



REPUBLIC OF KENYA



**Odek v Nyang'oro (Environment and Land Case Civil Suit
E019 of 2023) [2025] KEELC 193 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E019 OF 2023**

E ASATI, J

JANUARY 30, 2025

BETWEEN

VITALIS KENGE ODEK APPELLANT

AND

ODERA NYANG'ORO RESPONDENT

*(Being an appeal from the ruling and orders of Hon. J.M. Wekesa (SPM)
delivered on 6th September 2023 in Nyando SPMC MELC NO.32 OF 2019)*

JUDGMENT

1. Vide the amended Memorandum of Appeal dated January 23, 2024, the Appellant appealed against the ruling and orders dated 6th September, 2023 in Nyando SPMC ELC Case No.32 of 2019. The record of appeal shows that the Appellant was the Plaintiff in the suit and the Respondent the 1st Defendant.
2. The record shows further that the Appellant had sued the Respondent and the District Land Registrar, Nyando claiming that land parcel known as KISUMU/KAMAGAGA.4925 was his ancestral home given to him by the clan elders. That the Respondent had conspired with the District Land Registrar to register the suit land in the Respondent's name. He therefore sought for an order of permanent injunction, an order for recover of the suit land and costs.
3. The record shows that the suit was heard ex-parte by the trial court and judgement delivered on 9th March, 2020 whereby the court found that the Appellant had proved his case on a balance of probability and entered judgement in favour of the Appellant in terms of prayers (a), (b) and (c) of the plaint.
4. The record further shows that the Respondent subsequently filed Notice of Motion application dated 26th May, 2023 seeking for orders that;



- a. There be stay of execution of the judgement and decree of the court pending the hearing and determination of the application.
 - b. The judgement entered and all subsequent proceedings and consequential orders be set aside.
 - c. Leave be granted to the Applicant to file his statement of Defence out of time.
 - d. Costs of the application be provided for.
5. The application was opposed vide the Replying Affidavit sworn by the Plaintiff (Appellant herein) on 12th June, 2023.
 6. The record shows further that the application was heard by the trial court which vide the ruling delivered on 6th September, 2023 allowed the application thereby giving the Respondent a chance to be heard on his defence.

The Appeal

7. Aggrieved by the ruling dated 6th September, 2023, the Appellant preferred the present appeal on the grounds that the learned Magistrate;
 1. erred in law and fact by failing to hold that the Defendant was duly served with Summons to Enter Appearance and failed to enter appearance and/or file defence.
 2. erred in law and in fact by inferring that the Defendant only became aware of the existence of the suit when he was arrested while there are several unchallenged Affidavits of Service indicating that the Respondent was duly served.
 3. erred in law and in fact by wrongly and unjustly exercising discretion to assist a party who deliberately sought either by evasion or otherwise to obstruct or delay the course of justice.
 4. misdirected herself in law and in fact by holding that absence of evidence of service of Notice of Entry of judgement was a ground for setting aside judgement in default of appearance.
 5. erred in law and fact by holding that no prejudice would be occasioned to the Plaintiff if the court sets aside the judgement.
 6. erred in law and in fact by failing to consider the conduct of the defendant and therefore setting aside ex parte judgement on unjust terms.
8. The Appellant seeks for orders that the ruling and orders delivered on 6th September, 2023 in Nyando SPM ELC NO.32 OF 2019 be set aside and be substituted with;
 - i. an order dismissing the application dated 26th May, 2023.
 - ii. in the alternative application dated 26th May, 2023 be allowed upon payment of commensurate throw away costs.
 - iii. That the honourable court do order as it may deem fit and just.
9. The appeal was argued by way of written submissions. Vide the written submission filed on behalf of the Appellant, Counsel for the Appellant framed the issues for determination to be;
 - a. Whether the 1st Defendant was served and made aware of the ongoing suit against him.
 - b. Whether failure to serve Notice of Entry of judgement is a ground for setting aside judgement



- c. Whether the trial court exercise its discretion judiciously.
10. Counsel submitted that in considering an application to set aside judgement in default, the main consideration for the court to determine is whether the Defendant was served or not. That in the present case, the trial court conveniently avoided this important issue and that instead made a legally unsound inference that failure to attach an Affidavit from the area Chief was fatal.
 11. Counsel relied on the provisions of Order 5 Rule 15(1) of the Civil Procedure Rules and submitted that the Process Server duly complied with the requirement of service.
 12. Counsel submitted further that under Order 5 Rule 16 of the Civil Procedure Rules, if indeed there was doubt of the authenticity of the Affidavit of Service, there was need to cross-examine the process server. That the Respondent failed to cross-examine the process server.
 13. Counsel submitted that the trial court erred in law and fact by failing to hold that the Respondent/ Defendant was duly served with Summons to Enter Appearance.
 14. That the court ignored a crucial glaring undisputed fact that Nyando, Nyakach and Muhoroni Land Registry at Awasi was burnt down on 19th February, 2023 with all documents and had not started operations as at 26th March, 2023, that hence paragraphs 8 and 9 of the Respondent's Affidavit are untrue and a clear indication that the documents were served upon him by the Land Registrar but he ignored and/or failed to act.
 15. Counsel submitted further that the trial Magistrate misdirected herself in law and in fact by holding that absence of evidence of service of Notice of Entry of judgement was a ground for setting aside judgement in default of appearance.
 16. That the requirement of service of Notice of Entry of judgment is limited to an application for execution and not to setting aside of default judgement. That the trial court should have just stayed execution but instead went ahead and set aside the judgement. Counsel relied on the provisions of Order 22 Rule 6 and the case of Elizabeth Kavere & Another -vs- Lilian Atho & Another [2020]eKLR to support the submissions.
 17. Counsel submitted further that the trial Magistrate did not exercise her discretion judiciously given that the court did not take into account the conduct of the Defendant, failure of the Defendant to prove his assertion of lack of service and the steps, resources and time taken by the Appellant in prosecuting the suit. Counsel relied on the case of Shah -vs- Mbogo (1967)EA 166 where it was held inter alia that;

the discretion to set aside ex parte judgement is intended to be exercise to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
 18. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the 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 prejudice if denied an opportunity to be heard on merit”.
 19. Counsel submitted that the ruling and orders of the trial court did not meet the ends of justice but aided the Respondent as a party who deliberately chose to obstruct and delay justice.



20. On behalf of the Respondent it was submitted through the written submissions dated 6th May, 2024 that the Appellant's main grievance is that the trial court erred in law and in facts in failing to exercise its discretion judiciously. That grounds 1, 2 and 4 of appeal are not merited as the trial court relied on decided cases, the principles of natural justice and article 50(1) of *the Constitution* and also observed that the draft Statement of Defence raised triable issues, a fact not contested by the Appellant.
21. Counsel submitted further that as regards ground 3, 5 and 6, the Appellant did not demonstrate how the Respondent had deliberately sought to evade, obstruct or delay the cause of justice.
22. That the Appellant did not demonstrate prejudice, if any, to be suffered by him should the ex parte judgement be set aside.
23. That the Appellant requested in the amended Memorandum of Appeal for payment of a commensurate thrown away costs as an alternative in case the trial court and this court rule in favour of the Respondent.
24. That the Appellant was ready to have the judgement set aside on condition that he is compensated by an award of thrown away costs. That the trial court had taken this into account and granted costs in the cause.

Issues for Determination

25. The issue framed by Counsel for the Respondent is one of the 3 issues framed by Counsel for the Appellant. I therefore hereby adopt the issues as framed by the Appellant as the issues for determination herein.

Analysis and Determination

26. This being a first appeal, this court is duty bound to re-examine the material placed before the trial court to be able to determine the issues framed.
27. The application before the trial court for determination was the Notice of Motion dated 26th May, 2023. The main ground upon which the Respondent sought the setting aside of the ex parte judgement was that he was not aware of the existence of the suit until on or about 22nd April, 2023 when he was arrested. That he had not been served with Summons to Enter Appearance and hence he was prevented by just cause to file his Statement of Defence. He deposed in his Affidavit in support of the Notice of Motion on how he got to learn of the existence of the suit. He denied service of Summons to Enter Appearance and averred that the contents of the Affidavit of Service were untrue.
28. The Appellant's response was contained in the Plaintiff's/Respondent's Replying Affidavit sworn by the Appellant on 12th June, 2023. The Appellant narrated how service of Summons to Enter Appearance and other court processes was effected upon the Respondent. He stated that on 11th July, 2019, the Respondent was served in the presence of the area Chief. There is no Affidavit of Service filed in respect of the service effected on 11th July, 2019.
29. The Appellant further stated that on 13th August, 2019, the Respondent herein was served with a court order. There was Affidavit of Service sworn on 13th August, 2018 by David Elvis Ochieng who described how he served the Respondent with the court order.
30. That on 3rd October, 2019 and 3rd June, 2020 the Respondent was served by the same process server with Notice of Motion application and Supporting Affidavit and that on 2nd July, 2020, Respondent was served with a hearing notice dated 30th June, 2020.



31. The Appellant averred that from the foregoing, it was clear that the Respondent was duly made aware of the suit but however intentionally ignored, refused, neglected and/or disregarded the same.
32. Considering the evidence regarding service, the trial court in the ruling appealed against, observed;
- it is not in dispute that the various Affidavits of Service on record were served upon the 1st **Defendant herein, save that the contents of paragraph three where the process server explained how he did serve as disputed over claims by the 1st Defendant that he did not file along the Chief’s Affidavit to confirm his presence during the said service”**
33. The Appellant faults the trial court for this and avers that the trial court erred in law and fact in failing to hold that in view of the contents of the Affidavit of service filed, the Respondent was properly served with Summons to Enter Appearance. The Appellant also faults the court for requiring an Affidavit by the area Chief, who was said to have been present during service, confirming the service.
34. I have keenly examined the Affidavit of Service alongside the law on service of Summons to Enter Appearance and other court processes.
35. Order 5 Civil Procedure Rules provides for issuance and service of Summons. Rule 1 (c) provides.
- when a suit has been filed, a summons shall issue to the Defendant ordering him to appear within the time specified therein”
36. An Affidavit of Service sworn by David Elvis Ochieng on 11th July, 2018 but filed in court on 19th July, 2019 shows that the 1st Defendant was served with Summons to Enter Appearance with Plaintiff Verifying Affidavit, Witness Statement, Plaintiff’s list of witnesses, List of Documents, Notice of Motion under Certificate of Urgency with Supporting Affidavit.
37. All the other Affidavits of service annexed to the Replying Affidavit showed that the Respondent had been served.
38. It was upon the Respondent to prove non-service and my analysis of the evidence placed before the trial Magistrate reveals that the Respondent was served. The contents of Affidavit of Service were not contested.
39. There was no explanation why the Respondent did not call the process server for cross-examination so as to test the contents of the Affidavit of Service.
40. I find that the trial court erred in not finding and holding that the Respondent had been properly served and thereby notified of the existence of the suit.
41. The next issue for determination is whether or not failure to serve Notice of Entry of Judgement is a ground for setting aside judgement.
42. The requirement for service of Notice of Entry of judgement is contained in the proviso to Order 22 Rule 6 which provides that;
- Provided that, where judgement in default of appearance or defence has been entered against a defendant, no execution, attachment or eviction shall issue unless not less than ten days’ notice of the entry of judgement has been given to him either at his address of service or served on him personally and a copy of that notice shall be filed with the 1st application.
43. The trial court in its ruling observed that from the record there was no evidence that the 1st Defendant (Respondent herein) was served with a Notice of Entry of Judgement as required by law.



44. The Appellant faults the trial court for this and avers that the court misdirected itself in law and fact by holding that absence of evidence of service of Notice of Entry of Judgment was a ground for setting aside judgement in default of appearance.
45. Counsel for the Appellant submitted that failure to serve Notice of Entry of Judgment can only be a ground for stay of execution but not for setting aside of the judgment.
46. I have read the ruling. I find no holding of the trial court that lack of service of Notice of Entry of Judgment was a ground for setting aside of the judgement. The court merely noted that Notice of Entry of Judgment was not served which fact was not denied by the Appellant. The court gave its reason for allowing the application namely; principles of natural justice, the provisions of article 50 of *the Constitution* of Kenya, the draft defence demonstrated triable issues and that no prejudice would be occasioned to the Appellant.
47. I find that, as submitted by Counsel for the Appellant, failure to issue Notice of Entry of Judgment is a ground for stay of execution and not a ground for setting aside judgement. The provision is intended to give a judgement-debtor Notice should he/she wish to settle the judgement before execution. Notice of Entry of Judgment may as well be notice of existence of the suit and the judgement in case where the Defendant had not been served with the Summons to Enter Appearance.
48. I further find that the court did not misdirect itself on this issue as it did not hold that lack of service of Notice of Entry of judgement was a ground for setting aside of the ex parte judgement.
49. The third issue for determination is whether or not the trial court exercised its discretion judiciously.
50. To exercise discretion judiciously means to act on sound reason rather than whim, caprice or sympathy (see Civil Appeal No.NA I 294 OF 2003).
51. The exercise of discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. It must be exercised on the basis of evidence and sound legal principles.
(see Ghorib Mohammed Ghorib -vs- Zuleikha Mohammed Naaman – Civil Application No.Nai.4 1999 and Yooshin Engineering Corporation -vs- Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KELC 872 (KLR) (7 July 2013) Judgement.
52. The trial court based its decision on the reasons shown in the ruling. It found that the draft defence raised triable issues and in line with the provisions of article 50 of *the Constitution* gave 1st Defendant a chance to present his defence by setting aside the ex parte judgement.
53. The trial court however failed to compensate the Appellant by way of thrown away costs.
54. There was evidence before the trial court that service had been effected. There was also evidence that the Appellant had expended time and resources in prosecuting the suit to the end, albeit in the absence of the Respondent. Since the court exercised its discretion to set aside the judgement, it ought to have awarded the Appellant thrown away costs. I have noted that the appellant prayed in this appeal that in the alternative to dismissing the application dated 26th may 2023, the same application may be allowed upon payment of commensurate throw away costs.
55. I find that the appeal has merit and hereby allow it as follow: -
 - i. The ruling of the trial court is varied by setting aside the order that costs be in the cause and replacing it with an order awarding thrown away costs of Kshs 30,000 to the Appellant.



ii. Costs of the appeal are awarded to the Appellant.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 30TH DAY OF JANUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Tawo for Appellant.

No appearance for the Respondent.

