



REPUBLIC OF KENYA



**Isina v Njuguna (Environment & Land Case 15 of 2018)
[2024] KEELC 4716 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 15 OF 2018
MN GICHERU, J
JUNE 19, 2024**

BETWEEN

NICKSON SIMITIA ISINA PLAINTIFF

AND

LEAH KIRIGO NJUGUNA DEFENDANT

RULING

1. This ruling is on the notice of motion dated 1/9/2023. The motion which is brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Orders 40 Rule 1, 22 Rule 22, 51 Rule 1 of the [Civil Procedure Rules](#) 2010 and all other enabling provisions of the law seeks the following orders.
 5. An order of injunction restraining the plaintiff or anybody claiming through him from encroaching, trespassing, conducting any activities or interfering with the plaintiff's quiet possession of LR Kajiado/Kisaju/1621 pending the hearing and determination of this suit.
 8. Setting aside the judgment dated 2/3/2023 and all consequential orders.
 9. Leave to the applicant to defend the suit by filing a defence.
 10. Any other order or directions that the court may deem fit.
2. The motion is based on nine (9) grounds and is supported by an affidavit sworn by Leah Kirigo Njuguna which has five (5) annexures. The gist of the above material is as follows. The defendant is the registered owner of the suit land together with her late husband Henry Barnabas Njuguna. Secondly, the judgment of this court dated 2/3/2023 extinguished their title to the suit land. Thirdly, the defendants were never served with the pleadings and summons to enter appearance and the applicant only became aware of this matter when she was informed by her neighbours that some people had been seen on the land and she also saw the advertisement for sale of plots that were created from her land. Fourthly, service of court process through substituted service was not sufficient because at the time,



she was residing in Tanzania together with her family. Fifthly, the defendants have occupied the suit land since 1997 when they bought it from Kodes Mines Limited. They built a Mabati house for their workers who were residing thereon. The defendant swore a supplementary affidavit dated 17/10/2023 which has seven (7) annexures which include a surveyors map and aerial map of the property, letters showing renewal of contract, photographs showing the status quo on the land, copy of the register for the suit land (green card) and copy of the draft defence.

3. The motion is opposed by the plaintiff who has sworn a replying affidavit dated 22/9/2013 in which he replies as follows. Firstly the defendants were not condemned unheard because there was service through the standard newspaper of 10th November 2017 and this was proper service. Secondly, the supporting affidavit is composed of hollow and unsubstantiated allegations especially on how the plaintiff obtained the ex parte judgment. Thirdly, the defendant has never occupied the suit land. In a further affidavit dated 26/4/2024, the plaintiff has annexed photographs of some people putting up fences on what he says is the suit land. Fourthly, the plaintiff deposes that he sold the suit land for valuable consideration on 13/6/2023 and the current motion has been overtaken by events.

For the above and other reasons, he prays that the motion be dismissed.

4. Counsel for the parties filed written submissions dated 28/11/2023 and 26/4/2024. The plaintiff's counsel identified the following issues for determination.

- i. Whether proper service was effected.
 - ii. Whether the defendant is likely to succeed by putting in a defence.
 - iii. Whether the court should set aside the ex parte judgment.
 - iv. Whether the plaintiff is likely to suffer any prejudice if the application is allowed.
- On the other hand, the defendant's counsel identified the following issues for determination.

- i. Whether the defendant's application dated 1/9/2023 is meritorious.
- ii. Whether the plaintiff stands to suffer irreparable loss if the motion is not allowed.
- iii. Who bears the costs of the application.

5. I have carefully considered the motion in its entirety including the application by both sides and the annexures as well as the submissions by learned counsel for the parties, the issues raised therein and the law cited. I make the following findings on the issues.

6. On the 1st issue, I find that though service was lawful, there is no guarantee that the defendants ever saw the advertisement in the standard newspaper of 10th November 2017. It is more likely that the defendants did not see the advertisement than otherwise. The plaintiff or any other person for that matter cannot say that the defendants saw the advertisement.

7. As to whether the defendant will succeed in the defence, only time will tell. At the moment, we do not know how the end will look like. It will depend on the evidence adduced. We have not heard that evidence but the defendant says that she bought the suit land from Kodes Mines Limited. She has a copy of the title deed among other documents. He defence raises friable issues.

Article 40 (6) of the *Constitution of Kenya* proves as follows.

“The right under this Article do not extend to any property that has been found to have been unlawfully acquired”.



This means that this application cannot be overtaken by events and title to any property that is unlawfully acquired will be revoked.

8. On whether the plaintiff is likely to suffer any prejudice if the application is allowed, I find that he will not suffer because if he acquired the land lawfully, he has nothing to fear. The same question should be asked of the defendant and I find that she will suffer great prejudice if the application is not allowed. Under Article 50 (1) of the *Constitution*, it is provided as follows.

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”

The defendant has dispute on ownership of the suit land. It would be a derogation of the right in Article 50(1) of the *Constitution* if she was not heard.

9. On the final of the plaintiff's issues, I find that this court has unfettered discretion under Order 10 Rule 11 to set aside any judgment arrived at as a consequence of non-appearance, default of defence and failure to serve. It provides as follows.

“Where judgment has been entered under this order the court may set aside or vary the judgment and any consequential decree or order upon such terms as are just”.

I need not look at the issues raised by the defendants counsel because in deciding on the plaintiff's issues, I have already decided on the defendant's.

10. For the above stated reasons, I find merit on the defendant's notice of motion and I allow it in the following terms.
- a. The exparte judgment dated 2/3/2023 and all consequential orders are hereby set aside.
 - b. An order of inhibition is hereby issued forbidding any dealings with the suit land i.e. Kajiado/ Kisaju/1621 or any resultant parcels pending the hearing and determination of this suit.
 - c. Pleadings re-opened for 60 days and the parties are at liberty to file and serve any material that they wish to rely on at the trial.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 19TH DAY OF JUNE 2024.

M.N. GICHERU

JUDGE

