



**Michael v Mwangi (Environment & Land Case 3 of 2018)
[2023] KEELC 15739 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 3 OF 2018
LN GACHERU, J
FEBRUARY 23, 2023**

BETWEEN

KIARIE MUGO MICHAEL PLAINTIFF

AND

MOSES GITAU MWANGI RESPONDENT

RULING

1. Vide a notice of motion of application dated September 8, 2022, the defendant/applicant sought for the following orders: -
 - a) That the execution of the judgment delivered on the October 11, 2018, and all subsequent eviction orders pursuant thereto be stayed, pending the inter-parties hearing of this application and/or until further orders of this honourable court.
 - b) That the default judgement delivered on the October 11, 2018, and all subsequent eviction orders pursuant thereto be set aside, and unconditional leave be granted the defendant/applicant to defend the suit.
 - c) That the costs of this application be provided for.
2. The application was supported by the affidavit of Moses Gitau Mwangi dated September 8, 2022, together with the grounds on the face of the application. It is the defendant/applicant's contention that he was not served with summons to enter appearance or copies of the plaint, which denied him an opportunity to be heard. The defendant/applicant avers that he is the lawful proprietor of land parcel no Makuyu/Kariaini/Block 1/380 (the suit property) and has been in occupation of the same since 1994.
3. The defendant/applicant deponed that he was not aware of the existence of the proceedings until September 2, 2022, when he was served with an eviction orders issued in Murang'a Chief Magistrate



- Court ELC No 75 of 2022. That the default judgement was obtained on the basis of fraudulent evidence from the plaintiff/respondent claiming to have purchased the suit property on August 14, 1995, yet the title was issued in 1989. The defendant/applicant avers that the plaintiff/respondent was never a shareholder of Kariaini Co-operative Society, a land buying company and used corrupt means to obtain a title that was similar to that of the defendant/applicant. lastly, the defendant/applicant avers that unless the orders sought are granted, he stands to suffer irreparable loss and damage as he has lived continuously on the said parcel of land and has built and cultivated on the land for over 30 years.
4. In response to and in opposition to the application, the plaintiff/respondent filed a replying affidavit dated December 5, 2022. It is his disposition that the defendant/applicant was served with summons to enter appearance and a return of service was filed on February 2, 2018, and that the defendant/applicant ignored the said summons and subsequently failed to enter appearance in the matter. The plaintiff/respondent further averred that on July 12, 2018, the matter proceeded before Lady Justice Kemei, and a judgement was delivered on October 11, 2018, before extracting the decree.
 5. The plaintiff/respondent refuted the claim that the defendant/applicant had ever been the registered proprietor of the suit property. He further stated that he had initiated a suit at the Makuyu Division Land Disputes Tribunal No 41 of 2010, against the defendant/applicant. He urged the court to dismiss the instant application with costs.
 6. The application was canvassed by way of written submissions.
 7. The defendant/applicant filed his written submissions in support of the application on the December 5, 2022, and addressed the issue as to whether the judgement dated October 11, 2018, was regular, and if not, whether to grant stay orders on the grounds of lack of service. He relied on the case of Nairobi Court of Appeal civil application No 280 of 2005;- *Baraka Apparel EPZ (K) Ltd v Nrose Mbula Ojwang t/a Faida 2002 Caterers*, wherein it was held that a cardinal principle of law is that a party should not be condemned unheard. The principle is that unless and until the court has pronounced judgement upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.
 8. The plaintiff/respondent filed his written submissions on the December 5, 2022, wherein he identified the two issues for consideration.
 9. On the issue as to whether the judgment dated October 11, 2018, was regularly obtained, the plaintiff/respondent relied on order 5 rule 15(1) of the *Civil Procedure Rules*, which provides for affidavits of service. It states:
 - (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in form No 4 of appendix A with such variations as circumstances may require.
 - (2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.
 10. On the final issue as to whether the defendant/applicant should be granted leave to defend the suit, the plaintiff/respondent pointed out inconsistencies in the defendant/applicant's draft defence questioning his claim to the suit property.



11. It is the plaintiff/respondent's submissions that the application herein is bad in law, an abuse of the court process and ought to be dismissed.
12. The court has considered the application together with the affidavits in support and in opposition, and has equally considered the written submissions. The two issues for consideration are;
 1. whether the judgement dated October 11, 2018, was regularly obtained?
 2. whether the applicant should be granted leave to defend the plaintiff/respondent's suit?
13. The application herein is seeking to set aside and further stay the execution of the judgement dated October 11, 2018, in which plaintiff/respondent had proceeded with execution and extracted a decree and eviction orders. The application was made on the grounds that the defendant/applicant was not served with summons to enter appearance.
14. The plaintiff/respondent opposed the application and in his replying affidavit attached an affidavit of service dated February 1, 2018, which was signed by a process server corroborating that service had indeed been effected by the said process server.
15. The court has considered the affidavit of service sworn at Murang'a on February 1, 2018, by one Boniface Ng'ang'a Ngaara, who has deponed *inter alia* that he is a process server, and that he effected service of summons and that the process server was led to the home of the defendant/applicant, where he was served with summons. The affidavit of service shows that the plaintiff/respondent led the said process server to the home of the defendant/applicant and he identified the said defendant/applicant to the process server.
16. This being an application to set aside an *ex parte* judgment, the issue for consideration and determination is whether on the facts and circumstances, the court ought to exercise its discretion in favour of the defendant/applicant and set aside the said judgment.
17. In determining whether or not to exercise its discretion to set aside, the court has to take into account the reasons that may have occasioned default in appearance and such reasons and/or explanations as the defendant/applicant may adduce. The Court of Appeal in the case of *Janes Kanyitta Nderitu & another v Marius Phillotas Chikas & another* [2016] summarized the criteria upon which the courts exercise discretionary jurisdiction as follows: -

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one, which is irregularly entered. In regular default judgment, the defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default judgment. Such a defendant is entitled under order 10 rules 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 rises 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.”



18. In the case of *Shah v Mbogo* [1967] EA 166, the Court of Appeal established the guiding principles that a court needs to consider in an application to set aside an *ex parte* judgment. The court stated thus:-

“Firstly, there are no limits or restrictions on the judge’s discretion to set aside except that if the judge does vary the judgment, he does so on such terms as may be just.”
19. The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. Secondly, the discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
20. The Court of Appeal further reiterated the principles in the case of *Patel v E.A Cargo Handling Services Lt* [1974] EA 75, and the said principles have continuously been applied by our courts;
21. In the instant matter, the plaintiff/respondent deponed that service of summons to enter appearance had indeed been effected as witnessed by the attached affidavit of service sworn by the process server. The record shows that the plaintiff/respondent on February 2, 2018, indeed filed an affidavit of service on the application with summons to enter appearance and a plaint dated December 14, 2017. The same had been served by a process server. Despite service of the summons, the defendant/applicant failed to enter appearance. From the record, the plaintiff/respondent consequently filed a request for judgement on April 24, 2018, as required by the law.
22. Due process and procedure ensure that every party has a chance to have a fair and just trial. Adherence to the process and procedure, levels the justice arena and enables litigants to access justice in a predictable and fair manner.
23. Where a defendant in an application to set aside an *ex parte* judgment demonstrates that he was not served with summons, it follows that any *ex parte* judgment must have been obtained irregularly and the court in such instance will set aside the *ex parte* judgment unconditionally and will grant the defendant leave to defend the suit. However, in the instance case, there is evidence of service and the defendant/applicant failed to enter appearance.
24. Even where a regular judgment was obtained after due service, the court may for sufficient cause and upon the applicant demonstrating he has a defence on merits, set aside the *ex parte* judgement on such terms as may be just.
25. In the case of *Patel v East African Cargo Handling Services Ltd* [1974] EA75, the Court of Appeal per Duffus, V.P stated as follows:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied there is a defence on merits. In this respect, defence on merits, does not mean in my view, a defence that must succeed. It means as Sheridan, J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication”.

(See the ELC at Nakuru case of *John Muthee Ngunjiri v Ali Ibrahim* [2021] eKLR)



Order 10 rule 11 of the [Civil Procedure Rules](#) provides: -

“Where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

26. Having considered the available evidence and the annexures thereto, the court finds that the defendant/applicant was served with summons and he failed to enter appearance and defend the suit. The judgement entered was therefore regular.
27. The final issue for determination is whether the court should set aside the judgement and consequential orders dated October 11, 2018.
28. Order 10 rule 11 of the [Civil Procedure Rules](#) provides that the court can set aside, vary such judgement and any consequential decree or order upon such terms as are just. (See [Pitbon Waweru Maina v Thuka Mugiria](#) [1983] eKLR.)
29. The court takes note that the defendant/applicant filed a draft defence and counterclaim therefore allowing this court to determine whether they have a defence on merit. In the draft defence, the defendant/applicant states that the suit property was allocated to him by virtue of being a member of Kariaini Co-operative Society, and title later issued following Presidential Commission.
30. The law and procedure is clear that where a party has failed to enter appearance or filed a defence within the stipulated period, then such a party can move the court to set aside the *ex parte* proceedings, in certain circumstances and at the discretion of the court.
31. It is within the court’s discretion to look at each case on its own merits and decide whether such party meets the threshold for setting aside *ex parte* judgments. A party cannot be allowed to disregard court processes and come to court to set aside what has been done regularly as per the set down procedures. Such party cannot take steps backward to fulfil his or her own omission or commission. The court is cognizant of the fundamental right which is “a right to be heard”, which must be guarded, but it must also not lose sight of the “right of access to justice for all” which should be dispensed expeditiously.
32. This court having found that the *ex parte* judgement was regular, following effective judgement, the court considers the issue of whether to set aside the judgement and allow the defendant/applicant’s defence be tested. The defendant/applicant explained the reason for failure to file the defence and counterclaim to lack of service. No other reason was provided.
33. From the court record, the judgement was entered on October 18, 2018, while the eviction orders were issued on July 2, 2022. The defendant/applicant thereafter filed the instant application on September 8, 2022, which is a period of 2 months following execution of the judgement.
34. There is inordinate delay on the part of the defendant/applicant to bring this application. The plaintiff/respondent obtained his judgement on October 18, 2018, and he has expectation of enjoying the fruits of his judgement.
35. Indeed, setting aside the said judgement will be prejudicial to the plaintiff/respondent and the reasons for such delay in bringing this application are not satisfactory.
36. For the above reasons, the court finds and holds that the instant notice of motion application dated September 8, 2022, is not merited. The said application is dismissed entirely with costs to the plaintiff/respondent.

It is so ordered.



DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Plaintiff/Respondent – N/A

Mr Nyongesa for the Defendant/Applicant

Court Assistant - Joel Njonjo

L. GACHERU

JUDGE

23/2/2023

