



**Muraga & another v M'Murunga (Environment and Land Appeal  
E030 of 2023) [2024] KEELC 5031 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5031 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E030 OF 2023**

**CK NZILI, J  
JUNE 26, 2024**

**BETWEEN**

**FRANCIS MURAGA ..... 1<sup>ST</sup> APPELLANT**

**PATRICK MURIUNGI KIRIMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**M'RIRIA M'MURANGA ..... RESPONDENT**

*(Being an appeal from The Ruling of Hon. S.K Ngetich delivered  
on 27th September 2023 in Nkubu CMCC NO. 86 OF 2015)*

**JUDGMENT**

1. The appellants, who were the respondents at the lower court, had been sued by the respondent as the plaintiff as licensees on his ancestral land before the adjudication process, but who wrongfully became the recorded owners of No. 342 and 343 Mweru III Adjudication Section. He had sought for a declaratory order that the two parcels of land belonged to him and for eviction orders against the appellants.
2. The appellants who were duly served with the summons to enter an appearance on 25.9.2015, failed to enter an appearance, and a request for interlocutory judgment entered on 3.7.2017.
3. At the formal proof, M'riria M'Murunga testified as PW 1, adopting his witness statement dated 25.8.2015 as his evidence in chief. He told the court that his father gathered the land in 1957 out of his "gwato" that land and allowed the appellant as licensees at will to cultivate but failed to vacate and instead caused the same to be recorded under their names as P. No. 342 and 343 during the adjudication section. P.W. 1 said that his father successfully objected to the objection at the committee stage. He furnished the decision as P. Exh No. (1). Further, PW 1 said that the appellants lodged an objection after that and was awarded the land. He produced the decision as P exhibit No. (2). He asked the court to order that the land revert to him. He termed the appellants as strangers to his land. Isaack Mutugi



and Patrick Mutwiri Chabari testified as PW 2 and PW 3. adopting their witness statements dated 25.8.2015 as their evidence in chief.

4. The witnesses told the court that the appellant was licensed by the law and by the respondent's father, M'Murunga, only to state a claim on a portion during the adjudication process, which commenced in 1991. PW 2 said that the dispute was pending before the minister for determination. He termed the appellant as trespassers to the land. By a judgment dated 2.11.2018, the respondent's claim was allowed.
5. Through an application dated 3.4.2023, the trial court granted eviction and passed injunction orders against the appellant. It prompted the 2<sup>nd</sup> appellant to file an application dated 24.4.2023, seeking for stay of execution and the setting aside of the judgment, and subsequent decree and for leave to defend the suit. The reasons were that the eviction was eminent, service of summons was not served, the respondent was circumventing the law, and that he had on defense raising triable issues. In a supporting affidavit sworn on 24.4.2023, Patrick Murunga Kirima deponed that he became aware of the suit in April 2023, when he was served with the eviction notice. He availed a copy of the proclamation notice and a draft statement of defense as an annexure marked JKM – 01 and 02, respectively. The applicant wanted the court first to note he was condemned unheard against the right to a fair hearing, causing him grave injustice, prejudice, irreparable loss, and damage.
6. The respondent opposed the application through a replying affidavit sworn on 1.8.2023. It was averred that service of summons was duly effected at the 2<sup>nd</sup> appellant's homestead in Gatune village on 25.9.2015 at 1.20 p.m. as per the affidavit of service dated 30.9.2015 by a licensed process server. The respondent averred that an invitation to take a hearing date was served upon the applicant on 18.1.2018, leading to the formal proof. He attached the letters as annexure marked MM II and the decree as MM III served on 31.1.2019 as per the affidavit of service dated 31.1.2019 attached as MMIV.
7. Subsequent, the respondent averred that the appellant knew of the case and refused to vacate it until he had to file the application dated 3.4.2023. He was also served to the appellant as per an affidavit sworn on 18.4.2023, attached as an annexure MMV, only for the appellant to wake up from his slumber. He termed the appellant as ignorant, guilty of 6 years delay and unlikely to suffer any prejudice for they had been contemptuous of court processes, holding the land contrary to his constitutional right to land under Article 40 of *the Constitution*. The respondent urged the court to find the orders sought as prejudicial to him, made in bad faith and a delaying tactic to frustrate him from enjoying the fruits of his judgment.
8. Through a ruling dated 27.9.2023, the trial court found no merits in the application. The appellants have appealed against the said ruling by a memorandum of appeal dated 3.10.2023 on the basis that the trial court failed to:
  1. Condemned them unheard despite the injustice meted out against them.
  2. Appreciate the law and principles of setting aside interlocutory judgment.
  3. Found that the service of court processes was proper and sufficient
  4. Establish that the judgment was regular and should not be interfered with.
  5. Appreciate that the draft defense raised triable issues.
  6. Occasioned miscarriage of justice.
  7. Determined issues outside the law and the scope of the suit.



8. Ruled against the weight of the evidence and failed to take into account the respondent's matter.
9. This appeal was canvassed through written submissions due by 14.6.2024. An appellate court of the first instance has the mandate to re-analyze, weigh, interrogate, scrutinize, and re-assess the lower court recorded and come up with its independent findings as to facts and the law while giving credit to the lower court, which had an opportunity to see and hear the witnesses first hand. See Susan Munyi vs Keshar Shiani (2013) EKLK, James Odera HC AJ Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.
10. The single issue for determination of this appeal is whether the trial court exercised its discretion judiciously and applied the correct principles on whether or not the appellants were entitled to stay of execution of the decree and the setting aside of the interlocutory and final judgment and if they were entitled to leave to defend the suit.
11. Order 10 Rule 11 of the Civil Procedure Rules provides that a court may set aside or vary a judgment entered, not any consequential decree or orders upon jail terms as are just. In Patel vs. East African Cargo Handling Services Ltd (1974) E. A 75 it was held that the main concern for the court is to do justice to the parties, the discretion to set aside is broad, and if the judgment is regular, the court may not set aside the judgment unless there is a defense raising triable issues. In Philip K. Chemwolo & another vs Augustine Kubede (1982-88) KAR, the court said all the facts, not circumstances, prior, subsequent and the respective merits of the parties should be consistent.
12. The discretion to set aside the default judgment was held in Shah vs Mbogo & another (1967) EA 116 as to avoid injustice or hardship resulting from an inadvertence or excusable mistake or error but is not designed to assist a person who sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.
13. On triable issues raised in a draft defense, the court in CMC Holdings Ltd vs James Mumo Nzioki (2004) eKLR observed that the court must consider not only the reasons why the applicant failed to turn up for the hearing but also whether he has a reasonable defense.
14. A regular judgment, as opposed to an irregular judgment, is where summons to enter an appearance were duly served, but for one reason or another, the applicant failed to enter an appearance or file a defense. In such a case, the court has to consider the reason for the default to enter an appearance or file the defense, the length of time since default judgment, if the draft defense raises triable issues and the respective prejudice each party may suffer.
15. A triable issue was defined in Job Kilach vs. National Media Group Ltd & others (2015) eKLR as one that would require further interrogation at a full trial, regardless of whether it will succeed or not.
16. Applying the forgoing case law to the facts in this appeal, the appellants were raising issues of nonservice with court processes, issues of circumvention of the law, irregularly entered interlocutory judgment, lack of notice of entry of judgment, imminent danger in eviction, no prejudice or injustice if condemned unheard.
17. There is no dispute that the court record shows that the appellants were duly served with the summons to enter an appearance; subsequent to this summons to enter an appearance, court processes, including an invitation to take a formal proof, were sent to the appellants using the same address as the one indicated in the affidavit of service, sworn on 30.9.2015, 31.1.2019, 19.4.2023 and 18.4.2023.



18. The appellants at the hearing of the application for setting aside did not seek to cross-examine the process server, yet they were claiming non-service with the court process. The appellants filed a replying affidavit on 1.8.2023. Again, if the appellants were able to receive the application for eviction on time, one wonders why they did not move with speed and move the court immediately. The delay in challenging the interlocutory judgment entered in 2017 of close to six years down the line, was also inordinate and unexplained.
19. The next issue is whether the appellants had a bona fide defense raising triable issues. The affidavit sworn on 24.4.2023 had attached a draft defense as an annexure marked JKM 02. The respondent had indicated that the decree had been served upon the land adjudication officers on 31.1.2019, as well as on the appellants.
20. The draft statement of defense appearing on page 84 of the record of appeal was the one before the trial court when it made the ruling dated 27.9.2023. It raised no triable issues as regards the issue of ownership and the claim that the appellants were licensees at will.
21. A triable issue, as per the caselaw cited above, need not succeed but requires further interrogation during a full trial.
22. I think the draft defense had raised triable issues. I find no merits in this appeal the same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 26<sup>TH</sup> DAY OF JUNE, 2024**

In presence of

C.A Kananu/Mukami

Kiyuki for plaintiffs

Murango Mwenda for defendants

**HON. C K NZILI**

**JUDGE**

