



**Ng'ang'a v Katana (Environmental and Land Originating Summons
69 of 2019) [2024] KEELC 5909 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 69 OF 2019
EK MAKORI, J
SEPTEMBER 18, 2024**

BETWEEN

MARY WAIRIMU NG'ANG'A APPLICANT

AND

NICHOLUS KOPO KATANA RESPONDENT

RULING

1. The application dated 14th December 2023 and amended on 31 January 2024 seeks to set aside the ex parte judgment delivered by this Court (Odeny J.Dr.) on 8th May 2023 and all the consequential orders. It also requests that the matter be set down for hearing de novo, with attendant costs.
2. The Applicant/Respondent moved the Court vide an Originating Summons seeking orders of adverse possession over all that parcel of land known as Kilifi/Mtwapa/439 measuring 4.9 Ha., which belongs to the Respondent/Applicant herein.
3. The Respondent/Applicant avers she has been unaware of this suit, so she never instructed an advocate to come on record and defend her interest. Consequently, the Respondent/Applicant only learned about the suit when individuals unknown to her caused a disturbance and disruption on the suit property, claiming that they were the owners pursuant to a Court order.
4. As it stands, the Applicant/Respondent has proceeded to subdivide into subdivision title numbers Kilifi/Mtwapa/8847, 8848, 8849, 8850, 8851, 8852, 8853, 8854, 8855, 8856, 8857, 8858, 8859, 8860, 8861 and 8862.
5. The Applicant/Respondent contends that the Respondent has never had the suit property at any given time, and therefore, the allegation that he has been in occupation for the last 50 years cannot stand. It was a blatant lie made to mislead this Court into issuing the impugned judgment.



6. The Applicant, therefore, seeks that the Court be pleased to set aside the irregular judgment entered on 8th May 2023 and all consequential orders emanating therefrom. The Applicant is committed to the legal process and seeks to defend this suit unconditionally as a matter of right.
7. Significantly, the Applicant states that summons to enter appearance was never personally served upon the Applicant; the allegations contained in the affidavits of service by the Applicant/Respondent raise questions on the mode of service, seeing as the Respondent/Applicant is a well-known land owner in the area, who is also in the business of leasing the suit properties for farming and agriculture, which then questions the Applicant/Respondent's allegation of having the suit properties for more than twelve (12) years.
8. Regarding the preceding, the Respondent/Applicant has adduced evidence of leases to that effect. Therefore, the Applicant submits that the same was obtained irregularly and that an irregular judgment is amenable for setting aside in limine.
9. The Respondent/Applicant asserts that the Applicant/Respondent, in her affidavit, acknowledges that she was the registered owner of that parcel of land known as Kilifi/Mtwapa/439. The annexed Green Card indicates that the file was closed on a sub-division. The substratum of the Application was already dead upon arrival. The subject matter does not exist.
10. In his replying affidavit, the Respondent demonstrated to the Court through an affidavit of service that the Applicant herein could not be traced, necessitating the Court to order substituted service through the Daily Nation and the Standard Newspapers twice.
11. The Respondent further avers that the Applicant did not dispute any of the affidavits of service nor seek to cross-examine the court process server on the service issue. She was an absent landlord, and the Respondent/Applicant has not demonstrated to this Court whether the averments of the court process server are factual. In paragraph 15 of the replying affidavit sworn on 27th February 2024 by the Applicant/Respondent herein, an affidavit of service is annexed by a licensed court process server named Shem. O. Abudho, who demonstrates the efforts made to serve the Applicant personally to no avail. The Applicant was said to be unknown in that area. Failure to impeach the averments on service of the Court process, she fails to demonstrate prima facie case, and the application ought to fail. The averments in paragraph 6 of the supporting affidavit of the Respondent/Applicant that she has been in the occupation are untrue and unfounded. She has not demonstrated to this Court how she is occupying the property. There is no single annexure to that effect. She can't be in occupation and watch in vain as the property is sold to third parties. She could have noticed and complained about trespass. On this alone, she fails the test for a prima facie case.
12. The Respondent has further questioned how the Applicant obtained the transfer of the suit property well after the vendor died in 1986. In any event, execution has already been concluded in this matter, and the suit property is subdivided and in the hands of third parties—innocent purchasers for value.
13. Before I frame the issues for the decision of this Court, it will be reckoned that I have three applications originated by the Applicant in place. The Notice of Motion dated 14th December 2023 seeks to set aside the Court's judgment entered on 8th May 2023 and all consequential orders emanating therefrom. It also seeks an order of injunction to restrain the Applicant/Respondent, his servants, agents, proxies, beneficiaries, or persons claiming through him from advertising, selling, further sub-dividing, disposing, transferring, charging, leasing, developing, wasting, damaging and alienating and registering any new entries in respect of all that parcel of land known as Kilifi/Mtwapa/439 measuring 4.9 Ha. The 2nd Amended Notice of Motion dated 31st January 2024 seeks similar orders save that it adds sub-division title numbers Kilifi/Mtwapa/8847, 8848, 8849, 8850, 8851, 8852, 8853, 8854, 8855, 8856, 8857,



8858, 8859, 8860, 8861 and 8862. The 3rd Notice of Motion dated 21st February 2024 seeks orders to review and rectify its orders issued on 13th February 2024 to read the correct Land Title Number Kilifi/Mtwapa/439 instead of Kilifi/Mtwapa/438. This is all vexing, and I can see from the submissions from the Respondent it became challenging to submit what application we are dealing with.

14. For clarity, the suit property has already been subdivided into several subdivisions and is not registered in the name of the Respondent herein. The status quo orders issued by the Court required the subdivisions to remain as they stand on the register until further orders from this Court are made.
15. What then I frame for the decision of this Court is whether to set aside the ex parte judgment dated 8th May 2023 and all the consequential orders emanating therefrom and who should bear the costs of the application.
16. Service of summons to enter appearance is said to have been done by advertisement. As alluded to by the process server, Shem. O. Abudho, efforts were made to serve the Applicant physically, but he deposes in his return of service that:

“I went to enquire on her whereabouts at the Chief’s office Majengo, Kanamai, whereby I was directed to one Gona Menza, who is the village elder, and upon inquiry, I found out that the Respondent is not known and has never lived in that vicinity.”
17. Due to the foregoing, the Respondent approached the Court for an alternative service, which was okayed. Service was provided through advertisements in both the Daily Nation and the Standard Newspapers.
18. The Applicant believes that the service was irregular and will ask the Court to cross-examine the said process server at the hearing.
19. On the other hand, the Respondent believes that the Applicant has failed to challenge the averment by the process server in any manner and that the Applicant does not ordinarily reside in that vicinity, as confirmed by the area Chief.
20. When service is improper, it leads to an irregular judgment, which should be set aside ex debito justitiae (bila matata) and as correctly submitted by the Applicant citing the decisions in *Ali Bin Khamis v Salim Khamis Korobe & 2 others*, [1956] 23 EACA 195 and *James Kanyita Nderitu v Maries Philotas Ghika & another* [2016] eKLR where in the latter case it was held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the irregular judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the irregular judgment that is regularly entered and one, which is irregularly entered. In a regular irregular judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in irregular judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the irregular 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 irregular judgment, and will take into account such 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 irregular judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd*



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

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 irregular 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 irregular 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). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

21. The Applicant notes that the judgment herein was irregularly obtained since service was improper. The Applicant’s submission that the process server will be called in the future to be cross-examined on the service mode, in my humble view, cannot stand. This should have been the ideal moment to question the disputed process. Therefore, the process server’s averment shows that the Applicant does not ordinarily reside around the Kanamai area. I believe service was proper, and the judgment in place stands regular.
22. The decisions cited by the Applicant significantly the James Kanyita Case(supra) address how to deal with a regular judgment - the Court has unfettered discretion in determining whether or not to set aside the irregular judgment and will take into account such 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 irregular judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer.
23. Judgement was entered on 8th May 2023. The current application was filed on 14th December 2023. The Applicant says she was not aware of the same—this Could be true since, as already shown, it was through advertisement in the local dailies, and one can’t read the same daily. To me, the delay cannot be said to be inordinate.
24. The defence raises the issue that the Applicant is the registered owner of the property that has been decreed to have been acquired by the Respondent by the operations of adverse possession. She will be disputing this position if given a chance to defend. On the other hand, the Respondent says the property has since been subdivided and in the hands of third parties –innocent purchasers for value.
25. I think the Applicant has a right to defend. Therefore, I will allow the application dated 14th December 2023 and set aside the judgment dated 8th May 2023. The Applicant will be allowed to defend. The



subject matter is to remain registered in the names of the subsisting subdivisions until the matter is heard and determined—costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 18TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Gakuo, for the Applicant

Mr. Makworo, for the Respondent

Happy: Court Assistant

