



Kenya African National Traders & Farmers Union (Suing through its officials Kimani Wanyoike (Chairman) Peter Mugeka Maina (Secretary General) and Ibrahim Wanene (Treasurer) v Nthei & 43 others (Environment & Land Case 358 of 2012) [2024] KEELC 7541 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 358 OF 2012**

A NYUKURI, J

NOVEMBER 13, 2024

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION OVER L.R. NO. MAVOKO TOWN BLOCK 3/2174 AND UPON SUBDIVISION INTO MAVOKO TOWN BLOCK 3/5682 – 5717 (INCLUSIVE) PREVIOUSLY KNOWN AS PLOT NO. 406) IN LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY LIMITED)

BETWEEN

KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION (SUING THROUGH ITS OFFICIALS KIMANI WANYOIKE (CHAIRMAN) PETER MUGEKA MAINA (SECRETARY GENERAL) AND IBRAHIM WANENE (TREASURER) PLAINTIFF

AND

KIMUNDU NDUNDA NTHEI 1ST DEFENDANT
ROSE MUTHOKI JOHN 2ND DEFENDANT
PADDY KAMAU NGANGA 3RD DEFENDANT
GEORGE NGAARI NGANGA 4TH DEFENDANT
GEORGE KARIUKI 5TH DEFENDANT
JOHN GITHIRWA MAINA 6TH DEFENDANT
DORCAS WAMBUI IRUNGU 7TH DEFENDANT
ELIAS MAINA MATHENGE 8TH DEFENDANT
REBECCA WARUGURU NDUNGU 9TH DEFENDANT
MARGARET NJERI GIKONYO 10TH DEFENDANT
GIDEON MBUTHIA NDIRANGU 11TH DEFENDANT



STEPHEN THUKU NJIRI	12 TH DEFENDANT
NELSON IRUNGU KARONGA	13 TH DEFENDANT
JOHN NGANGA GATHANGA	14 TH DEFENDANT
PETER GATHIRWA GATHAGA	15 TH DEFENDANT
PATRICK NDUNGU NDIBA	16 TH DEFENDANT
CHARLES GACHERU GATHAGAH	17 TH DEFENDANT
STEPHEN IRUMBI NJUGUNA	18 TH DEFENDANT
WILSON THUO SIMON	19 TH DEFENDANT
STEPHEN WAKANDU GIKONYO	20 TH DEFENDANT
FRANCIS MAINA	21 ST DEFENDANT
MICHAEL NGIGE NJOROGE	22 ND DEFENDANT
MARGARET KAHINYA NGIGE	23 RD DEFENDANT
DAVID MUTHUI NDUNGU	24 TH DEFENDANT
SAMSON MWANGI MAINA	25 TH DEFENDANT
JOSEPH NJUNGE NJOROGE	26 TH DEFENDANT
JOAN WAMBUI KAMUYU	27 TH DEFENDANT
PETER MAINA MURIUKI	28 TH DEFENDANT
PENINAH NJOKI MUNGAI	29 TH DEFENDANT
JOTHAM KAMAU NJACHA	30 TH DEFENDANT
PETER GITHU NGACHA	31 ST DEFENDANT
PAUL MWANGI NJACA	32 ND DEFENDANT
JACKSON KAMAU MWAURA	33 RD DEFENDANT
JAMES NGIGI MWAURA	34 TH DEFENDANT
LUCY MUGATHA KINYUA	35 TH DEFENDANT
AUGUSTINE MBAE NJAGI	36 TH DEFENDANT
EUNICE NJERI GITHAIGA	37 TH DEFENDANT
LUCY NYAWIRA NJERU	38 TH DEFENDANT
NELSON IRUNGU KARONGA	39 TH DEFENDANT
FRED NYAKUNDI KIARI) AS TRUSTEES OF	40 TH DEFENDANT
BERNARD BINYANYA) MATIRIKA YOUTH	41 ST DEFENDANT
JOHN NUNDA TORORI) SELF HELP GROUP	42 ND DEFENDANT



LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY

LTD 43RD DEFENDANT

CHARLES KARIUKI GATUMU 44TH DEFENDANT

RULING

1. This ruling is in respect of two applications, namely; the application dated 27th July 2023 filed by the 3rd, 4th, 5th and 6th defendants and the application dated 22nd January 2024 filed by the 41st, 42nd and 43rd defendants.

Application dated 27th July 2023

2. In the application dated 27th July 2023, the 3rd to 6th defendants sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to set aside the judgment delivered by this court on 8th March 2019 and all other consequential orders thereto and the 3rd, 4th and 6th defendants/ applicants be granted leave to defend this suit.
 - d. That the costs of this application be provided for.
3. The application is anchored on the supporting affidavit sworn by George Kariuki, the 4th defendant. The applicants' case is that the 3rd to 4th defendants were never served with summons to enter appearance, pleadings and notice of entry of judgment in this matter, and therefore the matter proceeded ex parte. Further, that the applicants became aware of this matter after entry of judgment when the 14th defendant conducted a search on 25th July 2023 in respect of the parcel of land known as Mavoko Town Block 3/5691.
4. The deponent stated that upon conducting the required due diligence, the applicants purchased the parcel of land known as LR. No. Mavoko Town Block 3/2174 from the 2nd defendant who was the registered proprietor thereof; and that thereafter the said land was transferred to the applicants. That the applicants subdivided the aforesaid title into LR. No. Mavoko Town Block 3/5682–5717 and sold it for valuable consideration to the 7th to 43rd defendants. That the latter took possession and extensively heavily developed and invested in the said property, by building permanent homesteads thereon.
5. He stated that the defendants stood the risk of being evicted from the suit property and being rendered homeless as the plaintiff had already registered the decree at the Lands office. He maintained that the applicants had a good defence and ought to be given a chance to be heard. He stated that the defendants having been in possession of the suit property, the plaintiff could not trace their whereabouts. Further that the plaintiff's application dated 8th October 2012 was not supported by an affidavit from the process server to show efforts in tracing the defendants for purposes of service. He also faulted the newspaper advertisement for service, which did not list the names of the defendants and argued that, that was irregular. He insisted that the judgment was irregular and ought to be set aside ex debito justitiae. He attached authority to plead; certificate of official search; sale agreement; photographs of the suit property; affidavit of service; and draft defence.



6. The application was opposed. Peter Kigia the plaintiff filed a replying affidavit sworn on 23rd September 2023. He stated that upon obtaining leave of court, the plaintiff served the defendants by substituted service by way of advertisement in the Daily Nation Newspaper on 17th February 2018. That none of the 43 defendants entered appearance or responded to the suit filed by plaintiffs. Further that the matter came up for hearing on 17th October 2018 but none of the defendants was in court and therefore the matter proceeded ex parte and subsequently on 8th March 2019, the court delivered judgment herein in favour of the plaintiff.
7. Regarding the draft defence, the respondent stated that the same was a mere denial of facts and did not raise any triable issues. He also stated that the 1st defendant could not pass good title to the applicants as his title had been extinguished by the doctrine of adverse possession.
8. He reiterated that on 21st October 1993, the plaintiff entered into a land sale agreement with the 1st defendant whereof it purchased the parcel of land known as Plot No. 406 Lukenya at Kshs. 800,000/- which was to be paid by 3rd August 1995. That the plaintiff fully paid this amount and the plaintiff through its members took possession of the suit property. He stated that the 1st defendant never disrupted the plaintiff's occupation since 1995 but through fraudulent means, transferred the suit property to the 2nd to 6th defendants on 15th July 2008. He stated that the title to Lukenya Society was extinguished in 2007 and it could not pass good title to the 1st defendant hence the subsequent transfer of the same to the 2nd to 43rd defendants was void ab initio.
9. He maintained that the decree issued herein had already been executed by the Land Registrar and the plaintiff issued with a title deed on 17th March 2023. He attached copies of the orders for substituted service issued on 16th May 2013; extract of the content of the advertisement; affidavit of service; the judgment herein and title deed.

Application dated 22nd January 2024

10. In the notice of motion dated 22nd January 2024, the 41st to 43rd defendants sought the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to set aside the judgment delivered by this court on 8th March 2019 and all other consequential orders thereto and the 41st, 42nd and 43rd defendants be granted leave to defend this suit.
 - e. That the cancellation of LR. No. Mavoko Town Block 3/2174 and all subdivisions thereto be revoked and be reinstated to its original status before the cancellation.
 - f. That the costs of this application be provided for.
11. The application is supported by the affidavit of Fred Nyakundi Kiari the 41st defendant sworn on 22nd January 2024. The applicants' case is that the applicants were never served with summons to enter appearance and pleadings or notice of entry of judgment in this matter and only became aware of this matter after judgment when the 14th defendant conducted search of parcel Mavoko Town Block 3/5691 on 25th July 2023.
12. The deponent stated that the 3rd to 6th defendants purchased LR. No. Mavoko Town Block 3/2174 from the 2nd defendant and that the latter transferred the said property to the former. That the 3rd to



- 6th defendants subdivided the aforesaid title into LR. No. Mavoko Town Block 3/5682-5714 and sold and transferred the same to the 7th to 43rd defendants. That the latter have heavily developed the suit property and built permanent homes thereon.
13. He added that the applicants were at risk of being evicted from the suit property without having been granted opportunity to be heard. He complained that the plaintiff did not demonstrate that they could not be traced and that their names were not listed in the service by advertisement. He maintained that the applicants have a good defence which raised triable issues. He attached certificate of official search; sale agreements; subdivision plan; photographs; affidavit of service and draft defence.
 14. The application was opposed. Peter Kigia the chairman of the plaintiff swore a replying affidavit dated 8th April 2024 opposing the application. He stated that the plaintiff was allowed by court to serve summons to enter appearance by way of substituted service, which he complied with by service by advertisement in the Daily Nation Newspaper of 17th February 2018. He reiterated his averments in his affidavit of 23rd September 2023. He stated further that despite service, all the defendants failed to enter appearance and the matter proceeded *exparte*, upon which judgment was entered in favour of the plaintiff.
 15. The deponent added that the 1st defendant's title and that of Lukenya Society was extinguished by the doctrine of adverse possession and that the two had no good title to pass to the defendants. He stated that on 21st October 1993, the plaintiff purchased Plot No. 406 Lukenya Ranching and Farming Cooperative Society at a consideration of Kshs. 800,000/- which it paid in full and took possession thereof through its members since 1995 although the 1st defendant fraudulently transferred the same to the 2nd to 6th defendants on 15th July 2008.
 16. He maintained that the decree had been executed and he had been issued with a title deed and argued that the applicants had not met the threshold for grant of the orders sought. He attached orders of 16th May 2013; extract of the advertisement; affidavit of service; judgment and decree and copy of title deed.
 17. The two applications were canvassed by way of written submissions. On record are submissions by the 3rd, 4th, 5th and 6th defendants dated 13th September 2023; amended submissions by the plaintiff dated 8th April 2023 and the 41st to 43rd defendants' submissions dated 5th April 2024; all of which this court has duly considered.

Analysis and determination

18. This court has carefully considered the applications dated 27th July 2023 and 22nd January 2024, the respective responses thereto and the parties' rival submissions. The only issue that arise for the courts' determination is whether the applicants have met the threshold for setting aside *exparte* judgment.
19. Order 10 Rule 11 of the Civil Procedure Rules grants this court the jurisdiction to set aside or vary a judgment entered into as a consequence of non appearance and in default of defence 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.
20. Therefore this court has unfettered discretion to set aside default judgment as the interests of judgment may demand. Exercise of the court's discretion in considering an application to set aside *exparte* judgment, must be exercised judiciously and not whimsically and in doing so, the court considers whether the defendant was served and if service occurred, whether the defendant has a triable defence. Where it is shown that service was not effected, then the *exparte* judgment ought to be set aside *ex debito justitiae*. However, where service is found to have been effected, the court ought to further



consider if the defendants' defence raises triable issues, and if so, then a regular judgment may be set aside in the interests of justice.

21. In the case of *Mwala v. Kenya Bureau of Standards EA LR [2001] 1EA 148*, the court stated as follows;

To all that I should add my own views that a distinction is to be drawn between a regular and irregular *ex parte* judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in dealing with the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked, the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record.

22. In the case of *Tree Shade Motor Limited v. DT Dobie Co. Ltd CA No. 38 of 1998*, the court held that even where the *ex parte* default judgment is a regular judgment having been lawfully entered, the court ought to proceed and consider the draft defence to see if it raises a reasonable defence with a triable issue.

23. In considering an application to set aside default judgment, the court should always keep in mind that denying a party to a suit opportunity to be heard should be the last resort as the right to be heard is non-derogable right protected under Article 50 of our Constitution, and hence denial for a party to be heard can only be allowed where the interests of justice would be served by such denial. In the case of *Sebei District Administration v. Gasyali & Others [1968] EA 300*, the court stated as follows;

The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.

24. In the instant case, the applicants in both applications deny having been served with summons to enter appearance and pleadings and insist that they purchased the suit property and are in occupation thereof having put up permanent homesteads thereon. On the other hand, the plaintiff insisted that he sought and was granted leave by court to serve the 43 defendants by substituted service, which it did via advertisement in the Daily Nation of 17th February 2018, and that the defendants failed to enter appearance and file defence.

25. The court has considered the evidence presented by the plaintiff in demonstrating service of the applicants by Daily Nation. First, the plaintiff did not provide a copy of the Newspaper of 17th February 2018. What it attached to the return of service is a receipt from the Nation Media Group for payment of the advertisement, and an extract of the contents of the alleged advertisement. That extract only states the name of Kimundu Ndunda Nthei the 1st defendant but does not state the names of the other 43 defendants. It is clear that the extract of the contents of the advertisements could not be assumed to have been in reference to the 3rd to 6th defendants and the 41st to 43rd defendants as their names are not stated. In addition, while a copy of what is alleged to be the contents of the advertisement is attached, the same is not contained in a newspaper and therefore there is no certainty as to whether those words were published in the Daily Nation as alleged or at all hence it is not clear whether the plaintiff served by advertisement or not. If the plaintiff was unable to exhibit the newspaper where its advertisement was done, it would be unfair to expect the applicants herein to have seen that newspaper. It appears to



the court that all that the plaintiff was interested in was to tick the box of substituted service without considering whether the alleged advertisement would make the defendants aware of this suit. For those reasons, I find and hold that service herein if at all was improper, and could not afford the applicants an opportunity to be heard, hence the judgment herein is irregular.

26. On whether the applicants' draft defences raise triable issues, the applicants have maintained that they not only purchased the suit property but are also in occupation thereof having constructed permanent houses on the suit property. They attached photographs to demonstrate this position. I have considered the plaintiffs' response on both applications and it is clear that the plaintiff has not denied the applicants' averment of occupation, and most importantly, the applicants' position that there is no evidence of the plaintiff's occupation of the suit property has not been challenged at all as the plaintiff did not attempt to demonstrate occupation of the suit property in its response and none was attached to its originating summons.
27. Therefore as the plaintiff has not rebutted the applicants' averments and evidence of occupation of the suit property, the plaintiff's claim of adverse possession being anchored on uninterrupted occupation of the suit property for a period of over 12 years, I am convinced that the applicants' draft defences are not mere denials of the plaintiff's claim, but raise triable issues and are reasonable defences which ought to go to trial, and the defendants/applicants given opportunity to be heard on merit.
28. The applicants sought for orders to cancel registration of the suit property in the plaintiff's name and cancellation of the subdivision thereof so that the titles thereof reverts to their earlier position. As the cancellation of subdivision of the suit property and registration thereof in the plaintiff's name was pursuant to the *ex parte* judgment entered herein on 8th March 2019, and the said judgment having been set aside herein, it is only fair and in the interests of justice that the above process is cancelled. However, for the interests of justice to both parties, it is necessary that the suit property is preserved so that none of the parties alienates the same before the determination of this matter.
29. In the premises, I find and hold that the applications dated 27th July 2023 and 22nd January 2024 are merited and the same are allowed in the following terms;
 - a. The judgment delivered by this Honourable Court on 8th March 2019 and all consequential orders thereto is hereby set aside and the 3rd, 4th, 5th, 6th, 41st, 42nd and 43rd defendants are hereby granted leave to defend this suit.
 - b. The 3rd, 4th, 5th, 6th, 41st, 42nd and 43rd defendants are granted 14 days to file and serve their statements of defence, witness statements and documents.
 - c. The cancellation of subdivision of the suit property into Mavoko Town Block 3/5682 – 5717 and subsequent registration of Mavoko Town Block 3/2174 in the plaintiff's name is hereby cancelled so that the suit property reverts to the former position of Mavoko Town Block 3/5682 – 5717.
 - d. An order of inhibition is hereby made inhibiting the registration of any dealing in regard to all the parcels of land known as Mavoko Town Block 3/5682 – 5717 until this suit is heard and determined.
 - e. The costs of the two applications herein shall be borne by the plaintiff.
30. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the presence of;

Mr. Musyimi for 3rd – 6th defendants/applicants

Mr. Mugo for plaintiff/respondent

Mr. Nyakiangana for 41st, 42nd and 43rd defendants/applicants

Court assistant – Josephine

