



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 242 OF 2009

NAFTAL NYABERI NYANGERERE.....PLAINTIFF/RESPONDENT

VERSUS

REBECCA KWAMBOKA MIYABA.....1ST DEFENDANT

ORANGI AMISI.....2ND DEFENDANT

AND

BENARD LEPARAN NAMISI.....APPLICANT

RULING

INTRODUCTION

1. On 14th February 2020, the intended/Applicant filed a Notice of Motion dated 14th February, 2020 seeking the following orders;
 - a. THAT this Honourable Court be pleased to set aside the *Ex-parte* Judgment delivered on 20th February 2015 and the suit be set down for hearing.
 - b. THAT this Honourable Court be pleased to order for the cancellation of the registration of the Plaintiff/Respondent as the registered owner of land Parcel NO. TRANSMARA/POROKO/221 and the same revert back to the deceased pending the hearing and determination of the suit.
 - c. THAT this Honourable court be pleased upon grant of prayer number 1 to have the Applicant herein be enjoined as the 3rd Defendant.
 - d. Costs of the suit be provided for.
2. The application is grounded on Sections 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11. The Applicant also swore an affidavit in support of his application on 7th October 2020.
3. In support of this application the Applicant averred that, there was no proper service of pleadings upon on the initial Defendants and the subsequent defendants. Further it was his contention that, the 1st and 2nd defendant were wrongfully enjoined to these proceedings without succession having been undertaken to appoint administrators of the estate of the late **Joseph Namisi Kiptek alias Namisi Joseph Kiptek** who died on 19th March 2011.
4. It is his averment that the Respondent through misrepresentation amended the Originating Summons to remove the name of the Applicant's Father and introduced the Defendants without succession being undertaken. To him, the Defendants were introduced to proceedings illegally since they were neither the registered proprietors nor legal representatives of his father.
5. He further averred that the Plaintiff lied to this court to the effect that he was in exclusive occupation of the suit property and has now has now commenced criminal proceedings for forcible detainer against the Defendants and the Applicant.
6. He contends that he has since obtained Grant of Letters of Administration *Ad litem* to enable him represent the estate of his late father hence prays that he be enjoined to defend the suit.

7. The Applicant's Application is opposed vide a Replying Affidavit dated 24th July, 2020 and filed in this court on 28th July, 2020 wherein the Respondent avers that he, vide an agreement dated 21st November, 1975 bought a portion of the suit property measuring 7 acres from the Applicant's father at a consideration of 7,000 and a further 6 ½ acres from a parcel of land neighbouring the suit property and belonging to the Applicant's father making a total of 13 ½ acres. On 14th June 1996, the Applicant's father did sign the Application for consent of Land Control Board.

8. Further he avers on 13th July, 2003 he signed an Affidavit confirming that he had sold the said portion of the suit property to the Respondent but was unable to transfer the same because he had charged the property to ICDC.

9. Subsequently, upon the Applicant's father failing to give him title, he filed this suit. According to him the Applicant's father indicated that he did not have any objection for him to have the title but died before he could effect the transfer.

10. He states that the Defendants who were strangers then appeared onto his portion of land claiming to be wife and children of the seller who had passed on.

11. He avers that the case was heard and judgement pronounced in open court and a lawful decree was extracted and served upon the defendants through the area Chief and the Land Registrar in order for him to remove the caution he had placed on the property. However, when the process server went to serve he was attacked by the Defendants and was rescued by police officers.

12. It is his contention that all times before the case came up for hearing service was effected upon the Defendants. He believes that the Applicant came with the 1st Defendant in 2009 when he was an adult and is a stranger to the suit property because his home is in Kisii.

13. He avers that the application does not have any merit because 11 years have since lapsed and that appointment of the Applicant as the Administrator is strange given that he appeared with the Defendant in the year 2009 when he had already bought the suit property.

14. The parties agreed to dispose of the Application by way of written submissions and the court directed them to do so. The Applicant filed his submissions on 19th November, 2020 while the Respondent filed his on 26th January, 2021.

ISSUES FOR DETERMINATION

15. Having considered that pleadings, the Notice of Motion rival affidavits and submissions the following issues arise for determination:

- i) Whether the ex-parte judgment dated 20th February 2015 should be set aside and a stay of execution of the decree granted.
- ii) Whether the applicant should be enjoined in this suit.

ANALYSIS AND DETERMINATION

16. Whether the Applicant is entitled to a stay of execution of the Ex-parte judgment dated 20th February 2015 and the said judgment set aside.

The principles for the setting aside of ex parte judgment were considered by the predecessor Court of Appeal for East Africa in *Mbogo v. Shah* (1968) EA 93, 95 referred to in *Pithon Waweru*, 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.*”**

17. Of relevance to this case is the first question of establishing the circumstances or reason advanced by the Applicant that would warrant me to exercise my discretion to set aside the *Exparte Judgment*. The object of this 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.

18. In this instant Application the Applicant has raised two reasons as justifiable reasons that this court needs to consider in exercising its discretion to set aside the Exparte Judgment dated 20th February 2015. The first reason is that the Defendants were not properly served with summons to enter appearance nor a hearing notice in order for them to attend court and defend the suit. The second reason is that the court was misled to allow the Respondent irregularly amend the Originating Summons to substitute his late father with the Defendants who were neither registered owners of the suit property nor legal representatives or administrators of his estate.

19. With respect to the first reason the Applicant avers that the Defendants including his late father were never served. In order to analytically determine whether the allegation is true or not, it is important to look at the court record especially the Affidavits of service filed therein. A keen look at the court's record, on the 2nd February, 2010, when the matter came up for the 1st mention before the Deputy Registrar, should that the Deputy Registrar directed the Process Server who swore an affidavit of service dated 5th December, 2008 to swear a further Affidavit giving the full name and address of the person he alleged to have witnessed him serve the Applicant's father, one Mr. Mangwa. The Process Server did file a Further Affidavit on 19th May, 2010 wherein he just amended the earlier Affidavit by giving the full names of the said witness but failed to provide an address as directed by the Deputy Registrar. In the said affidavit (one dated 5th December, 2009) he also gives an account of how he, in the course of the service, was attacked by the Applicant's father and his sons wherein he ran to

the area chief who rescued him, arrested the Applicant's father and caused him to sign the summons to enter appearance.

20. The Applicant in his Further Affidavit averred that there is no location called Mwitani Location. It can also be noted from the aforementioned Affidavit of service that the Process Server did not give the name and address of the area chief who if contacted would have controverted the Applicant's claim that the location quoted does not exist. From the foregoing it can clearly be said that the Applicant's father, who is indicated vide an attached death certificate to have died in 2011 during the pendency of this suit, was not properly served.

21. On the part of the Defendants in the amended Originating Summons, the Process Server consistently filed a similar Affidavit's quoting the same location which the Applicant has clearly stated it does not exist without the Respondent controverting. I therefore find the reason that the Respondent was not served is valid and is good enough to warrant me to set aside the Exparte Judgment.

22. On the second reason, the Applicant avers that the 1st and 2nd Defendants were wrongfully enjoined to these proceedings without succession having been undertaken to appoint administrators of the estate of the late **Joseph Namisi Kiptek alias Namisi Joseph Kiptek** who died on 19th March 2011. It is also his averment that the Respondent through misrepresentation amended the Originating Summons to remove the name of the Applicant's father and introduced the Defendants without succession being undertaken. It is his contention that the Defendants were introduced to the proceedings illegally since they were neither the registered proprietors nor legal representatives of his father. He contends that now that he has requisite authority vide a grant of letters of Administration, the Exparte Judgement should be set aside for the reason he has advanced and be allowed to defend the suit.

23. In order to determine whether this reason is sufficient to set aside the Exparte Judgment, there is need to look at Order 24 rule 4 (1) of the Civil Procedure Rules provides as follows;

"4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit. (emphasis mine)

24. Section 2 of the Civil Procedure Act defines a legal representative as follows;

"means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

25. The rule requires substitution of a Defendant with a party clothed with legal representation. It is therefore clear that in law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Law of Successions Act provides the procedure to be followed in the Application for such a grant, and the various forms a grant may take including letters of administration.

26. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

"When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution." (emphasis is mine)

27. It is in doubt whether the Respondent followed the aforesaid procedure before amending his Originating Summons to substitute the Applicant's father with the 1st and 2nd Defendants as legal representatives of the Applicant's father who was the initial Defendant. The Respondent was at liberty to take out citation proceedings against the 1st and 2nd Defendants as per the provisions provided in the Succession Act for the purposes of the proceedings in this case. He did not present any material to the Court that indeed the said defendants were legal representatives of the Applicant's late father nor did he demonstrate to the court that he had filed citation proceedings in that regard which allowed him to bring the forth the Defendants to defend the suit in place of the Applicant's father. It is therefore true as submitted as by learned counsel for the Applicant that the Defendant must have misled the court to enter a Judgment against defendants who were not legal representatives.

28. In his Judgment the learned judge was misled to place a responsibility on the defendants when in he ordered them to execute transfer documents to facilitate the transfer of the suit land to the Respondent a duty they cannot perform because the court was misled by the respondent to believe that the Defendants were the legal representatives of the estate of the Applicant's father. Since the Applicant has demonstrated that he has since obtained a limited Grant of Administration **Ad litem** and having established that the 1st Defendant and 2nd Defendants do not qualify to be regarded legal representatives of the Applicant's father, I find the reason advanced by the Applicant sufficient to warrant the setting aside of the Exparte Judgment.

Whether the Applicant can be enjoined to this suit as the 3rd Defendant.

29. Having established that the Applicant has a Grant of Letters of Administration **Ad Litem** hence meeting the requirements of order 24 Rule 4(1) of the Civil procedure rules, I find no other reason not to allow him to be enjoined to the suit which he has successfully and with sufficient reasons moved the court to set aside the Exparte Judgment therein.

30. In the light of the foregoing, I find merit in the application and I grant it and make the following orders:

- (a) I set aside the Exparte Judgment dated 20th January, 2015.
- (b) I allow the Applicants prayer seeking to be enjoined so as to defend this suit as a third Defendant
- (c) I however decline to grant the third prayer therein as the same shall be canvassed the hearing of the suit.
- (d) The Applicant is hereby directed to file a response to the Originating Summons within 14 days from the date hereof.
- (e) Parties are directed to maintain the status quo.

The costs of this application shall be in the cause.

Dated, signed and delivered at Kisii this 18th day of February 2021.

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J.M ONYANGO

JUDGE