



**Kibundu v M'mukira (Environment and Land Appeal E087 of 2022)
[2024] KEELC 4559 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E087 OF 2022**

CK NZILI, J

JUNE 5, 2024

BETWEEN

SAMSON KIRIMI KIBUNDU APPLICANT

AND

ELIAS MUTURA M'MUKIRA RESPONDENT

*(Being an appeal from the ruling of Hon. Tito Gesora – CM
delivered on 15.12.2022 in Maua CMCC No. 89 of 2015)*

JUDGMENT

1. The appellant was the defendant in the lower court. The respondent had sued him through a plaint dated 11.5.2013 alleging that fraud over LR No Ithima/Antuambui/8351. The respondent had sought a declaration that the land belonged to him, reversal of the transfer, deregistration of the appellant as the owner, and payment of loss and damages.
2. The lower court record shows that the appellant was served with a summons to enter an appearance on 11.4.2016. An affidavit of service sworn by David Mwenda Kanyamu, process server, was filed on 12.7.2017. The trial court was satisfied that there was proper service of summons. It entered interlocutory judgment against the appellant on 21.8.2017 and listed the matter for formal proof. Parties were directed to comply with Order 11 of the Civil Procedure Rules.
3. The record shows that the appellant failed to appear on several days, including on 14.11.2019, 13.2.2020, and on 22.6.2022, when the suit commenced for hearing. There is also no evidence of service of mention or hearing notices on all those dates.
4. At the hearing on 22.6.2022, Elias Mutura M'Mukira testified as PW 1 and adopted his witness statement dated 11.5.2015 as his evidence in chief and called Gerald Mutuma as PW 2, who also adopted his witness statement dated 26.6.2022 as his evidence in chief. With the two witnesses, the



- respondent closed his case, and the trial court ordered the respondent to file written submissions by 21.7.2022.
5. The trial court proceeded to deliver the judgment on 8.9.2022, in favor of the respondent. An order of eviction was issued against the appellant. There is no evidence of notification of entry of judgment to the appellant.
 6. By an application dated 1.11.2022, the appellant sought the setting aside of the judgment entered *ex parte*. The significant grounds were that the affidavit of service against the appellant with the summons to enter an appearance was false, that there was another suit, ELC E052 of 2020, before the court no. (2) and which was within the knowledge of the respondent's counsel on record.
 7. The respondent opposed the application and disputed the memorandum of appearance alleged and that the allegations that the suit file had been missing for some time were untrue. Through a ruling dated 15.12.2022, the trial court declined to stay the execution or set aside the judgment on account of non-service of summons.
 8. The appellant faults the said ruling through a memorandum of appeal dated 20.12.2022. The cumulative effect of the 14 grounds listed is that; the appellant was condemned unheard, he was not served with the summons to enter an appearance or attend the hearing of the case; he had met the threshold of setting aside the *ex parte* judgment'; he had made efforts to trace the file so as to file his pleadings, Case No. E052 of 2020 was not sub-judice, there was a miscarriage of justice, the ruling was bad in law; the court failed to take into account relevant matters and went beyond its scope, and it was wrong to find that the respondent was entitled to occupy the suit land.
 9. As an appellate court of the first instance, Section 78 of the [Civil Procedure Act](#) mandates this court to re-analyze, re-appraise, and re-hear the lower court record, come up with independent findings on facts and the law while giving credit to the lower court saw and heard the witnesses first hand. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123.
 10. What was before the trial court was a contestation by the appellant that he had not been served with the summons to enter an appearance and the subsequent court processes until an eviction decree was issued and effected against him on 31.10.2022. In the application dated 1.11.2022, the appellant swore an affidavit on 1.11.2022. He averred that he discovered the suit and wrote through his lawyers a letter dated 15.9.2020, attached as SKK 1 (a) & (b), and after he could not trace the file, his advocates on record advised him to dismiss the file and follow up Maua ELC Case No. E052 of 2020.
 11. The appellant set out the history of his claim to the land with effect from 2013 in paragraphs 8 -1 4, 19, 21, 22, and 24 of his supporting affidavit. Further, the appellant gave a narration on how he tried to trace the court file in paragraphs 17, 18, 20, 22, 25 & 26 of his supporting affidavit. Additionally, in paragraphs 29-35, the appellant explained why the *ex parte* judgment was irregular, lacking merits, and obtained through concealment of material facts.
 12. The respondent opposed the application through an undated replying affidavit filed on 3.11.2022, terming the same as misconceived, an abuse of the court process, and misleading. He termed the service of summons to enter an appearance as regular. Further, he admitted that the suit land was transferred to his children. He denied that the transfer was irregular or fraudulent. Additionally, the respondent termed the application as spent for execution that had already taken place and that before the execution, he had called the appellant and made him aware of the decree. Moreover, the respondent termed the judgment as sound but the applicant had regained occupation of the decreed land after demolishing his fence worthy of Kshs 300,000/=, instead of waiting for the court to determine the application. In a further affidavit sworn on 15.11.2022, the respondents attached OB No 27/05/11/2022 and



- photographs as annexures EM "1" to show that the appellant was disrespecting court orders, bragging about being a rich man.
13. The appellant takes the view that the trial court did not exercise its discretion as per the law; hence, a miscarriage of justice occurred by condemning him unheard. To set aside an *ex parte* judgment is a discretionary power that a court exercises to serve the ends of justice. In *Shah v Mbogo & another* (1967) EA 116, the court observed that the discretion was intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.
 14. In *Equity Bank Ltd v West Link Mbo Ltd* (2013) eKLR, the court said that courts of law exist to administer justice by balancing between competing rights and interests of different parties but within the confines of the law to ensure the ends of justice are met.
 15. The issue of service of court processes took center stage before the trial court. The affidavit of service of summons to enter appearance was filed on 12.7.2017. It referred to the service of summons upon the appellant on a date that is not clear in paragraph (1). There is an overwriting at the back of the summons to enter appearance dated 11.5.2014 that was not countersigned. The summons to enter appearance issued on 11.5.2014 was allegedly served on 11.4.2016. The lifetime of summons to enter appearance is statutory. In this appeal, it is apparent that the appellant was served with a stale summons to enter an appearance. They had already expired and had not been extended for three years. The summons to enter appearance was a nullity in law. See *Macfoy v United Africa Co. Ltd* (1961) 3 ALL ER 1169.
 16. There is also no evidence that the appellant was served with mention and hearing notices for his appearance subsequent to the entry of an interlocutory judgment against him on 21.8.2017.
 17. The onus was on the respondent to prove service of court processes. A party who obtains a default judgment must satisfy the court that the opposing party was aware of the court case. In this instance, the service of not only summons to enter appearance but also the subsequent applications did not prove other court processes. I find the trial court was wrong in not finding there was insufficient proof of service of not only the initial summons but also the subsequent court process. The failure to establish that occasioned a miscarriage of justice.
 18. In an application for setting aside, the court is also required to establish whether the party seeking the setting aside has a plausible defense to the claim. The appellant had raised issues of the existence of a similar suit before the same court. He had also laid bare the history of the suit land and how it was acquired. The supporting affidavit had raised triable issues which the respondent did not dispute in both the replying affidavit and a further affidavit.
 19. To my mind the trial court should also have given credence to the said matters in considering whether or not the appellant should have been given an opportunity to ventilate such a defence. See *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75.
 20. The upshot is that I find the appeal with merits it is allowed. The judgment of the lower court is set aside and any subsequent orders are vacated. The appellant shall file and serve a defence to the suit within 21 days from the date hereof.
 21. Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 5TH DAY OF JUNE, 2024

HON. C K NZILI



JUDGE

In presence of

C.A Kananu

Asuma for Mutembei for respondent

Miss Kimotho for Kiyuki for appellant

