Minayo (Suing as Administrator of the Estate of Shem Odanga Achara) v Embuku & 2 others (Environment & Land Case 111 of 2016) [2024] KEELC 3839 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3839 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 111 OF 2016

FO NYAGAKA, J

MAY 13, 2024

BETWEEN

RAEL MINAYO (SUING AS ADMINISTRATOR OF THE ESTATE OF SHEM ODANGA ACHARA) ..... PLAINTIFF

AND

LINET KAGEA EMBUKU ..... 1ST DEFENDANT

SHEM MUDOGO ..... 2ND DEFENDANT

KISANG LOWANA ..... 3RD DEFENDANT

RULING

1. By an application dated 04/08/2023 the 3rd Defendant moved this Court under Order 51 Rule 1 and 4 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Articles 159(2) of *the Constitution* of Kenya and all enabling provisions of the laws of Kenya. He prayed for the following orders:-

    a. ...spent

    b. ...spent

    c. That this honorable Court be pleased to set aside expert judgment entered against the third defendant applicant and all other consequential orders arising from this matter, and be granted leave to defend this suit.

    d. That the costs of this application be in the cause.

2. The application was based on a number of grounds, which are summarized as follows. On the 01/08/2023, the 3rd Defendant received a call from the OCS Kwanza Police Station requiring him to appear before the station in respect of a warrant of arrest against him. He requested the OCS Kwanza

to supply him with the case number of the matter, which attracted the issuance of the warrant of arrest. Then he gave instructions to the firm of Advocates on record, whom upon inquiring the status of the suit they were informed that the matter had been concluded and there was a warrant of arrest in force and the police would arrest him any time.

3. He claimed that he was never served with summons to enter appearance or in the pleadings in the matter. He stated that the Affidavit of Service sworn by Samuel Nyangau Gentonto on 01/08/2016 was untrue as the process server did not state the place he resided. Further, that the mere fact that he met his wife was not satisfactory as no mobile number was indicated therein. He claimed that the affidavit sworn by Archibald Nyukuri on 18/02/2019 in respect of the application dated 17/012019 was untrue. He was an innocent but chaser for value of the suit land and it was in the interest of justice that he be granted an opportunity to defend the suit.

4. The further ground was that to lock him from participating in the proceedings would occasion an injustice and have him condemned unheard. The orders sought were necessary to give him a chance to be heard. The Application had been made without undue unreasonable delay and no prejudice would be occasioned on the Plaintiff if the order sought was granted. Lastly, that the orders sought ought to be granted in the interest of justice and fairness.

5. The application was supported by the affidavit sworn by the 3rd defendant, one Kisang Lowana, on 04/08/2023. He repeated the contents of the grounds in support of the application. However, he added that the warrant of arrest was in force against him. He annexed a copy and marked it as LL1. He deposed further that the affidavit of service of Samuel Getonto, a copy of which he annexed as KL2 and that of Archibald Nyunkuri which he annexed as LL3 were untrue. He annexed as LL4 (a), (b) and (c) copies of the agreement of sale, the Shares Certificate and payment receipts. He prayed that the application be granted.

6. The plaintiff opposed the Application through her affidavit sworn on 18/09/2023. She stated that the application was fatally defective, misconceived, bad in faith and an abuse of the process of the court. She stated that since 27/08/2016 when the Applicant was served with summons to enter appearance he was always been aware of this suit. That summons to appearance was served upon his wife, Alice Kisang who confirmed that the applicant was away and she had authority to accept the service. The Respondent annexed a copy of the Affidavit of Service as RM2. She deponed further that Order 5 Rule 12 of the Civil Procedure Rules allowed service to be affected upon an adult member of the family when the defendant could not be found. And that the service herein was made the same day as that of the 1st and 2nd Defendants (who did not deny it). Further, that despite being served with summons to enter appearance, a judgment was requested for and entered against the applicant. She annexed and marked as RM3 a copy of the application for Request for Judgment. She deposed that the Court had confirmed that service was duly affected on the applicant and the applicant was purporting to appeal through backdoor against the decision of the court.

7. On issues of summons to enter appearance she deposed that the applicant had not prayed for the Process Server to be summoned for cross-examination and in absence of that the applicant could not purport to deny service.

8. Regarding the non-appearance of the defendant the court satisfied itself that service was proper and proceeded with the suit and defendant, and judgment was entered against the defendants, following which a decree issued. She annexed as RM-5 and 6 the copies of the decree, the Bill of Costs and the certificate of costs. Further, a letter dated 25/09/2017 communicating the judgment was issued but the applicant ignored it. She annexed and marked as RM-7 a copy of the letter.

9. Further, a notice to show cause was issued on 08/01/2018. She annexed and marked as RM8 and 9 copies of the Application for Execution of Decree and the Notice to Show Cause. The Notice to Show Cause was served on 14/08/2018. She annexed as RM10 a copy of the Affidavit of Service of the notice to show cause. She deponed further than the applicant refused to grant her access to the suit land which prompted her to file an application dated 17/01/2019 for the OCS Kwanza Police Station to provide security to enable her enter the land. She annexed and marked RM11 and 12 copies of the application and an affidavit of service sworn by Archibald Nyunkuri on 18/02/2019. That despite being properly served with the application, the applicant did not attend court or defend himself and the court was satisfied with the service and issued an order on 26/02/2019. She annexed as RM13, a copy of the order.

10. The Applicant had not denied contents of the Affidavits of Service. He had denied he resided in Cheptuya but had noted denied service. The process Server had indicated that all the Defendants were personally known to him since he had served the Defendants with the notice to show cause on 14/08/2018. On that deposition that the processor did not state how he identified Applicant the Respondent stated that it was a mere denial.

11. His deposition was that between 17/09/2019 and 04/08/2023 when the instant application was served it was a period of 3 years, 10 months and 18 days. The Applicant could not claim to have not been aware of this case all that while considering that the suit land was fenced on 17/09/2019 and he stayed in Cheptuya where the land was situate. Further that between 04/07/2017 when the decree was issued and when the instant application was made, it was 2222 days, which is equivalent to 6 years and 1 month, which was inordinate delay. The Applicant had not given sufficient reasons why he had delayed in bringing the instant application all those years since the land was fenced on 17/09/2019.

12. She deponed further that instead of the Applicant moving to set aside the judgment he chose to destroy the fence that the Respondent had placed on the land, which action prompted her to file an application on 24/10/2022 for contempt of court. She annexed and marked her as RM14 a copy of the application. The application was served, but the applicant chose not to attend court, hence the issuance of the warrant of arrest which she annexed and marked as RM15.

13. The Applicant had taken only the instant steps upon realizing that warrants of arrest had been issued against him. In view of the above, it was clear that the instant application was aimed at frustrating the execution of the decree herein. The Applicant's conduct precluded him from benefiting from the discretion of the court. He did not have any claim recognized in law over the Respondents learned as he was refunded the money he paid by the 1st and 2nd defendants who had illegally sold him vide a meeting held on 17/06/2015 at the offices of the Assistant County Commissioner Kwanza, where he signed an agreement acknowledging receipt. She annexed and marked as RM17 a copy of the agreement dated 17/06/2015.

14. The applicant filed on 18/10/2023 a supplementary of Affidavit sworn on 11/10/2023. He stated that his case had merits. The Process Server had not shown how he was able to properly identify his wife and, in any event, the Area Chief or village elder was the right person to assist him in identifying the Plaintiff. The process server was unknown to them. Order 5 Rule 12 of the Civil Procedure Rules allowed service to be affected upon an adult member of the family but in the instant case the processor had failed to serve the documents on the immediate member of his family. In any event he had not told how he came to know or identify his wife or that he was served at the same time the 1st and 2nd defendants were served.

15. He stated further that even if judgment was entered against him the court was misled into believing that he was properly served. Further, that if the 1st and 2nd defendant were properly served, they could

have been the first persons to inform him of the suit since they sold their land to him. He stated that Affidavit of the Processor Server was full of falsehoods. Also, that even if he had not prayed for cross-examination of the process over the court could on its own motion summon the process server to avoid miscarriage of justice.

16. He repeated that he was a bona fide purchaser for value. He was not served with the application for contempt of court. He stated that Cheptuya referred to the location and not where he resided in Manyata Village. He repeated that the process server did not serve him since his mobile number was not stated in the return of service. He came to learn of the existence of this suit when he was summoned by the OCS Kwanza Police Station. He denied the other contents of Relying Affidavit.

17. The Application was disposed of by written submissions. The Applicant filed his 12/01/2024 on 19/01/2024. The Respondent filed his dated 21/11/2023 or on 04/12/2023. This court will consider the content of the submissions when making the determination below.

18. I have carefully considered the application, the law and the rival submissions. I am at the view that only two issues lie before me determination. The first one is whether the application is merited. The second one is who to bear the costs of the application.

19. In regards to their first issue, which is whether their application is merited, it is worth of note that the argument as to whether service of the Application dated 17/01/2019 is neither here nor there because the same was a post-judgment one and once this Court determines the issue whether the judgment herein is irregular or not the stay of execution as against the said application and subsequent order thereto shall be rendered otiose. Critical in the instant application is the alleged service of the summons to enter appearance on 30/07/2016. The issue is that the 3rd Defendant argues the he was never served with summons to enter appearance. In essence the 3rd Defendant alleges that the judgment against him was irregular. This calls on the Court to interrogate the alleged service vis-à-vis the law on service of summons to enter appearance.

20. Order 5 Rule 7 of the Civil Procedure Rules provides that where there are several defendants, as in this case, service shall be upon each and every one of them. Then Order 5 Rule 8(1) provides that:

> " Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."

21. Further, where the Defendant is not present, Order 5 Rule 12 stipulates that:

> " Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."

22. Regarding setting aside of a judgment entered where service is effected but the Defendant fails to enter appearance the law is settled just in the same was as it is regarding where service is not effected at all. Of judgments entered against the Defendants where they are not heard, if the judgment herein was irregular, this Court has no discretion but to set it aside ex debito justitiae, meaning as a matter of right. This is because the rules of natural justice do permit a party to be condemned unheard. In Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 the Supreme Court of India emphasized on the importance of the right to be heard as follows:

> " [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."

23. In a situation where it is proven that service was made but the party chose to be silent the judgment would be termed as regular they have to satisfy the conditions of setting aside a regular judgment. This was explained by the Court of Appeal in the case below in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR the Court of Appeal stated as follows:-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other....
>
> 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 justitiae, 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."

24. In the instant case, the 3rd Defendant alleges that he was not served with summons to enter appearance. The Plaintiff alleges that she served the same through the process server, one Samuel Getonto who swore an Affidavit on 01/08/2016. The contention by the Applicant is that the service on one Alice Kisang was not proper since her mobile number was not indicated and it was unclear as to how she was identified. That the village elder or the area chief was the right person to identify her hence it was insufficient that the identification the process server gave was not sufficient. Further, that in any event the service on the 1st and 2nd Defendant was questionable because they should have informed the Applicant about the existence of the suit.

25. I have carefully analyzed the Affidavit of Service sworn by the process server. At paragraph he explains how on 30/07/2016 at 12:16 PM the Plaintiff took him to the home of the 3rd Defendant one Kisang Lowana and there they met his wife one Alice Kisang who introduced herself as the 3rd Defendant's wife. She accepted service but did not sign.

26. It is instructive that the 3rd Defendant does not deny that one Alice Kisang was his wife or that she was at home on the material date and hour. The only issue he raises is that her mobile number was not indicated. I have looked at the law on service, it does not state anywhere that one's mobile number must be given in order to show that he was served. What if one does not have a mobile number? I find that the denial by the 3rd Defendant as to service is a mere denial only designed to mislead the Court. In any event with such precise identification of the adult member of the family at the home and time of the 3rd Defendant, the Plaintiff had sufficiently proven that indeed the 3rd Defendant was served with summons to enter appearance. Therefore, the judgment herein against him was regular.

27. The next question them is whether the Applicant had satisfied the conditions for setting aside a regular judgment. The requirements for setting aside such a judgment were stated in the case of James Kanyiita (supra) where their Lordships stated that (in such a case),

> " ...the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other..."

28. Similarly, in John Mukuha Mburu v Charles Mwenga Mburu (2019) eKLR where the court cited the case of Shah vs Mbogo (1979) EA 116, it held that the discretion is very wide. The Court went on to sates that:

> " .....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

29. In Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75, cited with approval in the case of Stephen Wanyee Roki vs K-Rep Bank Limited & 2 Others (2018) eKLR it was held:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

30. In the case of Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR, the learned Judge, citing the case of Stephen Ndichu vs. Monty's Wines and Spirits Ltd [2006] eKLR, held as follows:

> " The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel vs. E.A. Cargo Handling Services Ltd [1974] E.A 75). The discretion is intended 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 cause of justice

(See Shah vs. Mbogo [1969] E.A 116). The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs. Gasyali [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."

31. And in Wachira Karani v Bildad Wachira [2016] eKLR Justice Mativo (as he then was), cited the case Ongom vs. Owota where the Court opined that for one to succeed in setting aside of an ex-parte judgment, the court must be satisfied with two things namely:

    (a) either that the Defendant was not properly served with summons; or

    (b) that the Defendant failed to appear in court at the hearing due to sufficient cause.

32. I have considered the reasons advanced by the 3rd Defendant herein for the prayer for setting aside the judgment. Apart from non-service which this Court has found that it was proper, the Applicant did not give any other reason for failure to file a defence. It leaves the Court with the discretion to consider, in the interest of justice, whether the draft defence which was not marked as an annexture to the Supporting Affidavit but filed to the Application. While the document does not confirm to the Rule 9 of the *Oaths and Statutory Declarations Act* as it was not commissioned by the Commissioner for Oaths, this Court stretched its discretion to peruse and consider if it could have any triable issues. The Court found none. The individuals who allegedly sold the land to the 3rd Defendant had no relationship whatsoever with the Estate of the late Shem Odanga Achara. Strangers cannot purport to sell other people's properties, and the buyers, without due diligence purport to acquire good title in the pretext of innocent purchasers for value. In any event the 3rd Defendant does not in any way raise in the proposed Defence and Counterclaim any claim against those who sold to him the suit land. This lends credence to the fact, as raised in the Replying Affidavit, that he was refunded his money by those who illegally sold him the parcel.

33. The final result is that the Application is not merited and it is dismissed with costs to the Plaintiff/ Respondent.

34. Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 13TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

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