



Mutungi (Suing as the administratrix of the Estate of Henry Mwitari - Deceased) v Commissioner of Lands & another (Environment & Land Case 1758 of 1995) [2024] KEELC 6646 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1758 OF 1995**

**MD MWANGI, J
JULY 25, 2024**

BETWEEN

AGNES NKATHA MUTUNGI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF HENRY MWITARI - DECEASED) PLAINTIFF

AND

COMMISSIONER OF LANDS 1ST DEFENDANT

ROSE MUTHONI MATHENGE 2ND DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Motion Application dated March 11, 2024 filed by the 2nd Defendant/Applicant seeking for the following orders:
 - a. That the Honourable Court be pleased to set aside the Judgement and Decree made on the March 10, 2017 and vacate all subsequent orders therein and set down the suit for inter partes hearing.
 - b. That costs of the Application be provided for.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Rose Muthoni Mathenge who avers that she is the registered proprietor of the suit property known as L.R No. 20780 located at Ridgeways within Nairobi County having been issued with a Title on the 11th April, 1995. She states that the Plaintiff served her with summons to enter appearance in this matter and she duly filed her Statement of Defence through the Law firm of Kilonzo & Company Advocates. She however relocated to the United Kingdom but kept in touch with her Counsel through an English Law firm.



3. However, the firm of Kilonzo & Company Advocates sought leave to cease from acting for her vide the Chamber Summons dated 6th December, 2013, which leave was granted. She states that the said firm purportedly served her via registered mail through Post Box Number 64296 Nairobi, which information she learnt through her current Advocates on record upon perusal of the Court file. She argues that the said address was incomplete hence the letter was could not have been delivered as no postal code was indicated.
4. The Applicant avers that the Plaintiff purportedly served her with the Hearing Notice for 20th May, 2015 via Post Box No. 47665-00100 Nairobi which address is strange to her. She did not therefore receive the hearing notice and the matter proceeded in her absence. Subsequently, judgement was entered in the Plaintiff's favour on the 10th March, 2017 directing the cancellation of her title to the suit property and the award of Kshs. 4,000,000/= as damages for trespass. In executing the decree emanating from the said judgement, the Plaintiff appointed auctioneers who have since proclaimed her moveable properties with the aim of realizing the decretal amount awarded for damages for trespass.
5. The Applicant contends that she was never served with any document throughout the process of this case. All through, she thought that the firm of Kilonzo & Company Advocates were still representing her. She maintains that she only became aware of the status of the case when she was served with the proclamation notice and warrants of attachment of moveable property. It is then that she instructed her current Advocates on record, whom upon perusal of the court file, informed her about the entry of judgement and the execution proceedings.
6. The Applicant maintains that she has a good title to the suit property and prays that she be granted a chance to demonstrate to the court how the property was legally allocated to her. She avers that she stands to suffer irreparable damage if the Judgement delivered on the 10th March, 2017 and the decree emanating therefrom is not set aside. The Plaintiff will not suffer any harm that cannot be compensated by way of damages. She prays that the orders sought be granted.

Replying Affidavit

7. In her Replying Affidavit sworn on the 23rd April, 2024, the Plaintiff avers that her late husband pursued this matter to its logical conclusion with the court declaring him the rightful owner of the suit property. In executing the decree emanating from the judgement delivered therein, they commenced the cancellation of the 2nd Defendant's Title and were issued with an Allotment Letter. Upon payment of the requisite Stand Premium, they were issued with a new title and a Deed Plan duly registered on 6th April, 2021. The estate of the deceased was subsequently issued with a Certificate of Lease under L.R No. Nairobi/ Block 188/23.
8. The Plaintiff avers that consequently, the 2nd Defendant's application herein has since been overtaken by events as her title has since been cancelled and a new title issued. Further, that the suit property has already been distributed by the Court vide Nairobi High Court Succession Cause No. 493 of 2019. She further argues that the Applicant herein is guilty of laches since the application has been brought almost seven (7) years after the judgement was delivered. She further accuses the Applicant of indolence for failing to disclose the steps she took to confirm the status of her case. She asserts that the Applicant has no given an explanation for the inordinate delay in filing the application.
9. The Plaintiff further contends that the application has not been made in good faith as the Applicant was served at every step when the execution process commenced but failed to respond accordingly. She argues that even though the substantive prayer in the application is a discretionary prayer, the circumstances prevailing cannot warrant a Court to issue such an order as the same shall disparage the Honourable Court. The Applicant has taken more than 22 years to present her case after the suit was



filed contrary to the principle that litigation must come to an end. The application should therefore be dismissed with costs.

Court's Directions

10. The Court directed that the application be canvassed by way of oral submissions. The parties submitted orally before the Court on the 6th May, 2024. The proceedings of 6th May 2024 form part of the record of the Court. I need not replicate them in this ruling.

Issues for Determination

11. Having considered the application together with the affidavits in support and in opposition and the oral submissions made by the parties through their Advocates, this court is of the view that the only issue for determination is whether the court ought to exercise its discretion in favor of the 2nd Defendant/Applicant and set aside the judgment delivered on the 10th March, 2017.

Analysis and Determination

12. The grant of orders for setting aside of a judgment provides opportunity to an aggrieved party under two scenarios: one, is where the judgment is irregular; two, where the judgment is regular. For an irregular judgment sought to be set aside, it shall go that way as of right because it means that the party was not given an opportunity to be heard and rules of natural justice cannot permit it to be that a party is condemned unheard. the court ought to set it aside ex debito justitiae.

13. On the other hand, setting aside exparte judgment, is discretionary where the exparte judgment was regular. In both cases, the concern of the court should be to do substantive justice to all the parties in the suit.

14. Article 50 of *the Constitution* guarantees the right to a fair hearing under sub article (1) which provides 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.’

15. Order 12 Rule 7 of the Civil Procedure Rules, 2010 empowers the Court to set aside or vary a judgement or Order entered as a consequence of the non-attendance of any party. It provides that:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary such judgment or order upon such terms as may be just.”

16. The well-established principles of setting aside judgments were laid out in the case of Patel –vs- East Africa Cargo Handling Services Ltd (1974) EA 75 as per Duffus P. who stated as follows:

“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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on 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.”



17. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in the case of *James Kanyita Nderitu vs. Marios Philotas Ghika & Another* [2016] eKLR, where it was stated that;

“... In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others.”

18. The considerations are however different in case of an irregular judgement. The Court stated as follows: -

“In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo -vs- Attorney General* [1986 – 1989] EA 456).”

19. The right not to be condemned unheard is a cardinal principle of natural justice, without which the rule of law would be without equilibrium. This principle, like a golden thread, must be seen to run throughout all court processes even as the court strives to uphold the law and other legal principles. The legitimacy of court decisions and the rule of law find their bearing on this principle.
20. In my view, denying any person the right to a fair hearing, is a grave matter that ought not to be taken lightly. The court is under duty to ensure that every party to a suit, is accorded an opportunity to be heard. This opportunity starts with being made aware of any court processes filed against parties to a suit. In the case of *Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others* (2013) e KLR, the court held that;

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rule enjoys superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rule as captured in the Latin phrase ‘*audi alteram partem*’ literally translates in



to ‘hear the parties in turn,’ and has been appropriately paraphrased as ‘do not condemn anyone unheard.’ This means a person against whom there is a complaint must be given a just and fair hearing.”

21. At this juncture, I pose to ask myself whether the judgement entered in this matter was regular or irregular. To determine this, I have to determine whether the 2nd Defendant was duly served and notified about the hearing of the case.
22. It is not in dispute that the 2nd Defendant was duly served with Summons to enter appearance. She in fact entered appearance and appointed a firm of Advocates to represent her. The court record shows that the firm of Kilonzo & Company Advocates filed an application dated 6th December, 2013 seeking leave of the court to cease from acting for the 2nd Defendant. The said application was allowed on the 25th February, 2015. The effect of which was that the Plaintiff was required to effect service personally upon the 2nd Defendant in all subsequent court proceedings.
23. When the matter was slated for hearing on the 20th May, 2015, counsel for the Plaintiff informed the court that they had served the 2nd Defendant by way of registered post. It was on the premises of that service that the hearing proceeded in the absence of the 2nd Defendant. A perusal of the court file shows that indeed the Plaintiff filed a Return of Service on the said hearing day ostensibly to proof service of the Hearing Notice dated 31st March, 2015.
24. The Affidavit of Service is deposed by one Daniel Kingara sworn on 20th May, 2015. The Process Server at Paragraph 3 avers;

“That on the same day at around 10.30 a.m. I proceeded to General Post Office, Kenyatta Avenue and posted the Hearing Notice to Rose Muthoni Mathenge of P.O. Box 47665-00100 Nairobi by Registered mail and (was) issued with a Certificate of Postage to that effect for the 2nd Defendant.”
25. The 2nd Defendant has denied having been served with the Hearing Notice. She explains how she learnt of the matter only after she was personally served with the Proclamation Notice. The big issue hangs around the postal address. Does it belong to the Applicant? The Plaintiff in her reply does not say anything about the address Box No. 47665- 00100 Nairobi. She does not explain how and where the Process Server got the said postal address. The process Server too did not explain how he got to know that the alleged 2nd Defendant’s postal address.
26. The law on service of documents is governed by Order 5 of the Civil Procedure Rules 2010 as amended in 2020, and supplemented by the Practice Directions issued under Gazette Notice No. 3137 of 2021. It is important to point out that whereas Order 5 relates to service of summons, it applies mutatis mutandis to service of other court processes including applications and the related documents. This follows a purposive interpretation of the definition of “document” as given under Order 5 Rule 9(4) of the Civil Procedure Rules. See the case of Sifuna & Sifuna Advocates -vs- Patrick Simiyu Khaemba [2021] eKLR.
27. The question of service in litigation is a critical issue and the court must satisfy itself that the opposite party has been duly informed to avoid the risk of such a party being condemned unheard. This is why ‘personal service’ is the preferred mode of service.
28. Order 5 Rule 8(1) of the Civil Procedure Rules provides as follows: -

“ 8.



- (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.”

29. In the case of National Bank of Kenya – vs – Puntland Agencies Limited & 2 Others [2006] eKLR, the Court of Appeal stated as follows: -

“The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable.”

30. Ordinarily, an agent who is recognized in law as an agent authorized to accept service on behalf of a party in a suit would be the Advocate on record for the litigant. Where a party has not appointed counsel to act for him/her, then the preferred mode of service is personal.

31. Order 5 Rule 12 provides thus: -

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”

32. Order 5 Rule 14, allows, when the Defendant cannot be found, after exercise of reasonable and due diligence, service by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain.

33. Rule 14 requires the serving officer to exercise reasonable and due diligence to find the Defendant personally. In my understanding, the serving officer must make effort to find the Defendant. The effort made should be demonstrated in the affidavit of service filed. The serving officer must for example indicate the number of times he attempted to find the Defendant. He should demonstrate that he laboured to search the whereabouts of this defendant to justify service in the mode provided for under the said rule.

34. In the instant suit, the process-server made no disclosure of how many times he had attempted to serve the 2nd Defendant before resorting to effect service by Registered Post. He went straight away to purportedly effect Service by Registered Post; which mode of service is for corporations as provided under Order 5 Rule 3 (b) (i) of the Civil Procedure Rules. For an individual, service should be personal unless leave of court is granted for substituted service. This mode of service was improper and irregular and cannot be deemed to have been proper service upon the 2nd Defendant.

35. The judgement entered herein was therefore irregular. Going by the binding decision in James Kanyita Nderitu vs. Marios Philotas Ghika & Another (Supra), the judgement ought to be set aside *ex debito iustitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. Additionally, the court will not venture into considerations of whether the intended defence raises triable issues, or whether there has been inordinate delay in applying to set aside the irregular judgment.



36. Such a judgement is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process. Musinga J (as he then was), in the case of Frigonken Ltd – vs- Value Pak Food Ltd (2011) eKLR expressed the position in the following terms: -

“If there is no proper or any service of summons to enter appearance, the resulting judgement is an irregular judgement liable to be set aside by the court ex debito justitiae.”

37. Just in case I may be wrong on the irregularity of the judgement, I will consider whether the reasons advanced by the Applicant are reasonable to justify the setting aside of the judgement assuming it was regular. The Applicant alleges that her late husband was the owner of the suit property. She has exhibited documents to prove that averment.

38. In my opinion, the reasons presented by the Applicant were valid, reasonable and sufficient to move the court to exercise its discretion and set aside the default judgement even if it had been regularly entered. A claim of proprietorship qualifies as a reasonable defence for all intents and purposes.

39. The hearing proceeded without the knowledge of the 2nd Defendant. This was clearly contrary to the cardinal rule of natural justice not to condemn someone before hearing them.

40. The upshot is that the 2nd Defendant’s application dated 11th March 2024 is merited. It is accordingly allowed as prayed. I therefore issue the following orders;

- a. The Judgment delivered on 10th March, 2017 and the consequential orders thereof are hereby set aside.
- b. The hearing of the suit shall start de novo and on a priority basis due to the age of the matter.
- c. The matter shall be fixed for Pre-trial conference before the Deputy Registrar on a date to be set by the court on delivery of this ruling.
- d. The costs of the suit shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ogado for the 2nd Defendant/Applicant

Mr. Chasia h/b for the Plaintiff/Respondent

N/A by the 1st Defendant

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

ELC NO. 1758 OF 1995 RULING Page 4 of 16

