



**Konde v Konde (Environment & Land Case 120 of 2018)
[2023] KEELC 15743 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 120 OF 2018
MAO ODENY, J
FEBRUARY 24, 2023**

BETWEEN

SAMMY KASIWA KONDE APPLICANT

AND

SILAS KASIWA KONDE RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated February 29, 2022 by the Defendant seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. Upon inter-parties hearing, the judgment herein delivered on March 13, 2020 and all consequential proceedings and/or orders emanating thereof, be set aside unconditionally for being nullity for deliberate non/want of service of summons and the suit papers and the same be struck out with costs to the Defendant.
 - d. In the alternatively to 3 above, leave be granted to the Defendant to defend the suit by filing his Defence and all other necessary documents within 14 days of the date of granting leave.
 - e. The draft defence and all other documents annexed to the affidavit herein be deemed duly filed upon filing and payment of the requisite fees.
 - f. Any other or further orders as the Honourable court may find fir to grant.
 - g. Costs be provided.
2. The application was premised on the grounds on the face of it and supported by the affidavit sworn on February 28, 2022 by the Defendant who deponed that the Plaintiff instituted this suit against him but



failed to serve him with summons to enter appearance or any other document. That he only learnt of its existence when he was called by the OCS Gongoni at the execution stage. The Defendant annexed a draft defence and counterclaim and a copy of affidavit of service sworn on June 12, 2018.

3. The Plaintiff opposed the application vide a Replying Affidavit on June 14, 2022, where he deponed that the Defendant was duly served with the summons and even instructed the firm of Tonia Mwanja Advocates who entered appearance on his behalf but neither filed a defence nor participated in the suit.
4. Upon judgment being entered, the Plaintiff served the decree as exhibited in an affidavit of service filed on March 6, 2021 and subsequently warrants of eviction were signed and served upon the Defendant in 2021.
5. The Plaintiff further deponed that should the orders sought be granted, then the Defendant be ordered to deposit security of costs of Kshs 1,500,000/-.

Defendant/Applicant's submissions

6. In his submissions filed on November 21, 2022, the Defendant argued that he had made a case to warrant the reopening of this suit. That in the absence of service of summons, this court has a duty to set aside the impugned judgment unconditionally. And relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR; and *Mbaki & Others v Macharia & Another* [2005] 2EA 206.

Plaintiff/Respondent's submissions

7. Counsel submitted that the Defendant was properly served and that the Defendant has failed to demonstrate that the Defence raises triable issues or that he has any enforceable interests.
8. It was counsel's further submission that the application was not filed timeously hence should be dismissed with costs to the Plaintiff.

Analysis and determination

9. The issue only issue for determination is whether the Defendant was properly served with summons to enter appearance.
10. This suit was filed by the Plaintiff on May 30, 2018, and summons to enter appearance taken out on the same date. An affidavit of service sworn on June 12, 2018 by Speciancy Achieng Agwingi, a process server indicates that she served copies of summons to enter appearance, Plaintiff, Verifying Affidavit, Plaintiff's list of witnesses and documents to the firm of Tonia Mwanja & Associates on July 5, 2018 who filed a Memorandum of Appearance on June 6, 2018
11. The affidavit reveals that the same was sworn even before the documents were allegedly served on the advocates and a memorandum of appearance filed before service. Even assuming that the process server wrongly captured the date of service, what I find puzzling is how the Plaintiff came to the conclusion that the said firm of Tonia Mwanja had been instructed by the Defendant, yet paragraph 2 of his Plaintiff clearly states the Defendant's address of service as Bora Bora Village, Gongoni, not through the said firm.
12. The plaintiff did not indicate that the Defendant's address of service was Tonia Mwanja & Associates. The best could have been to serve the Defendant first with summons to enable him elect to be represented by an Advocate of his choice or act in person as he has done in this application. This was not done.



13. It is trite that the decision whether or not to set aside ex parte judgment is discretionary and such discretion is meant to be exercised judiciously to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice as was held in the case of *Shah vs Mbogo & Another* [1967] EA 116.
14. Order 10 of Rule 11 of the [Civil Procedure Rules](#) provides that: -

“where judgement has been entered under this order, the court may set aside or vary such judgement or any consequential decree or order upon such terms as are just.”
15. The court is further cognizant of the fact that an application to set aside an ex-parte Judgment cannot succeed if no good or substantial reasons are given to justify the setting it aside as was held in the case of *Departed Asians Property Custodian Board v Issa Bakuya* the Supreme Court of Uganda in Civil Appeal No. 18 of 1991.
16. From the analysis above on the service of summons to Tonia Mwanja & Associates and not the Defendant without any authority showing that the Defendant had instructed the said firm to accept service on his behalf, I find that there was no proper service.
17. The *ex parte* judgment dated March 13, 2020 is hereby set aside together with all the consequential orders.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

