



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjugu v Ngugi (Environment & Land Case 153 of 2018)  
[2023] KEELC 15 (KLR) (11 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 15 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 153 OF 2018**

**JG KEMEI, J**

**JANUARY 11, 2023**

**BETWEEN**

**ANGELA TAIYANA WANJUGU ..... PLAINTIFF**

**AND**

**FRANCIS KIMANI NGUGI ..... DEFENDANT**

**RULING**

1. The defendant/applicant filed the instant application dated May 5, 2022 seeking orders that;
  - a. Spent.
  - b. The firm of Kibanya and Kamau Associates Advocates be granted leave to come on record on behalf of the defendant herein.
  - c. Spent.
  - d. The honorable court be pleased to set aside the *ex parte* judgment entered and delivered herein on December 17, 2020 against the defendant in its entirety and any consequential orders thereof.
  - e. The defendant be granted leave to file a statement of defence to the cause herein
  - f. The costs of the application be in the cause.
2. The application is based on the grounds thereat and supporting affidavit of even date of Francis Kimani Ngugi, the applicant. He deponed that he is a resident of Delaware, United States of America since 2003 and occasionally visits Kenya to check on his family and investments. That on April 5, 2022 he received a call from one of his tenants informing him that the tenants had been asked to vacate from the houses built on land parcel known as UNS plot numbers 267 and 268 Thika municipality (hereinafter the suit properties). That he was shocked to receive from the tenant FK1, copy of the court order issued



in Thika ELC 153 of 2017 (sic) to that effect. That he contacted his advocates over the issue and upon visiting the ELC registry, the advocates learnt that no such orders was issued in ELC 53 of 2017 but the orders were issued in Thika ELC 153 of 2018. The deponent averred that he was never served with any summons to enter appearance or plead and therefore was not aware of the instant suit. He dismissed the plaintiff's claim on the issue of service of pleadings and denied employing a caretaker named Peter as averred in the plaintiff's affidavit sworn on July 8, 2019.

3. The defendant maintained that he is the legitimate owner of the suit properties as per annexed allotment letters marked FK4 and constructed houses thereon as shown by FK3. That he was duly authorized by the Thika municipality to develop the suit properties as per the fees assessment annexed as FK5 and paid land rates as shown by FK6. That the lease and certificate of lease held by the plaintiff are fraudulent as they could not be issued when the defendant legitimately owned the suit properties. He avowed that he had a good defence as per FK7 copy of the draft defence and counter claim and urged the court to allow his application.
4. The application is opposed. The plaintiff swore her replying affidavit on May 17, 2022 and termed the application fatally defective, frivolous and an abuse of court process. She was adamant that the defendant was duly served with summons to enter appearance as shown by return of service marked A1 but he failed to enter appearance within the prescribed time. That the plaintiff's suit proceeded for formal proof hearing and judgment duly entered in her favor on December 17, 2020. That the instant application has been inordinately filed after two years without any plausible explanation and the defendant has not met the threshold for setting aside the impugned judgment. She urged the court to dismiss the application with costs.
5. The application was prosecuted by way of written submissions.
6. Supporting the motion, the defendant/applicant through the firm of Kibanya Kamau & Co Advocates filed submissions dated June 3, 2022 and supplementary submissions dated June 21, 2022. The defendant submitted that this court has unfettered discretion to set aside *ex parte* judgment under order 10 rule 11 of the Civil Procedure Rules and as further held by the Court of Appeal in the case of James Kanyiita Nderitu & Anor v Marios Philotas Ghikas & Anor [2016] eKLR. That it is trite that the burden to prove service of summons to enter appearance shifts to the plaintiff once the defendant denies such service. That upon establishing that the defendant was out of the country, the plaintiff ought to have pursued the provisions of order 5 rules 21 and 22 of the Civil Procedure Rules on foreign service or apply for substituted service as envisaged under order 5 rule 17 Civil Procedure Rules. That neither of those avenues was preferred and as such the *ex parte* judgment should be set aside as a matter of right.
7. The defendant also submitted that his draft defence and counterclaim raise triable issues and it is therefore fair that he be allowed to defend the suit on its merits.
8. The firm of Waithira Mwangi Advocates filed submissions dated June 16, 2022 on behalf of the plaintiff. She submitted that the plaintiff was duly served through his agent on July 8, 2018 in accordance with order 5 rule 10 Civil Procedure Rules but failed to enter appearance. That subsequently interlocutory judgment was entered against him and the matter proceeded *ex parte*. That besides general denial of service, the defendant is not keen on cross-examining the process server on the contents of the said return of service.
9. The plaintiff added that the court's power to set aside a judgment should be exercised judicially and upon reason. That the defendant has not established a basis for this court to set aside its judgment. Moreover, that the draft defence presented by the defendant does not raise any triable issue. That the



plaintiff stands to suffer great prejudice if the application is allowed since she has gone to great lengths to enjoy the fruits of her judgment

10. In a brief rejoinder, the defendant reiterated that his draft defense was drawn by his advocates upon perusal of the court file. That the alleged Peter was not his employee or agent authorized to receive pleadings on his behalf as argued by the plaintiff and in any event, the said Peter never received the assailed pleadings. The defendant also denied that the *ex parte* judgement is regular or meritorious because he was not notified of the same. That the plaintiff will not suffer any prejudice that cannot be cured by way of throw away costs as held in the case of [Landmark Freight Services v Zakhem International Ltd](#) [20121] eKLR.
11. The main issue for determination is whether the application is merited.
12. The defendant is categorical that he was never served with any pleading herein as he resides abroad. The plaintiff conceded the fact of the defendant's residence is abroad but argues that his caretaker named Peter was served with summons herein on July 8, 2018. That upon calling the said on his mobile phone no 07xxxxxx5, the process server one Amos Chege left the summons at the suit premises and thus the defendant was served according to order 5 rules 10 and 14 [Civil Procedure Rules](#).
13. Order 5 rules 10 & 14 [Civil Procedure Rules](#) state;

“ 10. Service on agent by whom defendant carries on business [order 5, rule 10.]

(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons is issued, service on any manager or agent, who at the time of service personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule, the master of a ship shall be deemed to be an agent of the owner or charterer.”

14. Procedure when defendant refuses to accept service or cannot be found [order 5, rule 14.]

Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.”

14. A reading of order 5 rule 10 [Civil Procedure Rules](#) means that service ought to be on such agent or manager as the case maybe. This provision is read alongside order 5 rule 8 [Civil Procedure Rules](#) which is to the effect that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service. The return of service dated July 8, 2019 sworn one year after the alleged service on a person named “Peter” as the defendant's agent in my view does not satisfy the service stated therein.
15. Further in my view, order 5 rule 14 [Civil Procedure Rules](#) is not applicable to the facts of this case as it is commonly agreed that the defendant was out of the country at the time of filing this suit. There is no evidence that all reasonable diligence was taken to serve his agents in vain for that provision to apply.



In any event, there is no evidence that the summons was affixed at a conspicuous place as required by that rule.

16. As rightly submitted by the defendant, nothing stopped the plaintiff from invoking the provisions of order 5 rules 21 and 22 *Civil Procedure Rules* noting that the subject matter herein is land and the defendant resided outside Kenya. Order 5 rule 21 *Civil Procedure Rules* *inter alia* provides;

“21. Service out of Kenya [order 5, rule 21]

service out of kenya of a summons or notice of a summons may be allowed by the courtwhenever—

- a. the whole subject-matter of the suit is immovable property situate in Kenya (with or without rents and profits);
- b. ....
- c. any relief is sought against any person domiciled or ordinarily resident in Kenya.”

17. The decision whether or not to set aside such an *ex parte* is a matter of the discretion of the court. However, if such a judgment was entered despite irregular service of pleadings as in the instant case, then the judgment is set aside as matter of right as aptly discussed by the Court of Appeal in the case of *James Kanyitta Nderitu & Another v Marios Philota Gbikas & Another* [2014] eKLR which states as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, 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 judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment 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 judgment, 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 elapsed 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 other....In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

18. Consequently, it is my finding that the defendant has established a case for the court to exercise its discretion in his favor and allow the application as prayed.



19. Costs shall be in the cause.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mwangi HB Waithira Mwangi for Plaintiff/Respondent

Thuku for Defendant/Applicant

Court Assistant – Phyllis / Kevin

