REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT CASE NO. 63 OF 2015

REBECCA M'MBONE ACHOLA.....1ST PLAINTIFF/RESPONDENT

ARGWINGS MILLAN ACHOLA.....2ND PLAINTIFF/RESPONDENT

VERSUS

MARGARET TABU MUSUNGU.....DEFENDANT/APPLICANT

RULING

1) The Applicant seeks to set aside the judgement entered against her on 19th April 2018 and a stay of execution of that judgement and decree vide her application dated 8th of March, 2021 brought under sections 3A of the Civil Procedure Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks to be granted the following ORDERS:

a) Spent;

b) That pending hearing and determination of the application herein, judgement entered against the Defendant/Applicant on the 19th of April, 2018 and all consequential orders including the Notice to Show Cause dated 4th February, 2021 be and is hereby set aside;

c) That upon hearing and determination of the application herein, judgement entered against the Defendant/Applicant on 19th of April, 2018 and all consequential orders including the Notice to show cause dated 4th February, 2021 be and is hereby set aside;

d) That upon hearing and determination of the application herein, Mr. Julius Manwari, the original owner of land parcel Bukhayo/Bugengi/1677 which gave rise to the Plaintiff's and Defendant's portions of land being Bukhayo/Bugengi/7902 and 7903 be joined in this case as the second Defendant;

e) That subsequent to prayer three (3) and four (4) above, the Defendant/Applicant be granted leave to file her statement of Defence and Counterclaim out of time in terms of the draft statement of defence and counterclaim attached herewith;

f) That the costs of this application be paid by the Plaintiff/Respondent.

2) The application was supported by the Applicant's affidavit dated 8th March, 2021 and on the following grounds:

a. That there is urgent need to issue stay of execution orders for the notice to show cause issued on the 4th of February,2021which is coming up for hearing on the 10/3/2021 seeking execution of orders to create an access road in the Applicant's parcel of land No. Bukhayo/Bugengi/7902 and the Respondent's portion of land Bukhayo/Bugengi/7903 and remove all structures thereon developed by the Applicant to her detriment yet the Applicant was never served with summons to enter appearance or the Plaint;

b. That the suit herein was filed on 18/6/2015 and proceeded ex parte but summons to enter appearance together with the Plaint were never served upon the Defendant/Applicant who has been out of the country and ill for a very long time;

c. That the Applicant came to know about the case in February, 2021 through her care taker and upon calling the 1st Respondent on a telephone number given to her by the care taker, the 1st Respondent served her with the Notice to Show Cause dated 4/2/2021 and other court documents alleging that her latrine had blocked the access road;

d. That the Applicant was surprised by the demands made by the 1st Respondent for among the reasons that being the registered

owner of land parcel No. Bukhayo/Bugengi/7902 wherein her title deed was issued on 28/7/2006 after purchasing the said land from one Julius Manwari, a well-known advocate in Busia in the year 2006, there was no access road and the only road she used was from the main Busia-Mumias road;

e. That it was after settling on her land that the Applicant and her neighbour, one Mr. Thadayo Marabi met and mutually agreed to create their own access road wherein each party surrendered 30 meters of their respective portions to create a mutual access road and enable them access their homes and farms;

f. That at the point of creating a mutual access road in the year 2007, the Respondents obtained their title deed on 19/11/2012 and had not purchased their present land. Further the Applicant and her neighbour had already obtained their respective title deed and the access road was therefore not surveyed and/or registered with the surveys of Kenya and the Lands Registry;

g. That it is therefore surprising for the Respondent to claim an access road from the Applicant and although perusal of the Respondent's list of documents recently served to the Applicant among them a sketch development plan and surveyor's report dated 16/9/2014 implies that there exists an access road, the legality of the access road is questionable for the following reasons;

a) It is not clear when the alleged access road was created and who sanctioned the same;

b) The Applicant was never involved and or consulted prior to the creation of the alleged access road in her portion of land;

c) It is not clear whether the original seller knowingly sold the Applicant the land parcel no. Bukhayo/Bugengi/7902 when an access road was passing through her land, an act that amounts to fraudulent sale and misrepresentation of facts as the actual size of land sold to the Applicant was 3 acres. Accordingly, creation of an access road through the Applicant's parcel of land will automatically and unlawfully reduce the size of the Applicant's land which must attract compensation against the original seller in the unlikely event that the Respondent's claim is legit;

d) That there is a high probability that the Respondent's claim for an access road lacks merit for a clear reason that it cannot be true that the subdivision of the original seller's portion of land parcel number Bukhayo/Bugengi/1677 was done at the same time and created an access road between the Respondent's and the Applicant at the time the Applicant obtained her title deed on 28/7/2006 as if this was to be the case, the alleged access road could have been marked and established at the time the Applicant was buying her portion of land in 2006 and there was going to be no justification for the Applicant to build her latrine on an access road which she knew was there in the first place.

h. That in view of the circumstances, the notice to show cause dated 4/2/2021 scheduled for the hearing on 10/3/2021 and judgement against the Defendant/Applicant should be set aside and the Defendant/Applicant be allowed to file her statement of defence out of time as the facts pleaded above raise a triable defence worth going to full trial; and

i. That it is in the interest of justice that the order sought be granted.

3) The 1st Respondent filed her replying affidavit on the 26th of March, 2021 the where she swore that:

a) That the Applicant has not met the mandatory conditions or requirements for stay of execution and profoundly for setting aside judgement;

b) The Applicant was duly served with summons to enter appearance and plaint as per law established;

c) Together with the 2nd Respondent they are the registered proprietors of all that parcel of land known as Bukhayo/Bugengi/7903 whereas the Applicant is the registered proprietor of Bukhayo/Bugengi/7903;

d) It is not in dispute that apart from both parcels of land bordering each other, they were also created at the same time out of Bukhayo/Bugengi/1677;

e) The Applicant's main defence is that the two parcels of land were not created at the same time, since the Applicant got her title in 2006 and while the Respondents got their parcel in 2012;

f) The Applicant's further contention is that since the two numbers were not created at the same time, a road of access could be created serving their land and the mutation form indicates that the two numbers together with 7901 were created on the same day and that is on 20.3.2006;

g) Prior to filing suit, the County Land and the County Surveyor had visited the site and apart from ascertaining that the road of access was a creation out of the subdivision of parcel no. L.R Bukhayo/Bugengi/1677 which gave rise to L.R Nos. 7901,7902, 7903 and that the Applicant had blocked the access road by building a pit latrine thereon.

h) The Applicant has no arguable defence, is vexatious and her application is an a abuse of the due Court process;

i) The draft statement of defence and counterclaim is a sham as it tries to deny the obvious;

j) Julius Manwari, the original owner subdivided the land and the access road was created vide a mutation dated 20.3.2006.

That by 28.7.2006 when the Applicant was purchasing her parcel, the access road had already been created;

k) The Applicant has encroached on the access road by putting up a pit latrine, rendering the Respondent's parcel of land landlocked. That from her illegal actions, the Applicant has come to court with unclean hands while at the same time seeking equitable remedies;

l) The Applicant stands to suffer no irreparable loss by doing that which the laws mandates to be done; opening up the access road;

m) Dragging Julius Orina Manwari into this suit and making him and 2nd Defendant is vexatious and a waste of this Honourable Court's precious time;

n) If the Applicant can counterclaim for cancellation of documents that created her title before she bought the land, which cancellation will automatically lead to the cancellation of her title, there is no need to propound further that the Applicant is a vexatious litigant;

o) This application be struck out/dismissed with costs.

Submissions

4) During the hearing of the application on the 21st of April, 2021, the parties agreed to canvass the hearing by filing written submissions. The Applicant filed her submissions on the 5th of July, 2021. She submitted the application has met the threshold that she has demonstrated that her application merits grant of stay of execution. The Applicant submitted that she has been out of the Country for a long time and the service of the court processes on her sister-in-law contravened the provisions of Order 5 Rule 8(1) of the Civil Procedure Rules. She submitted further that she has an arguable case worth going to full trial and that it is in the interest of justice that the orders sought be granted.

5) The Respondents filed their submissions on the 22nd of September, 2021 submitted thereon that the Applicant has not demonstrated that she has sufficient cause to have the judgement set aside and sought to rely on the definition of sufficient cause as held in the case of **Wachira Karani vs. Bilaad Wachira (2016) eKLR**. They submitted further that the Applicant's defence was a sham and that even if the judgment should be set aside and her defence admitted, this Honourable Court would arrive to the same verdict as the exparte judgement. The Respondents continued further that the Applicant had delayed in bringing the current application and was only interested in wasting the Court's time. On the issue of enjoining Julius Manwari, the Respondent submitted that it will only be fair for an application to enjoin to be served upon him to enable him respond. They urged this Court to dismiss the Application with costs.

Determination

6) The instant application is for setting aside of judgement and for stay of execution. **Order 10 Rule 11 of the Civil Procedure Rules** empowers this Court to set aside or vary any judgement or consequential order or decree entered as a consequence of non-appearance, default of judgement and/or failure to serve on such terms that are just. In ***Mbogo v. Shah*** (1968) EA 93, 95 the Court held as follows:

> *"Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.*
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> *Dealing with the first question,* ***it is quite clear that the Judge has discretion under O. 9, r. 10, but of course he has to exercise that discretion judicially. In Kimani v. McConnell [1966] E.A. 547), HARRIS, J., dealing with the question as to the circumstances to be borne in mind by a judge on an application under that rule, said this (ibid. at 555G):***
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> > ***"…in the light of all the facts and circumstances both prior and sub-sequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."*** (per Sir Charles Newbold, P.)
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> 7) The object of ***the discretion to set aside is 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*** (**Shah v Mbogo [1969] EA 116,123 BC Harris J** and reiterated in **Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR**).

8) Setting aside judgement is a matter of the discretion of the Court and each court will establish what conditions need to be met in order for justice to be done. The Applicant in this case had to establish that:

a. She was not aware of the court case against her;

b. The judgement was irregular; and

c. She has a prima facie defence;

d. The application has been brought without undue delay.

9) The Applicant stated that she was never served with any pleadings, summons and even hearing notices to attend court in the matter. She swore in her affidavit that she has been out of the country for a long time and was ill as well. However, from the various affidavits of service on record, the process server, one Joseph Orata Kweyu severally served Fatina Munuve, Fatima Musungu, Rebecca Munuve, with the court documents, all whom he claimed were the Defendant's sisters-in-law. The trial court deemed the service proper and the Applicant has not provided any evidence to dispute that it was not her agents that received the documents. Having determined that the service was proper, it follows therefore that the judgement was a regular judgement.

10) Courts have severally held that where a regular judgement has been entered, the Court would usually not set aside the judgement unless it was satisfied that there arose triable issues which raised a prima facie defence that should go to trial. This was the holding in the case of **Patel v EA Cargo Handling Services Limited [1974] EA 75**. Annexure 'MTM6' is the copy of the Applicant's Draft Defence and Counterclaim. In it, she denies the encroachment onto the access road as alleged by the Plaintiff and that she was never invited to participate in the survey exercise that created the access road. She has alleged fraud on the part of the Plaintiffs and the District Surveyor and counterclaimed for the revocation of all the documents created by the County Surveyor and one Julius Manwari.

11) The line of defence proposed raises issues that are triable on the plain reading of the draft statement of defence and counter-claim. The Applicant annexed a copy of the mutation to her survey report marked as ***MTM4***. The mutation was for subdivision that created both parcels of land in dispute. At page 3 of that mutation is written that there is a 6meter road that runs parallel to her land connecting to the Respondents parcel of land. The Applicant provided a survey report which reported that at page 2 of the same mutation did not have a provision for the road. The surveyor added the Respondents were to be served with an already existing road and if the present road is created, it will take a portion of the Applicants road by 0.19ha. To the extent that the size of the road was not indicated on page 1 of the mutation raises a trial issue.

12) The Applicant prayed for stay of execution. The conditions for granting stay are provided under **Order 42 Rule 6 (2) of the Civil Procedure Rules** and also discussed in the case of **Butt vs. Rent Restriction Tribunal 1982] KLR 417.** The Applicant stated that the execution of the decree will not only lead to the destruction of her property but also reduce the acreage of her land from the original acreage at which she bought the land. She swears further that she will suffer substantial loss if the orders issued by this Court are executed. The reduction of size of land without compensation in this court's opinion demonstrate the Applicant shall suffer substantial loss.

13) In the case of James **Kamau & 42 others vs. Leonid Limited (2021) eKLR** the Court stated that:

> "***It is incumbent upon an applicant to demonstrate, within the application for stay pending appeal, that he stands to suffer substantial loss if stay is not granted. In other words, the applicant needs to inform the court exactly what loss he stands to suffer if stay is not granted so that the court may assess whether this loss meets the standard of substantial loss. Thus, evidence of such loss must be provided by the applicant, ordinarily within the affidavit in support of the application, and it is not for the respondent, or the court, to speculate on the loss the applicant stands to suffer if stay is not granted...***"

14) The Applicant brought this application on time (in respect to the prayer for of execution) hence fulfilling the condition of bringing the application without any unnecessary delay. The application was filed on the 10th of March, 2015, a month after the Notice to show cause was served upon the Applicant.

15) The Applicant has not offered any security neither has she submitted on the issue of security. The condition of providing security cannot be overlooked especially in this case where the matter has been in Court since 2015. The issue of security was discussed in the case of ***Victory Construction vs. BM (minor suing through next friend one PMM) 2019 eKLR*** where Odunga J. quoted the decision of the Court of Appeal in the case of ***Machira T/A Machira & Co Advocates vs East African Standard [2002] KLR 63*** where the Court of Appeal held that **"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal."**

16) Further, the orders sought by the Applicant are equitable in nature and he who comes to equity must do equity. The judgement in this case was made three years to the filing of this application. The Court having found that the Applicant was duly served with the summons to enter appearance, the delay in bringing this application has not been explained. From the Court record, the Respondents had taken several steps towards prosecuting the case and executing the judgement which steps involved costs expended. Thus for the consequence of their judgement being set aside, they are entitled to compensation for the costs already incurred. Therefore, I award them 2/3 of the already taxed costs of K. Shs. 81,280.

17) In light of the foregoing, I find the draft defence raises triable issues and that Applicant's application for stay and setting aside the judgement has merit as she has proved that substantial loss will occur in the event that execution of the decree occurs.

18) In conclusion, the application is allowed on terms stated herein that:

a. Judgement issued on the 19th of April,2018 be and is set aside;

b. The Decree dated 22nd May, 2018 is set aside;

c. The Draft Defence and Counterclaim is admitted as the Applicant's defence upon payment of the requisite Court fee within 7 days from the date of this ruling.

d. The opening of the road is stayed and the Applicant's demolished toilet not to be re-built until this suit is heard and determined

e. The Applicants to pay the Respondents thrown away costs of K.Shs. 54187- within 30 days from the date of this ruling. In default, execution shall issue

f. The costs of this application to the Plaintiff/Respondents in the cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 26TH DAY OF JANUARY, 2022.

A. OMOLLO

JUDGE