



**Maina v Mwangi & another (Environment & Land Case 50 of 2017)
[2024] KEELC 7294 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 50 OF 2017
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

NANCY WAMAITHA MAINA PLAINTIFF

AND

JANE MUTHONI MWANGI 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

RULING

1. Before the Court for determination is the 1st Defendant's Notice of Motion dated 5th April 2024 and brought under Article 50 of the Constitution, Section 1A and 1B of the Civil Procedure Act, Order 10 Rules 2,3,4,5,9,10,11, Order 12 Rules 2 & 7 and Order 5 Rule 17 of the Civil Procedure Rules. The 1st Defendant is seeking orders that:
 - a. Spent.
 - b. Spent.
 - c. The Court be pleased to set aside the Judgment of this Court delivered on 3rd May 2018 by Honourable Justice E.O Obaga.
 - d. Further to granting prayer (c) above, the Court be pleased to allow the 1st Defendant to defend the claim and reinstate this claim for hearing and determination on merit.
 - e. Costs of the application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by the 1st Defendant, who deponed that she has been working with UNICEF for 20 years and currently resides in Bangkok, Thailand, and that on or around 28th February 2024, she opened her spam inbox and found an email from the Plaintiff's advocate.



3. According to the 1st Defendant, the email contained a notice requiring her to attend Court and show cause why execution should not be carried out against her and that she informed her advocates of the same.
4. She further averred that during the pendency of the suit, she was residing in the United States of America; that the Plaintiff knew of her work email address; that he also knew that she was in the country from time to time; and that he also knew that she was participating in MCCR 268 of 2019 R v Dominic Njuguna Kiarie in person but failed to inform her about this suit. The Plaintiff chose to serve her by way of substituted service.
5. The 1st Defendant deponed that she was not served with any of the documents and only became aware of the suit when she saw the notice to show cause on 28th February 2024; that she was denied her constitutional right to a fair hearing and that the Court should grant the orders sought.
6. The Plaintiff filed a replying affidavit in which she averred that she is the owner of LR No 7785/1027 (hereinafter ‘the suit property’) having purchased the same from Greenoak Investments Limited in July 2014, and that sometime in January 2017, some three ladies visited the suit property and informed the caretaker that they had bought the suit property from the owner.
7. The Plaintiff averred that she was in possession of the legitimate title to the suit property. She deponed that she consequently instructed her advocates to file the instant suit on 24th January 2017; that summons to enter appearance were issued on 2nd February 2017 but they could not trace the 1st Defendant for personal service and that the DCI furnished them with an email address and telephone numbers that were not going through.
8. In the absence of a known postal address, it was deponed that she decided to serve the 1st Defendant by way of substituted service on 15th March 2017.
9. The Plaintiff further averred that when the 1st Defendant filed MCCR 268 of 2019 R v Dominic Njuguna Kiarie, her advocate testified as PW3 and gave evidence about the existence of this suit and that the 1st Defendant and her advocate participated actively in the suit in the lower Court and were consequently aware of the instant suit.
10. The Plaintiff deponed that Judgment was entered and a decree issued; that while the 1st Defendant was jolted by the notice to show cause, she had been actually/constructively been aware of the proceedings and Judgment in the suit and that the Judgment on record is regular and should not be set aside.
11. The 1st Defendant filed a further affidavit on 25th July 2024. She averred that while she lodged a complaint with the DCI, she did not have access to the documents provided to the DCI by the Plaintiff and that the Plaintiff had her work email and phone numbers but did not contact her.
12. In asking the Court to set aside the impugned Judgment, the 1st Defendant averred that: she has a good defence and counter-claim; that the orders sought by the Plaintiff were misconceived because she was a victim, not a perpetrator of the fraud. The parties filed submissions which I have considered.

Analysis and Determination

13. The 1st Defendant has asked the Court to set aside the impugned Judgment on account of the fact that she was not served with summons to enter appearance and on account of the fact that her defence raises triable issues.



14. The Plaintiff has averred that the 1st Defendant was served by way of substituted service and that the 1st Defendant was aware of the suit as the Plaintiff and advocate participated (and provided documents) in the criminal case where the 1st Defendant was a complainant.
15. Order 10 Rule 11 of the [Civil Procedure Rules](#) provides as follows:

“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. From the foregoing, it is clear that the Court has discretion to set aside a Judgment entered in default of appearance. In the case of *Shah v Mbogo* [1967] E A 116 the Court stated as follows concerning the exercise of that discretion:

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
17. The 1st Defendant has relied on what would perhaps be termed as ‘inadvertence’. She stated that she was not served with the summons to enter appearance and that the Plaintiff did not exhaust all channels of communication before opting for substituted service. In the case of [Phillip Mutiso Mulalya v Samuel Dominic Muatbe & 2 others](#) [2022] eKLR the Court stated as follows:

“In the instant case, there is no dispute that the 2nd and 3rd Defendants were duly served with summons to enter appearance by way of substituted service by advertisement in the Newspaper and they neither entered appearance nor filed defence as required by law; hence the judgment entered against them was lawful and regular. The applicants have stated that they did not see the advertisement herein. In my view, it is possible that indeed the applicants failed to see the said advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. Therefore, substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice. In the circumstances, it is my considered view that the reason given by the Applicants that they did not see the advertisement and were therefore not aware of this suit is a reasonable explanation to warrant setting aside the exparte judgment.”
18. While the law as set out above encourages the Courts to be sympathetic towards litigants who are served by way of substituted service and are likely not to have seen such service, it is worth considering whether the 1st Defendant fits the definition of such a litigant.
19. The 1st Defendant has firstly claimed that the Plaintiff did not exhaust all methods of communication available before opting for substituted service. However, it is worth noting that this suit was instituted



in 2017 when the legally prescribed methods of service were personal service, postal service or substituted service.

20. E-mail was not a legally recognized form of service. The claim that the Plaintiff knew the 1st Defendant's e-mail address and did not serve her using that mode is therefore immaterial.
21. The 1st Defendant has stated that she was not served with the summons to enter appearance. She has however acknowledged the existence of the substituted service when faulting the Plaintiff for not using other means. The 1st Defendant has not expressly or constructively stated that she did not see the advertisement.
22. Her case is that there were other means of communication available and that such means were not used before resorting to substituted service. The presumption that she did not see the advertisement therefore fails to come into play and fails to come to her aid.
23. The 1st Defendant has also claimed that the Plaintiff and her advocate participated in the criminal case where she was a complainant but they did not tell her about the instant suit. It is worth noting that the criminal case was instituted in 2019 way after this suit had been determined in 2018.
24. The Plaintiff averred that they served the 1st Defendant's advocate with all documents in the instant suit. The 1st Defendant has alleged that they did not receive any documents from the Plaintiff or her advocate.
25. Lenaola J, as he was then, in *Basil Criticos v Attorney General & 8 others & 4 others* [2012] eKLR, stated as follows concerning knowledge vis a vis service:

“However the law has changed and as it stands today knowledge supersedes personal service and for good reason...The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.”

26. While it could have been possible that the 1st Defendant was not served with the documents during the criminal trial, she/her advocate cannot feign ignorance about not knowing about the instant suit. The Plaintiff and her advocate testified in that suit - a matter that was first acknowledged by the 1st Defendant.
27. The advocate also testified about the instant suit and produced the Judgment as an exhibit. The 1st Defendant has not denied this fact. That being the case, I find that on a balance of probabilities, the 1st Defendant was aware of the instant suit and of the Judgment against her. She was therefore in a position to bring the application for setting aside/reinstatement at an earlier date.
28. In determining such cases, the Court in the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR stated as follows:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”



29. While this is a court of justice, it is also a court of law and rules. The court cannot come to the aid of a litigant who was aware of a Judgment that had been entered against her but chose to be negligent/lax in enforcing her rights.
30. Having found that the 1st Defendant was aware of the instant suit from the time the advocate testified in the criminal case, there is no justifiable reason as to why she did not bring the instant application earlier. Setting aside the Judgment at this stage would prejudice the Plaintiff who averred that she has put her residence on the suit property.
31. The 1st Defendant also averred that her defence raises triable issues. However, a perusal of the Judgment from the criminal case reveals that the accused in that case was found guilty of fraud in the transaction that supposedly made the 1st Defendant the ‘owner’ of the suit property.
32. Section 26(1) of the *Land Registration Act* provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

33. The proceedings in the criminal court shows that the 1st Defendant was sold the suit property in a fraudulent and/or illegal transaction. It therefore follows that her title was the product of an illegal process. Asking the Court to sit and decide ownership in such circumstances would not be a prudent use of judicial time that is already limited.
34. In view of the foregoing, the 1st Defendant’s application is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Masinde for 2nd Defendant

Mr. Kisia for Chacha Odera for 1st Defendant

Mr. Ochieng for Plaintiff/Respondent

Court Assistant: Tracy

