



**Awino v Awino & another (Environment & Land Case
34 of 2017) [2024] KEELC 5537 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 34 OF 2017
GMA ONGONDO, J
JULY 24, 2024**

BETWEEN

FRANCIS OKECH AWINO PLAINTIFF

AND

JOHN NYAMBOK AWINO 1ST DEFENDANT

LAND REGISTRAR HOMABAY 2ND DEFENDANT

RULING

1. This ruling pertains to a Notice of Motion application dated 5th March 2024 by the 1st defendant/ applicant through Juma Ouko and Company Advocates seeking the orders infra:
 - a. Moot
 - b. Moot
 - c. That this Honourable Court be pleased to issue an interim order for stay of execution of its judgment and all subsequent proceedings pending the inter-partes hearing and determination of this application.
 - d. That the Honourable Court be pleased to review, vary and/or set aside its judgment together with all consequential orders on such terms as are just in view of the circumstance of this case.
 - e. That the Honourable Court be pleased to reopen the Plaintiff's Case for devono hearing on priority basis and to grant the 1st Defendant/applicant leave to file his statement and/or statement of defence out of time.
 - f. That the statement of defence together with witness filed herewith be deemed duly filed for purposes of hearing.
 - g. That the costs of this application be provided for.



2. The application is anchored upon the applicant's supporting affidavit of fourteen paragraphs sworn on even date and the grounds set out on its face which include;
 - a. That the Plaintiff's case proceeded in the absence of the 1st Defendant /Applicant and judgment has been entered against the 1st defendant/Applicant.
 - b. That the 1st Defendant/Applicant never entered appearance as he was not aware of any suit pending against him before this Honourable court.
 - c. That it is in the best interest of justice to grant the reliefs sought ex debito justitiae, so that the Plaintiff's main suit can proceed to hearing on merit.
 - d. That condemning the 1st defendant/Applicant for the failures by the plaintiff to serve summons and/or pleadings is contrary to the dictates of natural justice.
3. By a replying affidavit of eleven paragraphs sworn on 3rd April 2024, the plaintiff/respondent, Francis Okech Awino through G.M Nyambati and Co Advocates, opposed the application. He averred, inter alia, the application was duly served with summons to enter appearance and that he filed a statement of defence dated 13th December 2016 (FOA-01) but deliberately failed to attend court for hearing of the suit as shown in the notices and affidavit of service (FOA-02) herein.
4. Also, the respondent averred that execution in this matter took place long time ago hence, judgment was fully settled and the estate was administered in accordance with the confirmed grant by court (FOA-03). That the applicant has not demonstrated any prejudice on loss and damage which may be occasioned on him in the even the judgment is not set aside. That the application is an abuse of the court process.
5. The application was heard by way of written submissions further to the circuit orders of 14th February 2024.
6. In the applicant's submission dated 12th April 2024, it is stated that the application was provoked by the respondent's notice of motion application dated 30th January 2024 for eviction of the applicant from the suit land reference No. Kanyada/Kanyiango-Kalanya/924 further to this court's decree of 21st January 2022. That the applicant was not aware of the suit and that he has a good defence.
7. Moreover, the applicant, submitted that non-service of pleadings upon him is prejudicial to him. That therefore, the application is merited and it be allowed. He relied on Order 5 Rules 6 and 15, Order 8 Rule 9B of the Civil Procedure Rule, 2010 and Supreme court of India decision in Sangram Singh-versus -Election Tribunal Kotch AIR 1955 SC 664 and 711 and David Gicheru -versus Gicheha Farms Limited and another (2020) eKLR, to fortify his submissions.
8. On his part, the respondent filed submissions dated 2nd May 2024 making reference to the parties' respective pleadings, ex-parte hearing and the judgment rendered on 15th February 2018, giving effect to the confirmed grant in HomaBay SRM's Court succession cause No. 223 of 2014. It is the position of the respondent that the applicant failed to participate in the hearing of the suit and that litigation has to come to an end. That the applicant's draft statement of defence and counter claim, is not a good one as it is mere denial of the suit.
9. Counsel also submitted that the application has not met the conditions to set aside the judgment. That the applicant did forgo the opportunity to be heard. That the application is not merited hence, it be dismissed.



10. I have taken into account the entire application, the replying affidavit, the rival submissions and the pleadings as well the judgment herein. Therefore, is the application meritorious?
11. It is the contention of the applicant that he was not served for the hearing of the suit. That he was not aware of the same until he was served with the notice of motion dated 30th January 2024 for eviction from the suit land.
12. The respondents asserted that the applicant was kept informed of the progress of the proceedings herein. He referred to Notices and affidavits of service (FOA-02), to reinforce his assertion.
13. By affidavits of service sworn on 30th November 2017 and 15th November 2017 herein, the respondent was duly served. Indeed, these affidavits were considered by this court at paragraph 5 of the judgment. It is trite that a party to a case must be made aware of its existence to enable that party to either appear or not appear in court for the same; see *Ogade -versus Mollin* (2009) KLR 620
14. Therefore, the applicant was accorded an opportunity to be heard as provided for under Articles 48,50(1) and 159(2) (b) and (e) of *the Constitution* of Kenya, 2010; see also Halsbury's Laws of England 5th Edition 2010 volume 61 paragraph 639.
15. In the instant circumstances, the applicant opted not to participate in the hearing of the suit.
16. In *Kirugi and another versus Kabiya and 3 others* (1987) eKLR, the Court of Appeal held that the burden was always on the plaintiff to prove his case on a balance of probabilities. That the burden is not less emend even if the case was heard by formal proof. The respondent did prove so in this suit.
17. Clearly, the judgment in place in this suit, is legal and regular. The applicant has not presented solid reasons to set it aside.
18. To that end, the application is devoid of merit. The same is hereby dismissed with costs to the respondent/plaintiff.
19. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 24TH JULY 2024.

GEORGE M.A ONGONDO

JUDGE

Present.

Mr. Okemwa Steve holding brief for Nyambati learned counsel for 1st respondent/defendant

Ms. E Opiyo for 2nd respondent.

T. Luanga, C/A

1st defendant/applicant and Counsel -Absent

