Case Number:	Environment and Land Case 24 of 2007
Date Delivered:	28 Oct 2020
Case Class:	Civil
Court:	Environment and Land Court at Kericho
Case Action:	Ruling
Judge:	Anthony Kaniaru
Citation:	Geoffrey Chirchir v Lucio Matingwony [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kericho
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 24 OF 2007

GEOFFREY CHIRCHIR.....APPLICANT

-VERSUS-

LUCIO MATINGWONY.....RESPONDENT

RULING

1. The application before me for determination is a motion on notice dated 13th August, 2019 and filed in court on 14th August, 2019. It is expressed to be brought under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (cap 21), Order 10 rule 11, Order 45 rules 1 and 2, Order 42 Rule 13, and Order 51 Rule 1 of Civil Procedure Rules and all other enabling law. The applicant – **GEOFFREY CHIRCHIR** – is the 3rd defendant in the suit while the respondent – **LUCIO MATINGWONY** – is the plaintiff. It is a post-judgement application challenging two things: one, the judgement of this court delivered on 14th September, 2018 and, two, the ruling of this court delivered on 21st June, 2019. The ruling was an outcome of yet another post-judgement application dated 7th February, 2019.

2. The application came with seven (7) prayers, two of which – prayers 1 and 2 – are spent, leaving five (5) – prayers 3,4,5,6 and 7 – for consideration. The prayers for considerations are as follows:

Prayer 3: That the ruling and orders made by this court on 21/6/2019 allowing the plaintiff's application dated 7/2/2019 be set aside.

Prayer 4: That the judgement and decree made by this honourable court on 14/9/2018 as well as all the proceedings undertaken herein be set aside and the 3rd defendant be allowed to appear and defend this suit.

Prayer 5: That the eviction of the 3rd defendant from the suit property in purported execution of the decree and order of this court be declared unlawful, the same be set aside and the plaintiff ordered to restore possession to the 3rd defendant and to pay damages for unlawful eviction and trespass to property.

Prayer 6: That in the alternative to the above, the honourable court be pleased to review its judgement and decree made against the 3rd defendant on 14/9/2018 and allow the 3rd defendant to appear and defend the suit on merit.

Prayer 7: That the costs of this application be provided for.

3. The application is premised on the grounds, interalia, that the judgement and decree made against the applicant are irregular and/or unlawful, the applicant having not been served. The applicant alleged that the process server said to have served him is unknown to him and that two counsel, one Orina and a Mr. Onganyi, said to have represented him are strangers to him. The applicant alleged that he was represented to the court as dead at one time and that at one time, service ordered to be effected on him was never effected while the respondent's counsel was accused of misrepresenting to the court that a hearing date taken in absence of the applicant was taken by consent.

4. The applicant emphasized his right to be heard. He said that the right is not only a constitutional entitlement but is based also on equity and justice. He further said that he has a good defence which he should be allowed to ventilate in the interest of justice and equity. According to him judgement was delivered and a decree was issued against him notwithstanding that there were glaring errors and mistakes on the face of the record.

5. In the supporting affidavit that came with the application the applicant deposed, interalia, that he got to know of this case in the month of May 2019 when the respondent tried to evict him from the disputed land. The applicant later engaged a counsel who found out for him what had happened. According to the applicant the proceedings, judgement and other orders relating to him were irregular and/or erroneous as service was never effected on him. He deposed that allegations concerning service effected on him or averment that he had engaged services of two counsel, a Mr. Orina and one Onganyi, were all lies. And so also was an allegation made at one time in court that he was dead.

6. The respondent filed a replying affidavit in response to the application. That was done on 17th October, 2019. She deposed, interalia, that the applicant is lying when he says he was unaware of the suit. She saw him, she said, in court on at least three (3) occasions. Besides, he was one of the administrators of the estate of the **SERONEY ARAP ROP** together with the other administrators already sued in this matter. The other two administrators – **JEREMIA CHIRCHIR** and **ERICK CHIRCHIR** – were said to be his step brothers.

7. The respondent reasoned that it is inconceivable that the applicant could possibly be unaware of the case, the matter having been extremely emotive and essentially involving family members, the applicant included. There were other surrounding circumstances including a visit to the land by photographers on two occasions, institution of contempt proceedings against some other family members leading to their conviction and imprisonment, a visit to the land by court bailiff, a survey of the same land by the District Surveyor on orders of the court, and commencement of various criminal cases. All these, according to the applicant, could not have passed unknown or un-noticed by the applicant.

8. Further, the respondent stated that the matter is essentially one involving family members, with her late husband being a brother to the late father of the first three parties in the suit, the applicant included. That late father is **SERONEY ARAP ROP** whose estates the first three parties represent. The applicant's assertions that he was unware of the suit were therefore viewed as hollow and/or unconvincing by the respondent.

9. The respondent also deposed that the applicant was duly served with court process, an example being 30th July, 2010 when he was served together with the others and he acknowledged the service but failed to sign the process server's copy. He was also represented by counsel as shown on record and his averments to the contrary were said to be untrue. And noting that the applicant alleges to have been represented as dead at one time, the respondent explained that the person so represented was not the applicant; it was somebody else who was the 3rd defendant in the suit, the applicant himself then being 5th defendant. More precisely, the dead party was one Rachel Rop. She was the 3rd defendant and her death caused a re-arrangement of the parties later, with the applicant becoming the 3rd defendant.

10. Issue was also taken with the fact that the applicant has not made available to court a draft defence so that the court can assess its possible merits. The respondent averred that this matter has been pending in court since year 2007 and setting it aside would make her suffer prejudice and/or hardships. She read bad faith in the manner the application is brought. To her, this is yet another obstacle among many others placed in her way to ensure that she does not become owner of the piece of land she is duly entitled to. The court was urged to dismiss the application with costs.

11. To further buttress some of the depositions she made in her replying affidavit, the applicant made available two other affidavits sworn by two people – **JOHN KIPYEGON KOECH** and **JOSEPH K. RONO** – both of whom are applicant's neighbors' at home. To counter the applicant's allegation that he was unaware of the suit, these two neighbours deposed that they saw him in court in the year 2009 when the court ordered parties to the suit not to pluck tea or cut trees on the disputed land. Both could also recall seeing the applicant in court in the year 2013 when the matter came up before Justice L. Waithaka.

12. The application was canvassed by way of written submissions. The applicant's submissions were filed on 3rd March, 2020. He submitted, interalia, that the decision of the court should be based only on the issue of service. He proceeded to state that he was not served and faulted the service mentioned by the respondent on the ground that the affidavits of service do not bear a court stamp. He further alleged that the process server failed to disclose how he identified him. And with service not having been done, the court need not consider the issue of the applicant's failure to make available a draft statement of defence.

13. Relying on the case of **KWANZA ESTATES LIMITED VS DUBAI BANK KENYA LIMITED (in liquidation) & 2 OTHERS: (2019) eKLR**, and emphasizing that service was never effected on him, the applicant urged that the judgement herein be set aside *EX DEBITO JUSTICAE* (as a matter of right). And the need to do so is necessary because the applicant was allegedly

condemned unheard. The case of **ATLANTA CORPORATION LIMITED VS CLARENCE MATHENY LEADERSHIP TRAINING INSTITUTE, NATIONAL LAND COMISSION & ANOTHER (interested party) (2019)eKLR** was cited to emphasize the need for a party to be heard. The court was asked to allow the application.

14. The respondent's submissions were filed on 2nd March, 2020. A summation of the matter as presented by each side was given. It was then submitted, interalia, that the applicant was indeed served and the court was referred to the affidavits of service ("marked LM 2(a) and 2(b)) that came with the respondents replying affidavit. Further evidence of service was said to be shown by other affidavits of service (marked LM7 and 8). Judgement against the applicant was therefore said to be regular. Further, the applicant was faulted for not calling the deponents of the affidavits of service for cross-examination and/or for not calling evidence to discredit them.

15. It was further pointed out that the applicant's averment that he was represented to court as dead at one time was not true as it was based on a misapprehension of the situation by the applicant. The true state of affairs was that a plaint, styled as Further Amended Plaint, existed and the applicant was fifth (5th) defendant in that plaint. The third (3rd defendant) was somebody else and that party was indeed deceased at the time. The applicant only became third (3rd) defendant after yet another plaint, this time styled Further Further Amended Plaint, was filed. In that plaint, the deceased party was removed and that is how the applicant became third defendant.

16. The applicant was also faulted for not making available a draft defence for scrutiny by the court. The law was said to envisage filing of such defence to enable the court to find out if there is an arguable case. The case of **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974** as cited in **RICHARD MURIGU WAMAI VS ATTORNEY GENERAL & ANOTHER: (2018)eKLR** was proffered to drive the point home.

17. The court was also asked to note that inspite of an order issued requiring the applicant to present himself for cross-examination, the applicant failed to present himself. The order was said to have been made in presence of the applicant's counsel and no excuse therefore can be raised for non-attendance.

18. Noting that the applicant had also prayed for stay of execution of the judgment, the respondent noted that by the applicant's own unwitting concession, eviction has already taken place and that prayer therefore is overtaken by events. Ultimately, the court was asked to dismiss the application with costs.

19. I have considered the application, the response made, and the rival submissions. As the matter involves contention concerning how proceedings took place, I also decided to have a look at the record of proceedings. The applicant would be comfortable if his contention regarding service is well looked into. He said he was not served. The respondent however contended that he was and, to prove it, annexed several affidavits of service to his response. The applicant noted this and shifted gear. He then alleged that it was not shown that the affidavits of service were filed in court and that the process server did not show how he identified the applicant.

20. In order to ascertain the truth, I checked the court records. I found as a fact that the affidavits of service were filed and duly form part of the court records. I read the affidavits of service and found it shown how the defendant was identified. It is very clear that the process server was not serving a stranger. He was serving a person he knew and this much is clear in the substance of the various affidavits of service.

21. The court record also showed me that it is not true that the applicant was represented to court as dead. As pointed out by the respondent, it was a different person who was so represented and that person was indeed dead. The applicant was not the 3rd defendant referred to in that representation. He only become 3rd defendant later. On this issue too, the applicant comes across as less than honest.

22. On the issue of failure to make available a draft amended defence for scrutiny by court, the respondent is again right in his appreciation of the applicable law. Such defence is always required to enable the court to make up its mind one way or the other. The applicant himself stated in his grounds in support of the application that he has a good defence. Question is: Where is that defence" What is its substance" Is it an arguable one" Without a draft defence being made available, the averment that there is a good defence sounds hollow and unconvincing.

23. I also note that the applicant has fallen short of doing all what is required to show that what he alleges is true. First, I expected that he would wish to call the process server for cross-examination, seeing, as it is, that his main allegation is that he was not served. When the other side responded by showing that service was indeed effected, one would expect that the applicant would have required that the process server be made available for cross-examination so that his false service, if such it was, could be exposed. Secondly, the applicant himself was required in court for cross-examination by the respondent's side. The order requiring him to do so was made in presence of his counsel. He never presented himself despite ample time being given to do so.

24. But a more curious thing is how the applicant sought to make out various actors in the matter as liars. The process server was one such alleged liar. The applicant's one time counsel, one Onganyi, is another one. Yet another counsel, a Mr. Orina, was also a liar. I have already shown that the process server was not a liar. As regards the two counsel said to be liars, I find it difficult to believe that a counsel can instruct himself to appear in a given case without instructions. Ordinarily, that does not happen. One would wonder how a counsel would know about somebody's case, instruct himself, take up the matter, and proceed to prosecute it. It takes time, expertise, and expense to prosecute a case. A counsel who is not in a case on probono basis is normally in it for pay. How then would such counsel act without instructions" What would be in the case for him"

25. More crucial however is the fact that if the applicant found in this case two strange counsel who purported to represent him, nothing prevented him from requiring their attendance in court for questioning or cross-examination by counsel now on record for him in this application. That would have demonstrated seriousness on his part. It does the applicant no good to make allegations and then fail to demonstrate them sufficiently.

26. When all is considered, the allegations by the applicant were largely displaced by the detailed and fact-based submissions brought by the respondent. The applicant is shown as a person who is distorting facts; packaging and passing them off as indubitable truth; and then clothing them with the garb of legality. The record of the court does not support him. He did not go far enough to demonstrate the truthfulness of the allegations he made in the application. While he set out to show some people as liars, he himself is shown as lying through the teeth. He is therefore undeserving of what he is seeking. In the circumstances of this case, the court would be wrong to exercise discretion in the applicant's favour.

27. The upshot, when all is considered, is that the application now before me is for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 28TH day of October, 2020.

.....

A. K. KANIARU

JUDGE