REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND DIVISION

ELC NO. 555 OF 2015

PENINA MOKEIRA MWASI.....PLAINTIFF/RESPONDENT

-VERSUS-

EMILY KWAMBOKA MUMA.....DEFENDANT

CAROLINE NYABOKE NYABOGA.....1ST INTERESTED PARTY/APPLICANT

ROSE NYANCHAMA NYAATA.....2ND INTERESTED PARTY/APPLICANT

RULING

INTRODUCTION

1. On 25th June, 2020, the Interested Parties filed a Notice of Motion dated 18th June, 2020 seeking to be enjoined as interested parties. They also sought an order of this Honourable Court to vary, review and/or set aside a decree of this Honourable Court dated on 22nd February, 2017 which decree emanated from a consent dated 21st March, 2016.

2. In support of this Application the interested parties averred that they were not parties to this suit and did not sign the consent dated 21st March, 2016. They also averred that the consent was a forgery and was obtained by misrepresentation and deceit. They stated that the resultant decree is now being used by the Respondents in Succession Cause No. 66 of 2017 filed at Nyamira Chief Magistrate's Court. It is their contention that the Decree which included them as parties to the suit was adverse to them as it was mischievously crafted to disinherit them from the Succession Cause. Referring the court to the Plaint filed in this suit, they averred that only Emily Kwamboka Muma was sued as a Defendant. The Respondent sought an order of injunction to prevent her from interring the body of one Benson Okongo Nyaboka on land parcel No. EKERUBO SETTLEMENT SCHEME/32 (the suit property). They also referred the court to an Affidavit of Service that included the 1st Interested Party as a Defendant in the suit while it was clear in the mind of the Advocate for the Respondent that the 1st Interested Party was not a party to the suit.

3. The application is opposed by the Plaintiff/Respondent vide a Replying Affidavit dated 9th July, 2020 and filed in this court on 10th July, 2020. The Respondent avers that the application is an abuse of the consent dated 21st March, 2016 which was duly signed by all the parties including the Interested Parties and was thereafter filed and adopted as a decree of the court. He avers that the Applicants are seeking a review of an order of this court far too late in the day.

4. She denies the allegation by the Interested Parties that the consent was obtained by misrepresentation or deceit. She also denies that the consent was signed by persons who were not parties to the suit as the same was meant to resolve the dispute once and for all. It is her contention that the Interested Parties are relying on procedural technicalities as the real issue in contention is whether or not they endorsed the consent that gave rise to the decree they seek to be reviewed, varied or set aside by this Honourable Court. It is also her averment that if the Interested Parties were genuine in their claim that their signatures were forged, they ought to have lodged a complaint with the relevant authorities.

FACTUAL BACKGROUND

5. Before I delve into the merits of the application, I find it necessary to give a brief background of this suit.

6. The Plaintiff commenced this suit vide a Plaint filed in this court on 17th December, 2015 against Emily Kwamboka Muma, wherein he sought the following orders: -

a) *A* permanent injunction restraining the Defendant, Emily Kwamboka Muma, her agents and or servants from disposing, interring and or burying the body of Benson Okongo on land Parcel No. EKERUBO SETTLEMENT SCHEME/32.

b) Costs of the suit

7. Filed together with the plaint was a Notice of Motion application seeking the above-mentioned orders in the interim, pending the hearing and determination of the suit. A temporary injunction was granted on 18th December, 2015.

8. There is no dispute that the Defendant did not enter appearance and there is no Affidavit of Service confirming that she was served vide a letter dated 22nd April, 2016 addressed to the Deputy Registrar. Counsel for the Respondent stated that parties to the suit had consented in terms of the contents of the said letter. On 14th June, 2016 the matter was mentioned in the registry in the presence of a representative of the Respondent and in the absence of the Defendant. The matter was fixed for mention on 18th July, 2016 and a notice was to issue to the Defendant.

9. On 18th July, 2016, the matter came up for mention in the presence of counsel for the Respondent and in the absence of the Defendant. It is clear from the record of the court that there was no Affidavit of Service to confirm that the Defendant had been served with the mention notice as directed by the court on 14th June, 2016. That notwithstanding, counsel for the Respondent moved the court to adopt the consent in terms of the letter dated 22nd April, 2016 and the matter was marked as settled.

10. The Respondent's counsel then proceeded to draft a decree from the consent that had been adopted by the court. Thereafter, vide a letter dated 8th November, 2016 and filed in court on 8th February 2017, he forwarded the decree for the court's endorsement.

11. Upon learning what had transpired, the Applicants filed the instant application on 25th June 2020 seeking to be enjoined in the suit as Interested Parties. They also sought an order of this court to vary, review or set aside the consent and the resultant decree. The application has been opposed by the Respondent in the manner highlighted hereinabove. It is the said application that I have been called upon to determine.

ISSUES FOR DETERMINATION

12. The application seeks two major orders; an order setting aside the *ex parte* judgment and stay of execution of the decree and an order to be enjoined to this suit. Having considered the application, the response by the Respondent and the submissions filed by both parties, I deduce the following as the main issues for determination: -

(i) Whether the Applicants are entitled to the order of this court varying, reviewing or setting aside the decree extracted on 8th February, 2017.

(ii)Whether the Applicants should be enjoined to this suit as Interested Parties.

ANALYSIS AND DETERMINATION

a) Whether the Applicants are entitled to an order of this court varying, reviewing or setting aside the decree extracted on 8th February, 2017

13. The principles for the setting aside an order of the court 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. <u>The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10,</u> 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.***

14. The first question I must determine is whether the circumstances or reasons advanced by the Applicant warrant the exercise of my judicial discretion to set aside the *ex-parte* judgment**.** The object of the court's discretion to set aside is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

15. In the instant application, the Applicants have raised two reasons as justifiable reasons that this court needs to consider in exercising its discretion to set aside the *ex-parte* judgment dated 20th February 2015. The first reason is that the Defendants were not properly served with summons to enter appearance to enable them to enter appearance and defend the suit. The second reason is that the court was misled to allow the Respondent to 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.

16. On the issue of service, it is important to look at the court record especially the Affidavits of Service filed herein. A keen look at the court record, on the 2nd February 2010, when the matter came up for the first mention before the Deputy Registrar, shows that the Deputy Registrar directed the Process Server who swore the Affidavit of Service dated 5th December, 2008 to swear a Further Affidavit giving the full names and address of the person who witnessed him serve the Applicant's father, one Mr. Mangwa.

17. The Process Server did file a Further Affidavit on 19th May, 2010 whereby he 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 dated 5th December 2009, he also gives an account of how he was attacked by the Applicant's father and his sons when went to effect service. He depones that he ran to the area chief who rescued him, arrested the Applicant's father and caused him to sign the Summons To Enter Appearance.

18. The Applicant in his Further Affidavit avers that there is no location called Mwitanik Location. It can also be discerned from the aforementioned Affidavit of Service that the Process Server did not give the name and address of the area chief who would have shed light on the name of the location. From the foregoing, it is clear that the Applicant's father was not properly served.

19. With regard to the Amended Originating Summons, the Process Server consistently filed a similar Affidavit quoting the same location whose existence is in question. Against the foregoing background, I am persuaded that the Respondent was not served.

20. Turning to the second reason, the Applicants aver 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 his also their contention 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. The Applicants further contend that the Defendants were included in the proceedings illegally since they were neither the registered proprietors nor legal representatives of their late father. The 1st Applicant contend that now that she has the requisite authority vide a Grant of letters of Administration, the *ex-parte* judgement should be set aside so that he can be allowed to defend the suit.

21. In order to determine whether this second reason is sufficient to set aside the *ex-parte* 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)***

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

> ***"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".***

23. 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.

24. Section 54 of the said 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 a 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)***

25. It is in doubt whether the Respondent followed the aforestated 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.

26. The Respondent was at liberty to cite 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 before 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 Defendant to defend the suit in place of the Applicant's father.

27. 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. In his judgment the learned judge was misled to place 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 could 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.

28. In the case of **Flora Wasike v Destimo Wamboko (1988) eKLR** Hancox JA observed as follows:-

> *"Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them.....and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement that is contrary to the policy of the court .....or if the consent was given without sufficient material facts, or in general for a reason which*

would enable a court to set aside an agreement".

29. I agree with counsel for the Applicants that the consent herein was obtained through non-disclosure of material facts and deceit by introducing the 1st Interested Party to a suit in which she had not been sued. This practice is contrary to the policy of the court.

It is therefore my finding that the Applicants have established sufficient grounds for setting aside the consent judgment.

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

30. Having established that the 1st 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 reason to bar her from being enjoined to the suit which she has successfully applied to set aside.

31. In the light of the forgoing, I allow the application, set aside the consent judgment dated 20th January, 2015 and allow the Applicants prayer seeking to be enjoined as Defendants.

32. The Applicants are hereby directed to file a response to the Originating Summons within 21 days from the date hereof.

33. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF APRIL, 2021.

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J.M ONYANGO

JUDGE