



REPUBLIC OF KENYA



**Gitau (Suing as the administrator of the Estate of Jane Wairimu Gitau) v Kariuki
(Environment & Land Case E077 of 2022) [2024] KEELC 5819 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E077 OF 2022**

OA ANGOTE, J

JULY 31, 2024

BETWEEN

**ANNE NJERI GITAU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
JANE WAIRIMU GITAU) PLAINTIFF**

AND

TERRY WANJIKU KARIUKI DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Defendant's/Applicant's Motion dated 20th May, 2022 brought pursuant to the provisions of Sections 3 and 3A of the Civil Procedure Rules and Orders 40 Rule 7, and Orders 15 and 16 of the Civil Procedure Rules. The Motion seeks for the following orders:
 - a. That this Honourable Court be pleased to set aside or vacate the Ex-parte Orders entered on 2nd March 2022, and issued herein against the Defendant/Applicant and all other consequential orders thereof against the Applicant herein and the Application dated 28th February 2022 be set down for hearing inter parties.
 - b. That the Application dated 28th February 2022 be heard on merit and the Defendant be allowed to file Grounds of Objections and Verifying Affidavit to the said Application.
 - c. That the costs of this Application borne by the Plaintiff/Respondent.
2. The Motion is supported by the Affidavit of Terry Wanjiru Kariuki, the Defendant, of an even date, who deponed that she was never served with the Motion of 28th February, 2022 nor the pleadings herein and only came to know about the matter upon service of the Court orders.



3. According to the Defendant, the process server should be called upon to be cross-examined on the alleged service and that she seeks to respond to the Motion by way of Grounds of Objection and a Replying Affidavit and have the same determined on merit.
4. According to Ms Kariuki, the Plaintiff knew her Advocates but did not serve them with the pleadings with respect to this matter and that the same is evinced by several correspondences between the two law firms, to wit, the letters dated 20th April 2022, 23rd February 2022, 16th February 2022, 14th February 2022, 10th January 2022, 17th December 2021, 14th December, 2022, 24th September, 2022, 22nd September 2021, 8th September 2021, 24th September 2021, 16th September 2021 and 7th October 2021.
5. In response to the Motion, the Plaintiff swore a Replying Affidavit on the 13th June, 2022. She deponed that on 4th March, 2022, a person by the name Maina called and informed her that he had been assigned the responsibility of serving Court documents on the Defendant and that she explained to him the premises where the Defendant resides and was in communication with him until he served her.
6. The Plaintiff deponed that after the Court granted her orders pursuant to the Motion of 28th February, 2022 on the 22nd March, 2022, the next day, a copy of the orders were served upon the Defendant and that the Tenant in Maisonette A was similarly served with the Court Orders and made partial payment of the rent arrears pursuant thereto.
7. Ms Gitau avers that it is curious that the Defendant waited for two months to apply to set aside an order served upon her in March; that as advised by Counsel, personal service upon the Defendant in a fresh matter is a generally accepted practice to enable her instruct an Advocate of her choice; that the fact of correspondence between her Advocate and the Defendants' now Advocate is not concealed and that it is illogical for her Counsel to have served the Defendant with the Order and not the Motion.
8. Francis Mithamo Maina, a process server also swore a Replying Affidavit of an even date. He deponed that on 4th March, 2022, he visited the Defendant's home situate along Tigoni Road in Kilimani directly opposite Naivas Supermarket and that he had been given directions by the Plaintiff and was in communication with her as he headed to the premises.
9. He stated that upon arrival, he engaged the Defendant in a conversation and she asked that he takes the documents to her Advocate in town; that upon consulting with the Advocate who had instructed him, he was told to leave the documents with the Defendant and that being a fresh matter, personal service was required.
10. According to Mr Mithano, on 23rd March, 2023, he was given a Court Order and summons to enter appearance; that he returned to the Defendant's home and served her with documents aforesaid and that he left another copy of the order at Supreme Smile Avenue Dental Centre who are tenants of Maisonettes A within the premises where the Defendant resides.
11. He deponed that on 4th April, 2022, he sent a scanned copy of the Order to the Defendant through her mobile number and that he is ready to be cross-examined on the averments of the Affidavit.
12. Vide a Supplementary Affidavit[undated], the Defendant deponed that she has never met Francis Maina nor engaged him face to face; that she does indeed receive several calls and chats some of which she deletes without having read and that the process server ought to have served the documents upon her Counsel whom he knew.
13. The Defendant deponed that the use of the words Maisonettes A, B & C is purely for ease of identification and none has been registered as such; that they are all in one compound and registered



under one title and that Maisonette C belonged to the Plaintiff's deceased daughter while she owns Maisonettes A & B.

14. She contends that there was no dispute regarding the property until the late Janes' demise; that they have filed Objection proceedings in the succession cause of the late Jane Gitau seeking Maisonette A; that the main tenant in Maisonette A vacated while his two colleagues remain thereon at the behest of the Plaintiff and that payments by the two aforesaid tenants to the Plaintiff are illegal and should be stopped. Both parties filed submissions which I have considered.

Analysis and Determination

15. Having considered the Motion, Affidavits and submissions, the sole issue that arises for determination is;

Whether the ex-parte orders of 2nd March, 2022 should be set aside and the Motion of 28th February, 2022 set down for inter-partes hearing?

16. The present Motion seeks the setting aside of ex-parte orders. Section 3A of the *Civil Procedure Act* grants this Court inherent powers to make such orders as may be necessary for the ends of justice to be met. Further, Order 51, Rule 15 of the Civil Procedure Rules provides that the Court may set aside an order made ex parte. It reads;

“The court may set aside an order made exparte.”

17. It is clear that the Court's power in this respect is discretionary in nature. This was affirmed by the Court of Appeal in *Richard Nchapi Leiyagu v IEBC & 2 Others* [2013]eKLR as follows:

“...the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

18. As the regards the manner in which the Courts should exercise their discretionary powers, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated thus;

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

19. It is trite that in seeking to invoke the discretionary jurisdiction of the Court, an Applicant must demonstrate sufficient cause. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus;

“It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”



20. Closer home, the Court in Wachira Karani vs Bildad Wachira [2016]eKLR held as follows:

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application....”

21. The Defendant seeks to have this Court set aside the ex-parte Orders of 2nd March, 2022 and set down the Motion of 28th February, 2022 for inter-partes hearing.
22. By way of brief background, on 28th February, 2022, the Plaintiff instituted the present suit against the Defendant seeking inter-alia permanent injunctive orders restraining the Defendant from interfering with her access to L.R No 1/563(suit property); demanding rent from the tenants occupying the premises designated as Maisonettes A erected on the suit property, and orders directing her to cede control of and hand over possession of the servants quarters for Maisonettes A and C situate on the property.
23. Filed contemporaneously with the Plaintiff was a Motion. The Plaintiff sought vide the Motion, inter-alia, for temporary injunctive orders restraining the Defendant or anyone under her authority from interfering with her access to the suit property, and demanding rent from the tenants occupying the premises designated as Maisonettes A on the suit property.
24. The aforesaid Motion equally sought to have the Defendant compelled to cede control and hand over possession of the servants quarters for Maisonettes A and C situate on the suit property to the Plaintiff.
25. On 2nd March, 2022, the matter came up for directions on the Motion of 28th February, 2022. The Court directed that the matter proceeds for inter-partes hearing on 15th March, 2022. On 15th March, 2022, the Defendant was absent. Further, no response had been filed to the Motion.
26. The Plaintiff sought and the Court granted prayers 2, 3 and 4 of the Motion, to wit, issuance of temporary injunctive orders restraining the Defendant from interfering with the Plaintiff's or her tenants' access to the suit property, and restraining the Defendant and/or her agents from demanding rent from the tenants occupying the property known as Maisonettes A erected on the suit property.
27. The Defendant contends that she was never served with the summons with respect to the suit or indeed the Motion explaining her failure to respond to the suit.
28. The law on service of documents is governed by Order 5 of the Civil Procedure Rules 2010 as amended in 2020. The manner of service of Court process on a Defendant is laid down under Order 5 Rule 8 of the Civil Procedure Rules which provides as follows:

“ 8. . Service to be on defendant in person or on his agent.

- 1) 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.
- 2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”



29. As regards proof of service, the law requires the filing of an Affidavit of Service. Order 5 Rule 15(1) provides;

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month’s imprisonment or both.”

30. It is important to note that the procedure for service of summons is applicable mutatis mutandis to service of other court process, which include Applications and related documents.

31. Order 48 Rule 2 of the Civil Procedure Rules provides thus;

“All orders, notices and documents required by these Rules to be given to or served on any person shall, save where other provision is made, be served in the manner provided for the service of summons.”

32. The Plaintiff maintains that the Defendant was duly served with summons and all the Court processes. In this respect, the process server, Francis Mithamo Maina, filed an Affidavit. He deponed that he served the Defendant at her home situate along Tigoni Road in Kilimani, opposite Naivas Supermarket; that he engaged her in a conversation and that she declined to accept service asking him to serve the same upon her Counsel and that he nonetheless left her with the documents.

33. Through the Affidavit of Service filed, the process server indicated that it is the Plaintiff who directed him to the home of the Defendant. He set out the time and manner in which summons was served. He noted that he personally knew the Defendant on account of previous service and the watchman guarding the premises pointed the Defendant’s house out to him.

34. The Defendant disputes this assertion. She contends that she has never been served with any summons. She contends that the Plaintiff knew her Counsel and ought to have served him with the Court process.

35. The law is now settled that where a process server has sworn and filed an affidavit to the effect that he/ she has effected service of a document on a person, there is a rebuttable presumption that the person has been served. The onus is upon the person challenging service to prove that service was not effected.

36. In the case of Secretary and Another vs Lucia Ndinda Musyoka T/a Jocia Stores [2019] eKLR, the Court at paragraph 22 cited with approval the treatise, the code of Civil Procedure’ vol.11 page 1670 by Chitale and Annaj Rao as follows;

“There is a presumption of service as stated in the process server’s report and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server is put in the witness box and opportunity of cross examination given to those who deny service.”



37. Also, in *Karatina Garments Ltd. vs Nyanarua* [1976] KLR 94, the predecessor of this Court stated as follows;
- “Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”
38. Having opted to proceed with the Motion without first seeking to formally have the process server cross-examined, the Court is now left to contend with whether the Defendant has disproved the rebuttable presumption that she was served with Court process.
39. Considering the evidence in this regard, the Court is not convinced that the proof of service has been rebutted. The Affidavit of Service sworn by the process server is as per the parameters espoused in Order 5 Rule 15(1). The same process was undertaken in serving the Defendant with the orders of 22nd March, 2022 which is not disputed. The Court opines that there is no firm basis for rejecting the affidavit
40. As regards claims that service should have been on Counsel, Order 4 Rule 8 of the Civil Procedure Rules is clear that personal service is to be undertaken unless a party has an authorized party to accept service. Indeed, evincing this is the fact that Counsel for the Defendant filed a notice of appointment as at the time of filing the present Motion. Notwithstanding their previous engagement, the firm/ Advocate only became an authorized agent of the Defendant in this matter upon coming on record.
41. Ultimately, the Court finds that the service was proper. This being so, no explanation has been rendered as to the delay between the service of the Motion of 28th February, 2022 and the present Motion, a period of about 2.5 months.
42. In *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, the Court stated as follows on the subject of delay:
- “It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases.”
43. The above notwithstanding, the Court is still minded to exercise its discretion so as to grant the Defendant a reprieve by granting them a chance to be heard.
44. The Court’s decision in this respect is informed by the fact that the question of ownership of the suit property and entitlement to rental proceeds therefrom is heavily disputed and the intended response shows triable issues. However, considering that the Plaintiff expended money in serving the Defendant, the Defendant shall pay thrown away costs assessed by this court to the Plaintiff.
45. It is noted that the Defendant seeks to set aside the Orders of 2nd March, 2022. On the aforesaid date, the Court simply directed that the matter proceeds for inter-partes hearing on 15th March, 2022. It is on the 15th March, 2022 that the Court issued orders pursuant to the Motion of 28th February, 2022 which the Defendant seeks to respond to.



46. In the interests of justice and in balancing the rights of the parties, the Application dated 20th May, 2022 is allowed in the following terms;
- i. The Orders of 15th March, 2022 are hereby reviewed and will subsist pending the hearing and determination of the Motion of 28th February, 2023.
 - ii. Leave is hereby granted to the Defendant to file their response to the Motion of 28th February, 2022 within 14 days of the date hereof.
 - iii. The Defendant shall pay to the Plaintiff thrown away costs of Kshs 10,000.
 - iv. The Defendant shall bear the costs of the Motion.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Macharia for Plaintiff/Respondent

Mr. Kahuthu for Defendant

Court Assistant - Tracy

