



Kathambi & 4 others v Kinyua & another (Environment and Land Appeal E090 of 2021) [2022] KEELC 14528 (KLR) (2 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E090 OF 2021
CK NZILI, J
NOVEMBER 2, 2022**

BETWEEN

**ELIZABETH KATHAMBI 1ST APPELLANT
SILAS MWANGI 2ND APPELLANT
DESDERIO MURIUNGI 3RD APPELLANT
PETER MWITIA 4TH APPELLANT
PAUL MWITIA MORRIS MURANGIRI 5TH APPELLANT**

AND

**JOSEPH KINYUA 1ST RESPONDENT
M'ARIMI MAGIRI 2ND RESPONDENT**

(An Appeal from the ruling in Githongo ELC Case No. 27 of 2017 delivered on 26.7.2021 by S. Ndegwa Senior Principal Magistrate)

JUDGMENT

1. The appellants by a memorandum of an appeal dated August 2, 2021 complains about a ruling by the trial court where it declined to grant both stay and setting aside of an *ex parte* judgment against the appellants entered on February 2, 2018 and May 20, 2020 respectively.
2. The appellants grounds of appeal are that the trial court:
 - i. Relied on affidavits filed without leave and which had been objected to and reached a finding that there had been proper service of summons.



- ii. Rejected their supporting affidavits in favour of that of the process server which had inconsistencies but nevertheless held that the appellants had failed to challenge it and or adduce evidence to the contrary.
 - iii. Failed to exercise discretion by considering the draft defence which had raised triable issues.
 - iv. Considered extraneous matters hence reached a wrong decision.
 - v. Made final determination on issues raised in the defence hence prejudicing the appellants without being heard in the matter.
3. This being a first appeal, the court is mandated to look at the lower court record, make independent findings on facts and the law. See *Abok James Odera T/A J Odera & Associates vs Kenya Posts HCCC* No 518 of 1996.
 4. The respondents by a plaint dated September 7, 2015 sued the appellants who are family members. They averred that as the appellants were registered owners of LR No Lower Abothuguchi/Igane/1044 and 1043, had bought a portion of the land of the appellant's father's LR No's Lower Abothuguchi/Igane/459, who had failed to bring up a surveyor to mark the boundaries of the two portions.
 5. The respondents averred that after the demise of their father, the appellants began encroaching, and or trespassing into his parcels of land, chased him away and frustrated his attempts to bring a land surveyor to help resolve the boundary. They prayed for an order that a licensed land surveyor in company of the parties and the OCS Gaitu Police Station visit the parcels to establish the boundaries and for eviction of the appellants from his two parcels of land.
 6. The plaint was accompanied by written witness statements and list of documents among them copies of title deed for the two parcels and a demand letter.
 7. The summons to enter appearance were issued and service effected on September 24, 2015. An affidavit of service was filed by Geoffrey Mburugu M'Mukiri on November 20, 2015.
 8. By a letter dated October 7, 2015 to the court, the respondents sought for entry of interlocutory judgment on account of default to enter appearance. This was allowed on February 2, 2018. Following the transfer of the suit to Githongo law courts it appears a mention notice was given for December 5, 2017. The mention notice was also served upon the appellants by Catherine Mworira the court process server on
 9. Eventually a hearing date was issued for formal proof for January 21, 2018. The 1st appellant was served by Mutunga Murithi advocate on January 9, 2018 and a return of service filed on January 24, 2018.
 10. Once again hearing notices were served upon the appellants on May 22, 2019 and at June 21, 2019 at Igane village lower Abothuguchi and a return of service filed by the process server on May 31, 2019 and July 5, 2019 respectively when the matter eventually proceeded for hearing.
 11. A judgment delivered on May 20, 2020. In the said judgment the court ordered that the boundaries of the three parcels of land namely 1044, 2043 and 1042 be adjusted in line with the surveyor's report within 60 days in default evictions to ensue against the appellants.
 12. The appellants by an application dated March 31, 2021 sought for stay and the setting aside of the judgment entered on December 2, 2015, February 2, 2018 and May 20, 2020 together with leave to enter appearance and file an attached draft defense.



13. The reasons given were non-service of summons upon them; existence of a reasonable defence and the right not be condemned unheard.
14. In the affidavit in support of the application sworn by the 2nd appellant, the appellants stated that they only came to know of the existence of the suit after the land surveyor visited the suit land on March 9, 2021 for purposes of implementing the decree. They denied service of the summons and hearing notices by the process server as alleged or at all including the transfer of the suit to Githongo law courts from this court. Further the appellants denied knowledge of the change of advocates or service of hearing notices by Ms Mutunga Murithi advocate and Catherine Mworira as alleged in the affidavit of service.
15. The appellants averred the draft defence had merits and urged the court to grant the orders sought. In the draft defense the appellants stated that the respondent should have filed the suit against the administrator of their deceased father's estate ;denied the alleged sale of the two parcels out of parcel No 459; denied any alleged trespass since beacons and boundaries of LR NO.1042, 1043 & 1044 had been in existence since 1977; that the claimed the suit was time barred since the fixing of boundaries by surveyors in 1977 and the permanent development thereon; admitted that their late father had sold ¼ an acre each to the respondents out of LR No 459 and subdivision undertaken leaving their late father with a portion but the respondent had fraudulently recorded the parcel as 0.25 ha and 1 acre instead of 0.25 acres, 0.25 acres and 3.11 acres for LR No's 1042, 1043 & 1044 since their father was illiterate.
16. The appellants averred the respondent's parcels were reduced in size in 2005 due to the widening of Kaongo-Muthere and Mukuene-Gitune Road hence the reduced sizes cannot be claimed or compensated from the land belonging to the deceased by adjusting the boundaries which had been in place for over 30 years and that the respondents were taking advantage of the errors in regard to sizes of the land in the green card to take up land which does not belong to them, going by the original map by the surveyor who carried out the subdivision.
17. The application was also supported by a further supporting affidavit sworn by Silas Mwangi on June 4, 2021 for and on behalf of the 1st, 3rd, 4th and 6th appellants. He raised the issue of Meru Chief Magistrates Case No 173 of 2004 which was dismissed for want of prosecution involving the same issue of boundary dispute between their late father and the respondents. The deponent averred the issues of sizes and boundary of the land predated the death of their late father hence the respondent's had failed to disclose material details. The appellants attached copies of the plaint, defence and counterclaim and the order for dismissal of the previous suit for want of prosecution as annexures marked SM "2".
18. The application was opposed by the 2nd respondent through a replying affidavit sworn by Marini M'Magiri on June 9, 2021 in which he denied instructing the 1st respondent then 1st plaintiff or his advocate instructions to file any claim against the appellants. He admitted the transaction and the handing over of vacant possession to the respondents but denied any alleged encroachment by the appellants. He therefore supported the application.
19. The application was opposed by the 1st respondent through his affidavits sworn on April 19, 2021 and June 11, 2021 admitting the existence of the previous suit No Meru CMC 173 of 2004 before the appellants. father passed on July 30, 2011 and in which he took out a citation No 60 of 2013 where the appellants failed to attend court or take out letters of administration to date leading the suit to abate.
20. The respondents averred they had sued the appellants as trespassers or encroachers on the land and that service of summons and hearing notices had been properly affected severally, with the assistance of the area manager. Further he said, the 2nd respondent even testified in court but was now withdrawing after



he was approached by the appellants since they belong to the same clan and allegedly tried to resolve the matter at the clan level meaning they knew of the existence of the suit.

21. The 1st respondent stressed that after the decree the land surveyor attended the scene on December 11, 2018 in the presence of the parties, the area chief and the police hence the applicants knew of the suit and its outcome after a letter dated November 27, 2018 was issued to them. The dependent averred that should the court accede to the request, throw away costs of Kshs 80,000/= should be paid to them. He attached copies of affidavits of service as well as a sworn affidavit of Jackson Mutwiri M'Arimi confirming that he met the process server by the name Geoffrey Murugu and pointed out the applicants for the service to be affected.
22. The parties buttressed their respective positions with written submissions dated June 18, 2021, June 16, 2021 and June 21, 2021 following which the trial court dismissed the notice of motion.
23. With leave of court and in line with Order 42 *Civil Procedure Rules* parties opted to canvass the appeal through written submissions dated June 6, 2022 and June 27, 2022 respectively.
24. The appellants have submitted that the issue of service was disputed especially on why the process server would still need the assistance of the area manager to point out the appellants yet he had served them thrice previously.
25. The appellants therefore urged the court to find the service was irregular and reliance on an affidavit not filed but annexed by the trial court was wrong since it was lacking probative value.
26. As to the draft defence the appellants have submitted that the same had raised triable issues that entitled them to be given audience before the court could condemn them unheard on merits.
27. Reliance was placed on *Cheall vs Associates of Professional Executive Clerical and Computer Staff* (1983) ALL ER.
28. The appellants submitted that the issue of a legal representative was raised in the draft defence yet the court did not find it a triable issue.
29. Reliance was placed on *Beatrice Kuri Francis vs Susan Gatiri M'Mukiria & 5 other* Meru ELC NO 81 of 2019, *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR and *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd* [1996] eKLR
30. On the other hand, the 1st respondent has submitted that the appellants were given leave to put in further affidavits before the process server attended court for cross examination upon request by the appellants in line with Order 5 Rule 15 *Civil Procedure Rules*.
31. The 1st respondent has submitted that the judgment was regular until it was proved otherwise as held in *Fidelity Commercial Bank Limited v Owen Amos Ndungu & another* [2017]. Therefore, the trial court was in order to dismiss the application after the appellants failed to challenge or shake the process server's assertions on service. Further, the 1st respondent submitted the draft defence was a mere denial, was shifting blame, was an afterthought and a delaying tactic.
32. The issues commending themselves for the court's determination are: -
 - i. Whether there was proper service of the summons to enter appearance and the hearing notices.
 - ii. If the draft defence raised triable issues.



- iii. If the application for setting aside and stay of execution was filed after inordinate delay, substantial loss and damage had been established, security was offered and if it was in the interest of justice to allow it.
 - iv. If the trial court exercised its discretion properly in dismissing the application.
33. Order 10 Rule 11 of the [Civil Procedure Rules](#) allows a party aggrieved by a default judgment to approach the court for an order for setting aside. In exercising its unfettered discretion on whether to set aside such a judgment, the court takes into account such factors as the reason for the failure to enter appearance or file a defense, length of the delay, whether the intended defence raises triable issues, prejudice to the opposite party and whether on the whole it is in the interest of justice to set aside the default judgment. See *Mbogo & another vs Shab* (1967) EA 166, *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75 & 76, [Chemwolo & another vs Kubende](#), [CMC Holdings vs Nzioli](#) (2004) 1KLR 173.
 34. There are two types of default judgments, irregular and regular. In [James Kenyaite Nderitu](#) (*supra*) the court termed an irregular default judgment as one where a defendant has not been served or was not properly served with summons to enter appearance in which case the court should set it aside ex debito justitiae, without considering the factors aforementioned since the right to be heard is fundamental and permeates the entire judicial system.
 35. As to a regular default judgment, the court in [Mwala vs Kenya Bureau of Standards](#) (2001) CALL21148, and [Mohamed & another vs Shoka](#) (1990) KLR 463, held that the court must also look at whether there is reasonable explanation for the delay, the issue of prejudice and the defence on merits.
 36. Further, in [Tree Shade Ltd vs DT Dobie Co Ltd](#) C/A 38/98 the court held that when an expert judgment was lawfully entered the court should look at the draft defence to see if it contains a valid or reasonable defence.
 37. In *Philip Chimwelo & another vs Augustine Kubende* (1982-1988) KAR the court held 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, subsequent and with the respective merits of the parties.
 38. In this suit the summons to enter appearance were collected and service effected upon the appellants going by the affidavit and testimony of the process server. There were no other process servers apart from Geoffrey Murugu who effected service of both the hearing and mention notices upon the appellants. The appellants did not seek leave of court to cross examine the process server as to the veracity of his affidavits of service.
 39. The inference is that the appellants herein were not doubting the truthfulness and or contents of the said affidavits of service.
 40. During the cross examination of the process server apart from the issue of details to the non-inclusion of the area manager as the person who pointed out the appellants so as to effect service, his evidence appeared consistent, truthful and credible.
 41. In [Shadrack Arup Baiywo vs Bodi Bach](#) (1987) eKLR the Court of Appeal said there is a presumption of service as stated in the process server's report and the burden lies on the party questioning it to show that the return is incorrect.
 42. Looking at the record of appeal and the affidavits of service in this matter, there is no doubt in the courts mind that the appellants were not only served with summons to enter appearance but also other



- court processes. Nevertheless, they failed to enter appearance or attend the formal proof. See [Rose Jerono Tiren vs Isaack K Tallam](#) (2021) eKLR.
43. In *Kingsway (supra)* the court held notwithstanding the existence of a regular default judgment a court may set aside an *ex parte* judgment if a defendant shows he has a reasonable defence on merits.
 44. The discretion to set aside a judgment is to avoid injustice or hardship resulting from inadvertence, accident or excusable error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. See [JKUAT vs Musa Ezekiel Oebal](#) (2014) eKLR.
 45. Applying the above principles to this appeal, it is not in dispute as the court has said above that the judgment entered herein was a regular one after the appellants were duly served with not only the summons to enter appearance but also other court processes after the entry of the interlocutory judgment before the final judgment was delivered.
 46. Therefore, the next issue is whether the draft defence was reasonable and or raised triable issues.
 47. A reasonable defence is one raising triable issues. It need not succeed. In [Gicien Constructon Co vs Amalgamated Trade & services](#) LLR No 103 CAK the court cited with approval [Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono](#) (2015) eKLR, where it was said a triable issue is said to exist if there is a dispute of facts which can only be ventilated in a full hearing. The court stated that as a general principle, where a defendant shows that he has a fair case for defense or reasonable grounds for setting up a defence or even a fair probability that he has a bonafide defense, he ought to have leave to defend.
 48. In the draft defense attached to the affidavit, the appellants had raised five key issues namely; the existence of a previous suit between their late father and the respondent(s) touching on the same issues of boundary and trespass; discrepancy between the sizes or acreage of the land at the time of the sale and what was now sought to be implemented, the widening of the road leading to reduction of the land sizes and lastly the element of alleged fraud in increasing the land size in the documentation contrary to what was on the ground which was initially established by the land surveyor at the time of the sale; the exact time of the alleged encroachment; trespass into the suit land and lastly if the appellants had capacity to be sued for and on behalf of the estate of their deceased father without letters of administration.
 49. In the replying and further replying affidavits the 1st respondent admitted the existence of the previous suit before the Chief Magistrates Court and the fact that he had filed citation proceedings to join the appellants in the said CMC No 173 of 2004. Similarly, the 2nd respondent filed a replying affidavit disowning the 1st respondent and their advocates on record as regards instructions to file the suit in the first instance and the merits of the suit.
 50. In my considered view, the aforesaid issues show that the appellants had a demonstratable and reasonable defence raising triable issues.
 51. To my mind and notwithstanding the delay in applying for the setting aside of the judgement, the prejudice on the appellants of being condemned unheard while having a reasonable defense, would weigh more, unlike the respondents who could be compensated for the time and expenses incurred by way of costs.
 52. The ends of justice also tilt in favor of vacating the judgment and giving the appellants an opportunity to have their day in court by presenting their evidence.



53. In the premises I find the trial court erred in law and in fact while exercising its discretion. The trial court failed to find the appellants having a reasonable defence requiring a right to access to justice and fair hearing.

54. Consequently, the appeal is allowed. Costs of the appeal and throw away costs of Kshs 50,000/= to the respondents in any event.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 2ND DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Ntarangwi for appellants

Mutunga for 1st respondent

Mwiti for 2nd respondent

HON. C.K. NZILI

ELC JUDGE

