



**Okello ((Substituted with Agripina Wafula Ongaria)) v Esike ((Now Deceased)); Etyang (Intended Defendant) (Environment & Land Case 82 of 2013) [2024] KEELC 7360 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7360 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 82 OF 2013  
BN OLAO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**WILLIAM ONGARIA OKELLO ..... PLAINTIFF  
(SUBSTITUTED WITH AGRIPINA WAFULA ONGARIA)**

**AND**

**BENUA EMOKOLI ESIKE ..... DEFENDANT  
(NOW DECEASED)**

**AND**

**ISAIAH EMOKOLI ETYANG ..... INTENDED DEFENDANT**

**RULING**

1. William Ongaria Okello (the plaintiff herein) first approached this court acting in person and vide his plaint filed on 14<sup>th</sup> October 2013, he sought the main remedy that the name of Benga Emokoli Esike (the defendant who is now deceased) be cancelled from the register to the land parcel No Bukhayo/Kisoko/6027 (the suit land) for having been obtained fraudulently. That plaint was later amended and the plaintiff was substituted with his daughter Agripina Wafula Ongaria.
2. The defendant filed a defence on 16<sup>th</sup> May 2018 through the firm of Bogonko, Otanga & Company Advocates. That firm later ceased acting for the defendant while the firm of Ashioya & Company Advocates came on record for the plaintiff.
3. The hearing commenced before Omollo J on 20<sup>th</sup> June 2022 and although personally served, the defendant did not turn up for the trial. The hearing therefore proceeded ex-parte and the plaintiff closed his case and his counsel MR ASHIOYA asked the court to close the defendant's case. That was allowed by Omollo J who directed that submissions be filed on or before 3<sup>rd</sup> October 2022. She



was however transferred before delivering the judgement. That duty fell on me. The judgement was subsequently delivered by myself on 7<sup>th</sup> February 2023.

4. I now have for my determination, a Notice of Motion dated 10<sup>th</sup> June 2024 by Isaiah Emokoli Etyang (the applicant) and premised under the provisions of Articles 50 and 159 of *the Constitution*, Sections 1A, 1B, 2, 3 and 3A of the Civil Procedure Rules. It is based on the grounds set out therein and is supported by the applicant's affidavit of even date. The applicant seeks the following orders:

1. Spent
2. The applicant be substituted in place of the deceased defendant
3. This court be pleased to set aside the judgement delivered on 7<sup>th</sup> February 2023 and all consequential orders and allow the applicant to be heard on merit.
4. That the applicant be allowed an opportunity to be heard interpartes.
5. That the process server who purportedly served the hearing notices upon the defendant who was bed ridden be summoned to court for cross-examination on his affidavit of service.
6. That the costs of this application be provided for.

The application is based on the grounds set out therein and supported by the applicant's affidavit.

5. The gravamen of the application is that the defendant was previously represented by the firm of Bogonko, Otanga & Company Advocates who later withdrew from acting for him. The defendant was never served with the hearing notices nor notice of entry of the judgement. That the defendant has been undergoing treatment due to his mental incapacitation upto 8<sup>th</sup> March 2024 when he died. Therefore, the plaintiff did not act in good faith and the process server one Elijah Okutima should be cross-examined. Unless the judgement herein is set aside, the applicant will not be afforded fair treatment. The defendant only learnt about the judgement of this court when the plaintiff commenced the execution process. Article 50 of *the Constitution* grants the applicant the right to be heard and the plaintiff will not be prejudiced.

6. The following documents are annexed to the application:

1. Certificate of death for the defendant.
2. Limited Grant of Letters of Administration Ad Litem issued to the applicant in respect to the Estate of the defendant.
3. Medical notes and receipt for the defendant.
4. Copy of the judgement delivered on 7<sup>th</sup> February 2023.

7. The application was placed before Cheronon J on 27<sup>th</sup> June 2024 who issued directions that it be served upon the plaintiff and canvassed by way of written submissions. It would then be mentioned before me on 29<sup>th</sup> July 2024 to confirm compliance and take a date for ruling. I did not sit on that day but by the time it came up on 30<sup>th</sup> September 2024, Ms Nabulindo holding brief for Mr Ashioya for the plaintiff informed the court that he had not been served with the applicant's submissions. The court directed that the plaintiff's counsel be served with the applicants' submissions. On 7<sup>th</sup> October 2024, the court was informed by Mr Ouma counsel for the applicant that he had not been served with any response by the plaintiff or submissions. Mr Ouma had however filed his submissions and an affidavit confirming service of the same upon Mr Ashioya on 25<sup>th</sup> July 2024.

8. I have considered the application which is not opposed.



9. With regard to prayer NO 2 which is to allow the Applicant to be substituted in place of the deceased Defendant, there is a copy of the deceased's death certificate showing that he died on 8<sup>th</sup> March 2024 which is just some three (3) months before this application was filed. There is also a copy of a Limited Grant of Letters of Administration Ad Litem issued to the Applicant on 19<sup>th</sup> April 2024 allowing him to substitute the deceased defendant. That prayer is allowed.
10. With regard to the setting aside of the judgement delivered herein on 7<sup>th</sup> February 2023 the court has wide powers to set aside ex-parte proceedings and judgments or orders. That power must however be exercised judicially. In the case of Patel -v- E.a. Cargo Handling Services Ltd 1974 E.A 75 the court said the following with regard to such powers:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgement upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

The main complaint is that the defendant was not served with the hearing notice. He requests therefore that the process server one Elijah Okutima be cross-examined.

11. On the issue of service, I notice from the record that the same process server has previously served the defendant including serving him with the Taxation Notice. And apart from Elijah Okutima, the defendant has also been served with processes by another process server namely one Stephen Otaget Ofula and one Job Juma Isaac both process servers confirm having served the defendant at Segero “A” Village Nambale Township. So you have three process servers who all depose to have served the defendant. In the Notice of Motion, the applicant has not identified which of these three (3) process servers he wants summoned. On my part, I am satisfied that the defendant was properly served with all the processes of this court. The ex-parte judgement herein was therefore a regular one.
12. That notwithstanding, even where a default judgement is regular, the court can still set it aside. That issue was considered by the court of Appeal in the case of James Kanyita Nderitu -v- Maries Philotas Ghikas & Another 2016 eKLR where it said:

“In a regular default judgement, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default judgement. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement 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 default judgement, and will take into account such factors 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 lapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others.”

In this case, the defendant filed a defense to the claim. What he did not do was to attend the trial. There are several medical documents filed to show that indeed the defendant has been unwell at least since



2017. That has not been rebutted because the plaintiff did not file any response to the application. The applicant has also deposed in paragraph 16 of his supporting affidavit thus:

16:

“That the defendant only learnt of the judgement of this court when the Plaintiff initiated the process of execution since there has not been any service of the court papers on him.”

When I delivered this judgement on 7<sup>th</sup> February 2023, I proceeded to direct as follows:

“And since the defendant has not been attending court even when served, the Deputy Registrar to arrange for a copy to be served upon him by the process server and an affidavit of service filed accordingly. Right of appeal.”

That direction was made deliberately to enable the defendant be informed of this judgement since it was ex-parte. However, there is no evidence to prove that the Deputy Registrar complied with that direction and served the defendant. And if she did, there is no evidence of such service. Therefore, the complaint that the defendant only knew about this judgement when the execution process commenced must be accepted by this court in the absence of any other evidence to the contrary. The Bill of Costs herein was taxed by the Deputy Registrar on 13<sup>th</sup> May 2024. This application was filed on 20<sup>th</sup> June 2024. Taking into account the fact that the defendant has been unwell, I do not consider that delay to be unreasonable. It is also on record that there is a defence filed herein. It is fair that the applicant be given an opportunity to canvass it. And since the application was not opposed, there is nothing to suggest that the plaintiff will suffer any prejudice if the judgement delivered on 7<sup>th</sup> February 2023 is set aside. Article 50 (1) of *the Constitution* grants every person the right to a fair hearing. I am also guided by the words of Sheridan J in the case of Sebei District Administration -v- Gasyali & Others 1968 E.A 302 that:

“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 considered, the question as to 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 a Court.” Emphasis mine.

Finally, in the case of Wachira Karani -v- Bildad Wachira 2016 eKLR, it was held that:

“The fundamental duty of this Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their case upon merits of the matter.”

13. Taking all the above into account and considering that this application was not opposed, I allow it but make the following conditions:

1. The applicant is allowed to be substituted in place of the deceased defendant.
2. The applicant shall within 30 days of this ruling file and serve his statement and any further documents if need be.
3. The judgement delivered on 7<sup>th</sup> February 2023 is hereby set aside on the following conditions:



- a. The applicant shall within 30 days from the date of this ruling deposit the original title deed to the land parcel No Bukhayo/Kisoko/6027 with the Deputy Registrar of this court and which shall not be released until further orders of this court.
- b. The applicant shall also within 30 days of this ruling pay to the plaintiff the sum of Ksh.20,000 being thrown away costs.
- c. In default of (a) and (b) above, the judgment delivered on 7<sup>th</sup> February 2023 shall revert and the plaintiff shall be at liberty to execute the same without further recourse to this court.

**BOAZ N. OLAO**

**JUDGE**

**7<sup>TH</sup> NOVEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

**7<sup>TH</sup> NOVEMBER 2024**

