



Farah & 3 others (Suing on their own behalf and on behalf of all the Residents of Neboi and Garbaqoley areas in Mandera East Sub-County) v County Government of Mandera (Environment & Land Petition E006 of 2021) [2024] KEELC 14178 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 14178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND PETITION E006 OF 2021
JM MUTUNGI, J
OCTOBER 31, 2024**

BETWEEN

**ABDULLAHI MOHAMUD FARAH 1ST PETITIONER
OSUBA OMAR FARAH 2ND PETITIONER
MOHAMED DUBAWE ABDILE 3RD PETITIONER
ABDULLAHI SHEIKH HUSSEIN 4TH PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE
RESIDENTS OF NEBOI AND GARBAQOLEY AREAS IN MANDERA EAST
SUB-COUNTY**

AND

COUNTY GOVERNMENT OF MANDERA RESPONDENT

RULING

1. The Respondent/Applicant filed the Notice of Motion application dated 17th October, 2023 supported by the Affidavit sworn on the same date by Hussein Somo Legal Counsel of the Respondent/applicant and prayed for orders:-
 - i. That this Honourable Court do certify this application as urgent and that the application be heard ex-parte in the first instance.
 - ii. That this Honourable Court be pleased to set aside the Judgment entered on 25th March, 2022 together with any consequential orders emanating from the Order and Decree.



- iii. That upon grant of Payer No. 2, this Honourable Court be pleased to grant the Respondent/Applicant unconditional leave to file its Replying Affidavit out of time and leave to defend the suit albeit out of time.
 - iv. That this Honourable Court be pleased to grant a stay of execution of the Judgment entered on 25th March, 2022 or any further Orders emanating from the Judgment pending the hearing and determination of the instant application and the entire suit.
 - v. That this Honourable Court do issue a conservatory order preserving the parcel of land near Central Division, Mandera East Sub-County, (hereinafter the suit land), measuring approximately 2000 hectares, in its current state pending the hearing and determination of the instant application and the entire suit.
 - vi. That this Honourable Court do issue an order of injunction preventing the Petitioners jointly and severally from entering into or interfering with the suit land and any structures affixed to the land pending the hearing and determination of the instant application and the entire suit.
 - vii. That the costs of the application be provided.
2. The application is opposed by the Petitioners/Respondents vide the Affidavit of their Advocate on record, Mr. Yusuf Ali Somo sworn on 24th April, 2024.
 3. The Respondent/Applicant's application is expressed to be made Under Section 1A, 1B, 3A and 3B of the *Civil Procedure Act* and Order 10 Rule 8, Order 12 Rule 7, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. Principally the Applicant claims not to have been served and/or properly served with the Petition and the other accompanying documents. The Respondent however admit being served with a Mention Notice on 1st September, 2021 but avers the Mention Notice was not accompanied with any pleadings. The Respondent denies having been served with any Hearing Notice of the Petition and/or given any Notice of the Judgment. The Respondent states the hearing of the Petition proceeded *ex parte* and the Judgment reserved for 25th March, 2022 when it was delivered in the absence of the parties. The Respondent stated that they on 29th March, 2022 instructed the Firm of Issa & Company Advocates to come on record on their behalf in the matter vide email of even date exhibited as "HS-I".
 4. The Respondent contends that the Petitioners never sought leave to proceed with the matter as undefended and hence the Judgment obtained was irregular. Further, the Respondent averred the Deputy County Secretary who was served had no authority to receive service as such authority is vested on the County Secretary and the County Attorney.
 5. The Respondent argues the purported service effected on the Respondent was irregular and they are therefore entitled to have the *ex parte* Judgment set aside 'ex debito justitiae'. The Respondent further avers they have a good and arguable defence that raises cogent triable issues and they should be afforded the opportunity to defend the Petition. The Respondent averred the subject land was public land reserved for the development of a Livestock market and Islamic University and a KEMRI Research Centre for the benefit of the Residents of Mandera County.
 6. On behalf of the Petitioners, Yusuf Ali Somo Advocate filed the Replying Affidavit in opposition to the application by the Respondents. He reiterated that on 1st September, 2021 he served upon the Respondent the Mention Notice dated 1st September 2021, the Petition and Notice of Motion both dated 23rd July, 2021 and were received by one Hussein Hassan, Deputy County Secretary who embossed on each of the documents the official County Secretary stamp denoting the receipt of the documents. He further deponed that he subsequently served on the Respondent a hearing Notice



dated 18th October, 2021 for hearing of the application/Petition on 28th October, 2021 which was duly acknowledged and stamped with the official stamp of the County Secretary on 18th October, 2021. The Advocate deponed that he served on the Respondent a further Mention Notice dated 6th December, 2021 for mention of the matter on 15th December, 2021 and finally also served upon the Respondent a Hearing Notice of the Petition on 20th January, 2022 for hearing on 26th January, 2022. The Respondent despite being served variously had not appeared and the Court on 26th January 2022 allowed the Petition to proceed for hearing *exparte*.

7. The Respondent averred that even though the Respondent instructed their Advocate on 29th March, 2022 there is no explanation that has been given why it took the Respondent over 1 ½ years to bring the instant application yet they were aware Judgment had been entered. The delay was not only inordinate but in excusable. The Respondent thus contended there was no justiciable reason to set aside a Judgment that had been regularly obtained by the Petitioners.
8. The parties canvassed the application by way of Written Submissions. I have reviewed and considered the submissions made on behalf of the Respondent/Applicant and the Petitioners/Respondents by their respective Counsel. I have also reviewed and considered the authorities referred to me by the respective Counsel on behalf of their clients.
9. The Applicant's application invites the Court to exercise its discretion to set aside the *exparte* Judgment entered against it and to grant it leave to defend the Petition.
10. The principles for setting aside of *exparte* Judgments have been articulated in various Judicial decisions. The issue is one of exercise of discretion by the Court and which discretion requires to be exercised in a Judicial and Judicious manner on the basis of clear principles, and not capriciously or on whims. The Judicial discretion is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of Justice ---- as was held by Harris, J in *Shah -vs- Mbogo & Another* (1967) EA 116 and upheld by the Court of Appeal in *Mbogo -vs- shah* (1968) EA 93.
11. In the Case of *Shah -vs- Mbogo & Another* (*supra*) the Court stated as follows:-

“ This decision to set aside an *exparte* Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice. However, the discretion of the Court must always be exercised Judiciously with the sole intention of dispensing Justice to both parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”
12. In the instant matter the Respondent/Applicant has argued they were not served with the pleadings. The Affidavits of service on record and which were equally exhibited by the Petitioners in the Replying Affidavit indicate that the Mention Notices and Hearing Notices were all served and received by the Deputy County Secretary who embossed the stamp “Received” of the County Secretary on the served documents on every occasion. In particular the Respondent has stated they were served with the Mention Notice but without any pleadings. I have carefully reviewed the Court record and in particular the Replying Affidavit sworn in response to the application. The annexed Affidavit of Service marked “YAS” paragraph 2 sets out the documents served thus:-



2. That on the 1st day of September 2021, I received from the Firm of M/s Yusuf Ali & Co Advocates a Mention Notice dated 1st September, 2021 and a Petition and Notice of Motion application both dated 23rd July, 2021 with instructions to serve the same upon the 1st Respondent.
13. The Deponent under paragraph 3 of the Affidavit of Service depones that he served all the aforesaid documents which were received by Mr. Hussein Hassan, Deputy County Secretary who stamped on the copies returned to the Process Server. I have scrutinized the documents served and which were stamped and it is evident the Mention Notice, the Certificate of Urgency, the Notice of Motion and the Petition were all embossed with County Secretary's stamp on 1st September 2023 and were all marked as "RECEIVED". The documents must have been served as in the Petitioners bundle of documents, the Certificate of Urgency, the Notice of Motion and Petition appear sequentially at pages 1, 5 and 9 respectively as appears in the stamped copies. I am in the premises satisfied, the Respondent was indeed served with all the pleadings on 1st September, 2021 as deponed in the Affidavit of Service sworn by Yusuf Somo on 23rd September, 2021. Likewise, I am persuaded the Respondent was thereafter served with the Mention Notices and Hearing Notices as deponed in the exhibited Affidavits of Service.
14. Although the Respondent has alluded to the fact that the Deputy County Secretary had no authority to receive service, I do not consider that anything turns on that. There is no indication whether there was a substantive County Secretary or County Attorney at the time the service was effected and as the Deputy County Secretary, Hussein Hassan held himself to have authority to receive service on behalf of the County. He was a Senior Officer and had access to the official stamp of the County Secretary which he duly affixed. The service in my view was proper and regular.
15. The Respondent/Applicant inspite of having been served with the Petition way back in September, 2021 never entered any appearance and never attended Court for hearing inspite of having been served with a Hearing Notice. The Respondent has not offered any plausible reason for the failure to appear and/or instruct Counsel. The Respondent alludes to the Mention Notice and the Hearing Notices being served but without any Supporting Pleadings. This cannot be a good reason for failing to appear and/or file a response. The averment that there were attempts and efforts to reach the Petitioners Advocates to be furnished the pleadings cannot be taken seriously. There is no demonstrated evidence of how the overture was executed and I treat the assertion as a red herring not intended to be taken seriously otherwise there would have been some form of communication initiated at the instance of the Respondent/Applicant. Besides once documents have been filed in Court they become public and a party such as the Applicant could have easily accessed the documents from the Court.
16. It is further unexplained why after the Respondent/Applicant instructed its Advocates on record it took a whole 18 Months to file the instant application if indeed they wished to have the exparte Judgment set aside. The record shows a party and Party Bill of Costs was filed on 21st April, 2022 and that indeed the Firm of Issa & Company Advocates filed a Notice of Appointment on behalf of the Respondent on 30th March, 2022 after the Judgment had been entered on 25th March, 2022. No doubt the Respondent must have become aware Judgment had been entered against them, yet the present application was not filed until 17th October, 2023. The Respondent was aware of the Judgment and for 18 Months did nothing about it.
17. The Respondent/Applicant in my view has not laid any proper basis upon which I could exercise my discretion in their favour. The Respondent have argued that they have a good defence and if the Judgment is not set aside they stand to suffer prejudice and the Public will suffer loss as they will be required to satisfy the decree. The Respondent had the opportunity to appear and file their defence as they were regularly served. The Respondent' chose to ignore the suit and have only woken up when



it has dawned on them execution will issue. The Respondent even after having notice that Judgment had been entered against them took their “sweet time” to challenge it. Justice cuts both ways. The Petitioners as the successful party are entitled to the fruits of their Judgment. They have a regular Judgment and the conduct of the Respondent is not such as would entitle them to have the Court’s discretion exercised in their favour. All indications are there, that the Respondents brought the instant application as an afterthought.

18. The application is devoid of merit and is hereby ordered dismissed with costs to the Petitioners/ Respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 31ST DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

