



Otieno (Suing on behalf of the Estate of Paul Otieno Odwar - Deceased) & another v Dawa (Sued on behalf of the Estate of Meshack Dawa (Deceased)) (Environment & Land Case 43 of 2019) [2023] KEELC 15785 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15785 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 43 OF 2019
MN KULLOW, J
FEBRUARY 21, 2023

BETWEEN

FELIX OGUTU OTIENO (SUING ON BEHALF OF THE ESTATE OF PAUL OTIENO ODWAR - DECEASED) 1ST PLAINTIFF

SUSAN OWUONDO ODWAR (SUING ON BEHALF OF THE ESTATE OF CALEB ODWAR - DECEASED) 2ND PLAINTIFF

AND

S.O. OKOTH DAWA DEFENDANT

SUED ON BEHALD OF THE ESTATE OF MESHACK DAWA (DECEASED)

RULING

1. By a notice of motion dated October 21, 2021, the defendant/ applicant sought the following orders; -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to set aside the judgment delivered on July 15, 2020 against the defendant/ applicant and all consequential orders be set aside and the defendant/ applicant be granted unconditional leave to defend this suit.
 - d. That the costs of this application be in the cause.
2. The application is based on the 5 grounds thereof and on the applicant's supporting affidavit sworn on even date. The applicant avers that he was never served with summons or any pleadings in the matter. He further claims that in the case of substituted service; the onus was on the process server to mandatorily affix a copy of the process on the outer door or some other conspicuous part of the



house, where the party ordinarily resides or carries on business or personally works for gain. He thus maintained that there was no proper service carried out as required by law hence the *ex-parte* judgment entered was irregular and ought to be set aside.

3. He further maintained that the suit as filed is *res judicata*, the same having been finally determined by the Rongo Principal Magistrate's Court in ELC Case No 43 of 2018 vide a judgment delivered on January 15, 2019, which has never been appealed against, set aside or varied.
4. He deposed that he had a good defence which raised triable issues and urged the court to allow the application and grant him an opportunity to defend the suit against him on merit and in the interest of justice.
5. The applicant also filed a response to the replying affidavit; which he erroneously named a replying affidavit instead of a supplementary affidavit. He faulted the alleged substituted service by way of advertisement since the same did not conform to the provisions of order 5 rule 17 of the [Civil Procedure Rules](#). He also annexed a copy of the decree marked "SOO1" in support of his claims that the suit was *res judicata*.
6. The application was opposed. The plaintiffs/ respondents filed a grounds of opposition dated September 19, 2022 and a replying affidavit sworn on November 2, 2022 by the 1st respondent on his own behalf and on behalf of the 2nd respondent. He deposed that the applicant had duly been served with the summons, pleadings, orders and all the relevant processes, by a substituted means of advertisement. That the said service was pursuant to the requisite leave of the court and before any proceedings in the matter.
7. It was his claim that the court upon being satisfied that service was proper and sufficient; the case proceeded for hearing and judgment was entered on merit in their favor. He therefore maintained that the said judgment was regular.
8. It was further his contention that the application was overtaken by events, the decree in question having been executed and the suit land jointly registered in their names on September 30, 2021 before the filing of the instant application.
9. On the issue of the suit being *res judicata* as raised by the applicant; he averred that the said allegations were incorrect and unsubstantiated and no evidence had been adduced in support of the same. It was his view that the application had been filed in bad faith and urged the court to dismiss the same with costs.
10. The application was canvassed by way of written submissions. Both parties filed their respective submissions and referred to several decisions, which I have read and considered in arriving at my decision.

Analysis and Disposition

11. I am of the considered view that the main issue arising for determination is whether the application dated October 21, 2021 is merited on account of:
 - i. Whether the suit herein is *res judicata*.
 - ii. Whether there was proper service of the summons and pleadings in the matter upon the applicant.



- iii. Whether the defendant/ applicant has made out a case for setting aside the *ex parte* judgment delivered on July 15, 2020 and all consequential orders.

I. Whether the suit herein is res judicata

12. The applicant contends that the suit as filed is *res judicata*; that the dispute herein was heard and determined by the court in Rongo Principal Magistrate's Court ELC Case No 43 of 2018 *vide* judgment issued on the January 15, 2019. The said dispute was between the same parties and in respect to the same subject matter. It is his claim that the said judgment has never been appealed against, set aside and/or varied to date.
13. The respondents on the other hand dismissed the said allegations as being incorrect and unsubstantiated. They maintained that no evidence had been adduced to prove the said allegations.
14. The doctrine of *res judicata* is defined and provided under section 7 of the [Civil Procedure Act](#), which states as follows: -
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
15. The doctrine of *res judicata* essentially implies that, the matters directly and substantially in issue in the present suit must be similar to those previously in dispute, between the same parties and the same having been heard and finally determined on merits by a court of competent jurisdiction. It is aimed at ensuring that there's an end to litigation.
16. The Court of Appeal in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR held that: -
- “For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
17. The applicant contends that the suit herein was heard and determined by the court in Rongo Principal Magistrate's Court in ELC No 43 of 2018; that the subject matter is similar in both suits and further that the dispute is between the same parties. It is important to note that other than stating that judgment in the previous case was delivered on January 15, 2019; the applicant has not provided any evidence in support of the said averments; no pleadings, proceedings or judgment was adduced in evidence. Be that as it may, I will proceed to analyze the 4 elements of *res judicata*.



18. Firstly, the matter in issue must be directly and substantially in issue in the former suit. A close look at the decree annexed herein and marked “SOO1”; the plaintiffs/ respondents claim is for an order of nullification of title deeds, the rectification of boundary thereof and the register records. They further sought for permanent injunction, restraining the defendant from further trespass into the suit land.
19. I have also looked at the originating summons herein dated April 17, 2019 and I note that the same is primarily centered on the issue of adverse possession. Thus, even though the dispute is over the same subject matter and between the same parties, the issues in both suits are fundamentally different. As stated in the *Maina Kiai case* (supra), all the elements of *res judicata* must be proved conjunctively, in this regard, I find that the present suit is not *res judicata*.
20. In the alternative and without prejudice to the foregoing; i have also noted that the claim herein is premised on the issue of adverse possession. I seek to reiterate that the court in Rongo Principle Magistrates’ Court is not vested with the requisite jurisdiction to determine a claim of adverse possession by virtue of section 38 of the *Limitations of Actions Act*. Hence, it cannot be said that the matter was heard and finally determined by a court of competent jurisdiction.
21. In conclusion, I find that the issue of *res judicata* does not arise.

II. Whether there was proper service of the summons and pleadings in the matter upon the applicant

22. The issue of service goes to the root of any *ex-parte* judgment; where the court is satisfied that there was no proper service, it has the discretion to set aside and/or vary any *ex-parte* judgment entered and all the consequential orders thereto.
23. It is the applicant’s claim that he was never served with the summons or any pleadings in the matter and denied the alleged service by substituted means. It was further his contention that the process server was duty bound to affix a copy of the substituted process on the outer door or some other conspicuous part of the house; where he ordinarily resides or carries on business or personally works for gain.
24. The respondents on the other hand maintained that the defendant was duly served with the summons, pleadings, orders and all the relevant processes by substituted means of advertisement. He further stated that the matter only proceeded for hearing upon the court being satisfied that there was proper service. He annexed the copy of the order directing service by alternative means and said service notices.
25. Order 5 rule 17 provides the law on substituted service and states as follows: -

“ 17.

- (1) ‘Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
- (2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
- (3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.



- (4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in form No 5 of appendix A with such variations as the circumstances require.

26. I have carefully looked at the court record and I note that on July 8, 2019, my Predecessor, Ong’ondo J. granted leave for the defendant to be served by way of substituted service. Pursuant to the said order, the plaintiffs herein served the defendant through an advertisement on the Standard Newspaper. Mr Agure Odero, who previously had conduct of the matter consequently filed an affidavit of service sworn and dated on July 19, 2019, outlining the details of the said service and further annexed a copy of the newspaper notice.
27. Substituted service by way of advertisement in a newspaper shall be deemed as proper service where the same has been allowed by the court. I have looked at the said Standard Newspaper Notice on the Standard Newspaper and I am satisfied that indeed there was proper service, the same was in accordance to the provisions of order 5 rule 17(4) of the Civil Procedure Rules.
28. I have also looked at the proceedings of July 22, 2019 and December 10, 2019 and I note that the learned judge Ong’ondo J. proceeded with the matter only upon being satisfied that there was proper service upon the defendant and subsequently issued directions on the disposal of the suit. I therefore find that the judgment entered on the July 15, 2020 was a regular judgment.

III. Whether the defendant/ applicant has made out a case for setting aside the ex parte judgment delivered on July 15, 2020 and all consequential orders

29. This court retains unfettered discretion in determining whether or not to set aside such a judgment. The grounds for setting aside an *ex-parte* judgment are well settled and the court in exercising the said discretion ought to consider the circumstances of each case. The court in the case of *Mbogo v Shah* 1968 E.A 93 held as follows: -

“This discretion is intended so to be exercised to avoid injustice or 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”

30. The applicant avers that he has a good defence which raises valid triable issues and that the same ought to be canvassed at the full hearing. He further stated that the salient issues raised in the suit ought to be addressed by way of full trial.

31. The Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd and Michael Rono* (2015) eKLR in outlining what amounts to a triable issue held as follows: -

“..... What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

32. I have looked at the annexed draft replying affidavit dated January 12, 2022 in response to the originating summons herein and I note that save for his confirmation that the plaintiffs have been in possession and occupation of the suit land, the same is marred with blanket denials. The applicant has further raised the issue of *res judicata* which I have already discussed hereinabove.



33. The primary consideration in setting aside an *ex-parte* regular judgment is whether there is a defence which raises triable issues with real prospects of success. The Court of Appeal in [Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede](#) (1982-1988) KAR page 1036, the Court of Appeal held that:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Connell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.” (emphasis mine)

34. In view of the foregoing; I find that the applicant has not presented a justifiable explanation and/or basis to warrant the grant of the orders sought. The annexed replying affidavit does not raise bonafide triable issues and further he has not provided any justifiable explanation for the inordinate delay.

Conclusion

35. The upshot is that the notice of motion dated October 21, 2021 is not merited and I accordingly dismiss the same with costs to the plaintiffs/ respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 21ST DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Miss Otieno for the Defendant/ Applicant

Mr. Marvin Odera for the Plaintiffs/ Respondents

