



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Amin (Environment & Land Case 28 of 2021)
[2024] KEELC 6253 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 28 OF 2021
JM ONYANGO, J
SEPTEMBER 24, 2024
IN THE MATTER OF ASCERTAINMENT OF LAND
OWNERSHIP OF LAND PARCEL NO. ELDORET
MUNICIPALITY BLOCK 12/31 MEASURING APPROXIMATELY 0.0929 HECTARES**

BETWEEN

WILLIAM KEMEI TANUI PLAINTIFF

AND

KANIKA NITIN AMIN DEFENDANT

RULING

1. The Defendant /Applicant filed a Notice of Motion dated 19.4.2024 seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this Honourable court be pleased to direct that and/or order the County Land Registrar Uasin Gishu to suspend and/or halt the registration of the decree issued on 16th October 2023 and/or any other conveyance instrument over the suit land title number Eldoret Municipality Block 12/31 and to instead register a restriction on the title No. Eldoret Municipality Block 12/31 pending the hearing and determination of this application and thereafter the main suit.
 - iv. That the ex-parte proceedings undertaken, the judgment in this matter and the subsequent proceedings and/or orders if any, be set aside ex-debito justitiae.
 - v. That the Defendant/ Applicant be granted leave to defend the suit and to file a response to the claim together with the supporting documents and he draft replying Affidavit attached herein be deemed properly filed and served subject to payment of the court fees only.



- vi. That the costs of this application be borne by the Plaintiff/Respondent.
2. The application is based on the grounds stated on the face of the Notice of Motion and the facts in the Applicants Supporting affidavit sworn on the 10th April 2024.
 3. The main grounds upon which the application is based are that the Applicant was not served with the pleadings and only learnt of the existence of the suit when unknown people visited the suit land claiming to be owners thereof pursuant to a court decree issued on 16.10.2023 granting the Plaintiff/Respondent proprietary rights over the suit land.
 4. In her affidavit the applicant depones that she was surprised to discover that there is another suit filed in the subordinate court being ELD CM ELC (O.S) NO. E012 OF 2023 Zendera Kiplagat Biwott & Another v Kanika Nitin Amin in which the Plaintiffs therein obtained a decree in their favour in respect of the suit land on 10th May, 2023.
 5. She depones that the suit land initially belonged to her father who later transferred it to her on 7.10.1996 as per annexure “KNA3” It is her deposition that she has been in occupation of the suit land since then without any interruption. The Applicant further avers that during her stay on the suit land she has never seen, met or transacted any business with the Plaintiff over the suit land. That when she learnt of the suit she instructed her advocate to peruse the file and he discovered that the Plaintiff had instituted the suit herein claiming the suit land by way of adverse possession as he claimed he had been in possession and use thereof since 1969. The suit proceeded ex-parte and judgment was entered in his favour.
 6. The Applicant avers that the proceedings that were undertaken are irregular as the Applicant was not served with the pleadings in accordance with Order 5 of the *Civil Procedure Rules, 2010*. She adds that the proceedings before the court were false and fictitious with the sole intention of grabbing her land by misleading the court into issuing orders in the Plaintiff’s favour. She states that the suit land is vacant and she would like the court to visit the suit land to confirm the status thereof.
 7. The Applicant depones that the Plaintiff is in the process of effecting registration in his favour in accordance with the judgement issued on 16.10.2023 and there is need to stay execution pending the hearing and determination of the application and later the suit herein.
 8. She depones that the right to defend is constitutionally protected and that the court ought to grant her the opportunity to defend the claim as it is against the rule of natural justice to condemn a party unheard. She avers that she has a good defence as depicted in the annexed Replying Affidavit and the court should have an opportunity to hear the parties based on the correct set of facts.
 9. She depones that the failure to participate in the matter was not deliberate but due to the fact that she was not aware of the existence of the proceedings herein.
 10. The application is resisted through the Respondent’s Replying Affidavit sworn on 3rd May 2024. In the said affidavit he depones that the Applicant was duly served through substituted service in an advertisement in the Standard Newspaper after obtaining an order of the court for substituted service and therefore the resultant judgment is proper and regular.
 11. It is his contention that the prayers sought are discretionary and the court cannot aid a party who deliberately chose not to participate in the proceedings resulting in the ex- parte judgment. He denies that the Applicant has been in occupation and use of the suit property and states that he has been in continuous use and occupation of the suit property and he has over the years been fencing off



trespassers who tried to occupy the suit property. He claims that the Applicant has come to court with unclean hands and is therefore undeserving of the orders sought.

12. He avers that the Draft Replying Affidavit annexed to the Applicant's affidavit is a sham as it does not raise any triable issues and that it is a mere denial. He adds that the Applicant has not demonstrated to this court that she has a plausible defence. Further, that the Applicant has not demonstrated that she is willing to remedy the prejudice by paying thrown away costs in the event the application is allowed.
13. He is of the view that the application is made in bad faith and that it lacks merit and should therefore be dismissed.
14. The application was canvassed by way of written submissions and both parties filed their respective submissions which I have carefully considered and will refer to them in my analysis.

Analysis and Determination

15. The main issue for determination is whether the court should set aside the ex- parte judgment delivered on 27th September 2023 together with all consequential orders.

Order 10 Rule 11 of the [Civil Procedure Rules](#), provides that:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

16. It is therefore clear that the Court has the discretion to set aside or vary any default judgment so long as this is done upon such terms as are just on the basis of the evidence placed before the Court, and always bearing in mind the principle set out in the case of *Mbogo v Shah* [1968] EA 93 that the discretion is intended to be exercised "...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error," but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
17. However, the court must draw a distinction between a regular and irregular judgment. This distinction is significant for the reason that where the Court finds that the Judgment was irregular, then it ceases to have discretion in the matter and it must proceed to set aside the default judgment ex debito justitiae.
18. In the case of in [James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another](#) [2016] eKLR, the Court of Appeal restated the distinction aforementioned as hereunder:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd*



(1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

The Court further stated that:

“In an irregular default 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 issue 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 v. Attorney General* [1986-1989] EA 456).

19. In the case of *Mohamed & Another v Shoka* (1990) KLR 463 the court set out the conditions that a court should consider in an application for setting aside an interlocutory judgment. They include:
 - a. Whether there is a regular judgment
 - b. Whether there is a defence on merit
 - c. Whether there is a reasonable explanation for any delay
 - d. Whether there would be any prejudice
20. In the case at hand, the Defendant was served by way of substituted service pursuant to a ruling of this honourable court delivered on 15th June, 2022 in accordance with Order 5 Rule 17 of the *Civil Procedure Rules*. The service is therefore deemed to be proper. However, the court still has a discretion to set aside the ex-parte judgement if it is satisfied that there is sufficient cause.
21. The Applicant has stated that she was not aware of the existence of this suit until strangers came to her property claiming to the owners thereof pursuant to a court decree issued on 16.10.23. This can be explained by the fact that she was not served personally but through an advertisement in the newspaper. The court takes judicial notice that in the current digital age very few people buy daily newspapers and even if they do, few people read the “Classified Advertisements” where the notice of suits filed are advertised. In the circumstances, I am inclined to believe the Applicant that she was not aware of the existence of the suit.
22. On whether the Respondent has an a reasonable defence I am guided by the case of *Tree Shade Limited v D.T Dobie Co. Ltd* CA 38/98 where the Court held that;

“when an ex parte judgment was lawfully entered, the court should look at the draft defence to see if it contained a valid or reasonable defence”
23. I will now proceed to consider whether the Applicant has a reasonable defence. I have perused the Draft Replying Affidavit annexed to the Applicant’s Supporting Affidavit and I am of the view that it raises triable issues. In particular, the Applicant has pointed out that the Originating Summons does not meet the conditions in Order 37 Rule 7 of the *Civil Procedure Rules*. She has also stated that the



Respondent did not satisfy all the requirements for adverse possession. In my view these are triable issues that can only be determined at a full hearing.

24. Before I pen-off, I note with concern that there is another suit relating to the subject matter herein where different Applicants filed a suit in the lower court seeking orders of adverse possession and the same were ostensibly granted vide an ex parte judgment in CMELC Case No. 12 of 2023 Zendera Kiplagat Biwott & Another v Kanika Nitin Amin. This is a more compelling reason for this court to hear this matter on its merits so that the truth can be unearthed.
25. In view of the foregoing, I am persuaded that the application has merit and I therefore grant it and make the following orders:
 - a. The ex-parte proceedings undertaken, the judgment in this matter and the subsequent proceedings and/or orders if any, are hereby set aside.
 - b. The Defendant/ Applicant is hereby granted leave to defend the suit and to file a response to the claim within 14 days from the date hereof.
 - c. The Land Registrar Uasin Gishu County is hereby directed to suspend and/or halt the registration of the decree issued on 16th October 2023 and/or any other conveyance instrument over the suit land title number Eldoret Municipality Block 12/31 and to instead register a restriction on the title No. Eldoret Municipality Block 12/31 pending the hearing and determination of the main suit.
 - d. The Applicant shall pay thrown away costs assessed at Kshs.8000.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 24TH DAY OF SEPTEMBER, 2024.

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Waithera for Miss Odwa for the Defendant
2. Miss Kirui for the Plaintiff

Court Assistant: Brian

