



REPUBLIC OF KENYA



KENYA LAW
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Njeru v Njuguna; Macharia (Objector) (Environment & Land Case 53 of 2017) [2023] KEELC 16733 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16733 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 53 OF 2017

JG KEMEI, J

MARCH 29, 2023

BETWEEN

RENET RUNJI NJERU APPLICANT

AND

JUSTUS W NJUGUNA DEFENDANT

AND

JULIUS KIEMA MACHARIA OBJECTOR

RULING

1. The objector/applicant filed the instant Motion dated the 3/10/22 seeking Orders That;
 - a. Spent.
 - b. Spent.
 - c. The honorable court be pleased to set aside the proceedings, Judgment and all consequential decrees and notice of eviction in this matter.
 - d. The Plaintiff/respondent be and is hereby ordered to serve the defendant/respondent and the objector/applicant or the applicant's counsel with the summons and all the pleadings filed in this case.
 - e. The honorable court be pleased to grant leave to the objector/applicant to file an Application to be enjoined as an interested party in Thika ELC No. 53 of 2017.
 - f. The costs of this Application be provided for.
2. The Application is based on the grounds on the face of it and a Supporting Affidavit of even date sworn by Julius Kiema Macharia, the Applicant. He averred that on 19/9/2022 he was served with JKM-1;



an eviction notice dated 19/7/2022 by the Plaintiff's firm of Advocates, Owuocha & Associates alongside copies of this court's decree dated 21/7/2022. That the hearing of this suit proceeded *ex parte* and he was not accorded an opportunity to be heard despite being currently in occupation of the suit land which he acquired from the Defendant in September 2010. That he entered into an oral agreement with the Defendant for purchase of the suit land at Kshs. 2M and later in May 2014 paid a further Kshs. 1M for processing of his title deed as evidenced by JKM-3; copy of handwritten agreement dated 23/5/2014 has been annexed. That however the Applicant has never obtained a title deed in his favor nevertheless he has developed the land and enjoyed quiet possession of the suit land since 2010.

3. Despite service of the Application to both the plaintiff and defendant, only the plaintiff opposed the Application.
4. Renet Runji Njeru filed her Replying Affidavit on 2/11/2022. She avowed that Judgement was delivered in his favor on 15/6/2020 and he duly served his pleadings through the dailies, on the suit property premises and in particular on the applicant who held himself out as the defendant's caretaker. She denied the Applicant's allegation that he only came to learn of the suit upon service of the eviction notice. That the Application is unmerited as there is no evidence to prove the averments of the Applicant's alleged purchase of the suit land; that the JKM-3 refers to Plots 3 & 7 which could be anywhere in Thika and not necessarily the Plaintiff's suit land, titled Municipality Block 2/1100. He urged the court to dismiss the Application with costs.
5. In a rejoinder, the Applicant swore a Further Affidavit 8/11/2020. He reiterated that he has never been served with any mention/hearing notices regarding the suit land and put the Plaintiff to strict proof. That it is not true that he held himself as the defendant's caretaker yet the defendant has sued the applicant in Thika CMELC No. 50 of 2014 over the ownership of the suit land. See copy of pleadings in the said case marked JKM-1. That at the time of his purchase, the Defendant was the registered proprietor of all that land known as Land Parcel No. 1097 and 1096 which were registered as Block II and Block 7 under the defendant's name. See copies of the allotment letter in the defendant's name and survey map marked JKM-2.
6. On 3/11/2022 directions were taken to canvass the Application by way of written submissions.
7. The Applicant filed his submissions dated 8/11/2022 through the firm of Nelson Otiemo & Associates Advocates whilst the firm of Owuocha & Associates filed submissions dated 1/11/2022 on behalf of the Plaintiff.
8. The Applicant submitted that he is entitled to the orders sought in the Motion majorly because he was not aware of the suit proceedings and he is the legal and beneficial owner of the suit property. That his objection proceedings is anchored under Order 22 Rule 5(1) *Civil Procedure Rules* and highlighted in the case of *Tawakal Airbus Limited v Irene Muthoni Njirati & anor.* [2020] eKLR where the court enumerated the principles to be considered in such proceedings. That the right to be heard is enshrined under article 50 *Constitution of Kenya* and the applicant has demonstrated his interest in the suit land vide JKM-3 coupled by the fact of his occupation and possession of the suit land. He beseeched the court to allow his Application with costs.
9. The plaintiff faulted the provisions relied on by the applicant in the Motion as inapplicable and that Order 22 of the *Civil Procedure Rules* cited in the submissions and maintained that the Application should fail. That the Application is devoid in merit as the Applicant allegations of his purchase are unproven and the Plaintiff's title produced at the hearing deserves protection under section 26 *Land Registration Act*. That no legal interest has been established by the Applicant in the suit land whose title deed is in the plaintiff's hands. The court was urged to dismiss the Application with costs.



10. The main issue for determination is whether the Application is merited.
11. Order 10 Rule 11 of the *Civil Procedure Rules* empowers the Court to set aside an ex- parte Judgment for default of appearance and defence.
12. Order 12 Rule 7 of the *Civil Procedure Rules* provides that where under this Order Judgment has been entered or the suit has been dismissed, the court, on Application, may set aside or vary the Judgment or order upon such terms as may be just. Further the provision is buttressed by Order 51 Rule 15 of the *Civil Procedure Rules* which provides that the court may set aside an order made ex parte.
13. The court's power to set aside Judgments is discretionary and must be exercised judiciously. The Court of Appeal in the celebrated case of *Shah vs Mbogo and another* [1967] EA 116 held that:

“This discretion (to set aside ex parte proceedings or decision) 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.”
14. In instances where the court is satisfied that proper service was not effected upon a defendant, then Judgment would be set aside as a matter of right. This position as affirmed by the Court of Appeal in the case of *Pithon Waweru Maina vs Thuka Mugiria* [1983] eKLR.
15. In the instant case there is evidence that the Defendant was duly served. Under the provisions of Order 12 Rule 7 action for setting aside of the Judgement would be available to the defendant who was already a party to the suit.
16. The suit belongs to the plaintiff and her cause of action is against the defendant who despite service elected not to challenge the suit. The Applicant having not been a party to the suit, there was no obligation on the part of the Plaintiff to serve him.
17. The Applicant's case is that he purchased the property from the Defendant and that he has been awaiting for the processing of the title in his name. That may be so, however that cause of action can only validly be pursued against the defendant by the applicant and not the plaintiff.
18. The Plaintiff has a valid Judgement which cannot be defeated by an untested claim (as at now) brought by the Applicant. With tremendous respect, the provisions of Order 22 Rule 51 on attachment of property is not applicable to this case.
19. The Application is dismissed with costs in favour of the plaintiff/respondent.
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Awuocha for Plaintiff/Respondent

Defendant/Respondent – Absent

Rotich HB Otieno for Objector / Applicant



Court Assistant – Lilian

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