On the final issue of delay in filing the current motion, I find that there is inordinate delay because the defendants should have joined the suit in 2017 when they were duly served by George Okwemba the process server. They should not have come to court five and half years after service to claim falsely that they were not served.
11. Finally, even though I agree with the defendants that the plaintiff ought to have proved service of notice of entry of judgment upon the defendants at least ten days before execution, as required by the proviso to Order 22 Rule 6 *Civil Procedure Rules*, failure by the defendants to disclose the outcome of ELC 579 of 2017 is fatal to the entire motion for reasons already given.

For the above stated reasons, I dismiss the motion dated 8/11/2022 with costs to the plaintiff.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30TH DAY OF APRIL 2024.

M.N. GICHERU

JUDGE

