



**Ogutu v Arogo (Environment and Land Case E004 of 2024)  
[2024] KEELC 13385 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13385 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE E004 OF 2024**

**E ASATI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**SIMON OMELA OGUTU ..... PLAINTIFF**

**AND**

**SALINA AOKO AROGO ..... DEFENDANT**

**RULING**

1. The Applicant/Defendant, Salina Aoko Arogo vide the Notice of Motion dated 28<sup>th</sup> October, 2024 sought for orders that;
  - a. the order issued herein on 29<sup>th</sup> May, 2024 in favour of the Plaintiff against the Defendant/Applicant and all consequential proceedings be set aside unconditionally.
  - b. the court grant leave to the Defendant/Applicant to respond to the Plaintiff/Respondent's Notice of Motion application dated 14<sup>th</sup> February, 2024 and be set down for hearing inter partes.
  - c. Cost of the application be in the cause.
2. The application was based on the grounds that the Applicant was not served with Summons to Enter Appearance and the application dated 14<sup>th</sup> February, 2024. That the Defendant depends solely on the suit land for subsistence and that the injunctive orders issued preclude her from preparing and planting her food crops this season. That the Plaintiff will not suffer any prejudice if the orders sought are granted.
3. That the Defendant has a right to defend herself in proceedings pursuant to article 25 and 159 2(d) of the [Constitution of Kenya](#), 2010. That the Defendant has a valid and legitimate defence to the Plaintiff's case.



4. The application was supported by the averment in the Supporting Affidavit sworn by the Applicant on 28<sup>th</sup> October, 2024 and the annexures thereto. The Applicant denied knowledge of the process server and the contents of the Affidavit of Service.
  5. The application was opposed vide the Replying Affidavit of Simion Omela Ogotu sworn on 9<sup>th</sup> November, 2024. The Respondent's case is that the Applicant was served on 16<sup>th</sup> February, 2024 with Certificate of Urgency, Notice of Motion application and Supporting Affidavit dated 14<sup>th</sup> February, 2024 at Chiga market. That the Applicant has not met the grounds necessary for grant of the orders sought. That setting aside the orders will result in loss to the Respondent.
  6. The application was argued orally on 4<sup>th</sup> November, 2024.
  7. I have taken the rival submissions into account.
  8. The grounds for setting aside an ex – parte orders include firstly, explanation for failure to file response to the application, attend court or participate in the proceedings that led to the ex parte orders, secondly, a demonstration that that the applicant has a good defence that raises triable issues and thirdly, that prejudice will not be occasioned to the Respondent if the relief sought is granted.
  9. The ground advanced by the applicant for failure to participate in the hearing of the application that led to the orders sought to be set aside is that she was not served with the application. There are, however, Affidavits of Service by the process server on record which the court keenly considered before proceeding to entertain the application dated 14<sup>th</sup> February, 2024 in the absence of the current applicant.
  10. It has been pointed out that the Applicant herein never sought to call the process server for cross-examination on the contents of the Affidavit of Service. In the case of *Shadrack Arap Baiywo v Bodi Bach* [1987]eKLR the Court of Appeal held that

“There is a presumption of service as stated in the process server's report and the burden lies on the party questioning it to show that the return is incorrect. But an Affidavit of the process server is admissible in evidence and in the absence of contest, it would normally be considered sufficient evidence of regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”
  11. The applicant in the present case simply denied service and made no move to have the process server questioned on the contents of his Affidavit of Service.
  12. I find that the grounds for setting aside of orders have not been demonstrated.
  13. The orders shall remain in force.
  14. For expeditious disposal of the suit, the court hereby directs the Applicant to file her response to the Originating Summons and compliance documents within 30 days hereof to enable taking of directions on the Originating Summons.
  15. The application is dismissed. No orders as to costs.
- Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**



**E. ASATI**

**JUDGE.**

In the presence of:-

Maureen: Court Assistant.

Nyagol for the Applicant.

No appearance for the Respondent.

