Bowskill v Jofwe & 7 others (Civil Suit 89 of 2018)
[2024] KEELC 5836 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5836 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL SUIT 89 OF 2018

FM NJOROGE, J

JULY 31, 2024

BETWEEN

ANN JANE BOWSKILL ..... PLAINTIFF

AND

SIDY JOFWE ..... 1ST DEFENDANT

ALICE ERNESTINE ..... 2ND DEFENDANT

JENIFFER ERNESTINE ..... 3RD DEFENDANT

SANDY ERNESTINE ..... 4TH DEFENDANT

JIMMY EARNESTINE ..... 5TH DEFENDANT

RONNY EARNESTINE ..... 6TH DEFENDANT

TOMMY ERNESTINE ..... 7TH DEFENDANT

JILL EARNESTINE ..... 8TH DEFENDANT

RULING

1. This Ruling is in respect of the defendants' Notice of Motion Application dated 6th January, 2024 brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 22 Rule 20 of the *Procedure Rules* and Article 50 of the *Constitution* of Kenya which seeks the following orders:

    1. Spent

    2. Thatpending hearing and determination of this application this Honourable Court be pleased to order stay of execution of Judgment dated 23rd March 2023 and all the consequential orders;

3. Thatpending hearing and determination of this application the Honourable Court be please to order stay of execution of Judgment dated 23rd March 2023 and all the consequential orders set aside the Judgment;

4. Thatupon order 2 being granted the Honourable Court be pleased to order fresh hearing of the suit and issue directions as to new the trial and the applicants be granted unconditional leave to defend the suit and file all the necessary documents.

5. That the costs of this application be provided for.

2. The application is premised on the grounds set out at its foot which are as herein under:

1. That the applicants have been serve with a warrant of eviction dated 3rd October 2023 and the O.C.S. Mtwapa has already been instructed to execute the warrants and eviction is now imminent.

2. That the applicants were never served with court summons, suit papers and the mandatory notice of entry of judgment as provided in the *Civil Procedure Rules* to defend the suit.

3. That the irregular judgment was entered without the input of the applicants due to lack of service and the applicants were condemned unheard contrary to Article 50 of the *Constitution*.

4. That the applicants have an arguable defence and if this court allows the matter to start afresh it has a high chances of success at the trial.

5. That the applicants are apprehensive that if the orders sought are not granted, the applicants will lose their property in the most callous manner and be rendered vagabonds despite having proprietary rights on the suit premises.

6. That it is in the interest of justice that a stay of execution be granted to avert an injustice being occasioned.

3. The application is also supported by the sworn affidavits of all the original Defendants/Applicants as well as those of the 7th and 8th "defendants" (who have been questionably joined by the defendants) which elaborate on the above grounds. In the affidavits of the deponents it is claimed that the plaintiff is related by marriage to all the defendants. The 1st defendant states that she is her sister-in-law and the others allege that she is their paternal aunt. On a preliminary basis the defendants aver that the matter concerns immediate family members it is fit to be referred for mediation. However, that is an issue to be addressed at another stage after the present application has been dealt with.

4. The defendants aver that they were not served with court summons in the case and therefore they were condemned unheard contrary to the provisions of Article 50 of the *Constitution*. They are apprehensive that they may lose the suit property. All the defendants aver that the respective names used in the plaint are not their proper names and they rely on that assertion per se to state that service could not have been successfully served upon them. They claim to have been residing on the suit premises for many years without any interruption from any person and that some have constructed permanent structures thereon; in particular, the 1st defendant avers that she has been resident thereon for 37 years. They aver that they came to learn of the suit when they were served with a warrant of eviction and that they were also never served with the mandatory notice of entry of judgment.

5. The application is opposed. The plaintiff filed her sworn affidavit on 19/3/2024 in opposition. She stated that the draft statement of defence raises no triable issues; that on the advice of her counsel on record she believes that the defendants were effectively served with the summons in the case through

the 3rd defendant who accepted service of the plaint and other documents on her own behalf and on behalf of her co-defendants and the matter proceeded in their absence due to their non-appearance and default of defence; that the process server could not effect service of hearing notices on the defendants on a number of occasions since the defendants had instructed a crowd of persons to bar anyone from accessing the premises; that consequently the plaintiff resorted to substituted service of the amended plaint and hearing notices through the Daily Nation newspaper; that the misspelt names of some of the defendants were not meant to mislead the court in any way; that the plaintiff never sued the 7th and 8th defendants though they are named in the application and they can not be deemed to have been condemned unheard and that they were also served with a decree. She states that the defendants are merely attempting to obstruct the course of justice.

6. The defendants filed a supplementary affidavit dated 27th March 2024, sworn by the 3rd defendant. The deponent reiterated that some of the defendants are not sued in their proper names and that the suit is a non-starter; that the defendants and 5 other persons have filed an application in Succession Cause No 39/2010 Mombasa seeking revocation of the grant; that the defendants were not informed of the dismissal of the succession cause and are currently seeking its reinstatement; that the outcome of the said application for reinstatement of the succession cause is bound to greatly impact on the present case and so the judgment in this case ought to be set aside. They reiterated that they may be rendered homeless and destitute if the orders sought are not granted. They state that one of the process servers swore an affidavit of non-service stating that the defendant's tenants denied him entry yet the defendants have never had any tenants on the premises, nor a caretaker by the name of "Kenga" whom the process server alleges to have served. The deponent also avers that the press advertisement bore names that would not have been recognizable to the defendants. In respect of service of the decree, she states that she is married and she has lived with her husband at Bomani about 5 kilometres away from the suit property since 2020 and she was not within the vicinity on 27/3/2023 when the process server is said to have effected service. She also states that the substituted service order did not state the "names of the correct parties" and that it thus failed to comply with the court order issued on 22/6/2022. That none of the defendants would have seen the notice on the court's notice board as they live in Kikambala; that the postal address indicated by the plaintiff on the plaint is not theirs. They also stated that the plaintiff has never resided on the suit premises.

7. Both the plaintiff and the defendants filed submissions of which I have had regard while preparing this ruling.

Determination.

8. The crux of the application is whether service of plaint and summons was effected or properly effected. The next issue to be considered after the issue of service is whether the defendants have a defence that raises triable issues.

9. This court is satisfied from a perusal of the supporting affidavit and the supplementary affidavit that proper physical, personal service was not effected on all the defendants. The court in the circumstances ordered substituted service of process.

10. Since the court found it necessary to order substituted service the initial attempts to serve the defendants should be ignored in favour of weighing if the substituted service was effective. The question that then arises is whether the substituted service should be deemed to have been proper service while the defendants dispute having seen the press advertisement and also while they are also disputing the names given in that advertisement. The defendants have all now given their correct names, to which the plaintiff lacks an answer. Though ordinarily substituted service ordered by the court should be deemed to be effective, where a question arises as to whether the persons intended

to be served were appropriately described in the notice by their correct names arises, that calls for an examination as to whether service under that description can be deemed to be proper service. The court has a very wide discretion in handling a setting aside application but the principal aim in the fair determination of such an application is to avoid unnecessary hardship to any of the parties and to do justice to all. Justice is usually done by granting all involved parties a hearing. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR it was stated as follows:

> " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

11. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76, the court held:

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

12. In setting aside applications and especially those based on non-service, the court needs exercise maximum caution to prevent the injustice that may occur of declining a setting aside application and hence barring a litigant in the event it eventually turned out that the claims of non-service were, after all, correct. The court must carefully assess the evidence supplied by the parties claiming non-service and weigh it against the assertions of the party alleging service, and determine which of the opposing positions is likely to lead to justice in the case. And under the *Civil Procedure Rules*, even where service has been effected but the court is persuaded on the basis of the material presented in a setting aside application that such service was insufficient and is likely to engender an injustice, it may exercise its discretion and set aside the judgment in the case. All this approach is intended to jealously guard a citizen's constitutional right to a fair hearing as envisaged in Article 50 of the *Constitution*.

13. The plaintiff admits that some of the names of the defendants were not correctly given in the documents in the suit documents. The importance of the admission at paragraph 16 of the plaintiff's replying affidavit should not be underrated. Persons must be sued in their proper names at all times. The purpose of that is to ensure that they have no doubt that they are intended to be in the suit and to appropriately participate.

14. The defendants aver that despite the fact that she is a close relative who should know the proper spelling of the defendants' names, the plaintiff deliberately misspelt the defendant's names in order to cause confusion and thus hamper the defendant's defence. This court is not persuaded and in any event there is no evidence of intention to deceive the court or the defendants on the part of the plaintiff. However, in the circumstances of this case where all the defendants' names were not correctly given, this court is of the view that service is wanting. There is no indication of whether the persons whose names were misspelt in the service documents would have, had the proper names been used, either had direct notice of the press advertisement or otherwise caught wind of the existence of the case or decided to enter appearance and defend the same. As that kind of service is insufficient, this court is inclined to give

the defendants a benefit of doubt and set aside the judgment delivered on 27th March 2023 and all consequential orders on that basis.

15. The defendants' draft defence brings to the fore the issue that they have been resident on the suit premises for a period of about 40 years. They aver that the claim of trespass is thus not sustainable on that ground. They aver that there has not been any dispute regarding the suit land in the past save some succession proceedings involving the suit land in which they are applying for reinstatement of the proceedings to enable them prosecute an application challenging the grant issued therein. This fact is acknowledged by both sides in this dispute. In this court's view the proposed defence raises triable issues.

16. In the case of *Sammy Maina v Stephen Muriuki* 1984 eKLR the court stated as follows:

> " The court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence."

17. Besides, it is clear that the dispute herein is between a plaintiff who is said to be related by blood to the defendants. The defendants have indicated that there is need that the matter be referred to mediation for that reason. Such disputes as may involve family should be resolved so as to distil justice so meticulously as to absolve the justice system of any blame in any event. I state this because I am aware that even under our constitutional dispensation the family is the building block of the nation. Indeed, Article 45 of the *Constitution* provides that the family is the natural and fundamental unit of society and the necessary basis of social order and it shall enjoy the recognition and protection of the state.

18. A resolution not based on solid evidence or consent from both sides is to be loathed in the circumstances as it is a threat to such a vital building block of the nation. It is for that additional reason that this court is inclined to set aside the judgment in this case and ensure that both sides are given an opportunity to ventilate their grievance.

19. The upshot of the foregoing is that the application dated 6/1/2024 has merit and the same is allowed in terms of prayer no 3 and 4 thereof. For the avoidance of doubt I will set out the final orders as hereunder:

    a. The application dated 6/1/2024 has merit and is hereby allowed;

    b. The judgment of this court delivered on 27/3/2023 and all consequential orders are hereby set aside entirely;

    c. The plaintiff shall amend the plaint to reflect the proper names of the defendants as submitted by the defendants in the affidavits in support of the application dated 6/2/2024 and she shall be at liberty to add any other party to the list of the original 6 defendants, as may be necessary for the effectual and final adjudication of this dispute, and she shall serve the same upon the defendants within 14 days from the date of this ruling;

    d. The defendants shall file their defence and serve it within 14 days of this ruling;

    e. Parties shall prepare and serve each other with their trial bundles, the plaintiff within 30 days from the date of this order and the defendants within 30 days of the expiry of the period granted the plaintiff;

    f. This suit shall be mentioned on 24th October 2024 for issuance of a hearing date.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31ST DAY OF JULY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI