



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**ENVIRONMENT AND LAND CASE NO. 164 OF 2012**

**BAIKIAMBA KIRIMANIA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**M'MAUTA NKARI.....DEFENDANT/APPLICANT**

**RULING**

This Ruling deals with two applications.

The 1st Application is dated 17th April, 2014 and seeks orders:-

1. ***THAT this Honourable Court be pleased to certify this application as urgent and hear it ex-parte in the first instance.***
2. ***THAT this Honourable Court be pleased to order stay of execution of the Decree/Judgement herein and all the subsequent orders thereto pending the inter partes hearing and determination of this application.***
3. ***THAT this Honourable Court be pleased to set aside the Judgment herein and all the subsequent orders thereto.***
4. ***THAT this Honourable be pleased to grant Defendant/Applicant leave to file his defence in this suit.***
5. ***THAT the annexed draft -Defence and Counter-claim be deemed as properly filed and served subject to payment of the necessary Court fees.***
6. ***THAT costs of this application be provided for.***

The application is supported by the affidavit of WILLIAM NTOMAUTA METHANGATHA and has the following grounds:-

1. ***The applicant is in the process of being evicted from the suit land in execution of the Decree herein.***
2. ***The suitland is a family Land and was owned and registered in the name of the applicant's father, the late ETHANGATHA KIRIMANIA.***
3. ***The Applicant was born on the Suitland has lived thereon through his life of 60 years and has no other land.***

4. ***The Plaintiff secretly, illegally and fraudulently caused the name of the Plaintiff's deceased father to be deleted from the register of the Suitland and replaced with that of the Plaintiff.***
5. ***The applicant and his family have extensively developed half of the Suitland.***
6. ***The Applicant failed to file his Defence herein out of an inadvertent and excusable mistake.***
7. ***The Applicant stands to be condemned unheard.***
8. ***The applicant shall suffer great irreparable damage if this application is not allowed.***

The 2nd Application is dated 28/05/2014 and seeks orders:-

1. ***That this Honourable Court be pleased to certify this application urgent and hear it ex-parte in the first instance.***
2. ***That this Honourable Court be pleased to issue an Order of Inhibition restraining any dealings whatsoever with Land Parcel No. ITHIMA/NKUNENE/40 pending the hearing and determination of this suit or until further orders of this suit.***
3. ***Costs of this application be provided for.***

The application is supported by the affidavit of WILLIAM NTOMAUTA M'ETHANGATHA, the applicant, and has the following grounds.

1. ***The plaintiff has secretly applied for Land Control Board Consent to transfer the Suitland to 3rd parties.***
2. ***On 27.05.2014 the Plaintiff in company of 3rd parties attended Igembe North Sub County Land Control Board meeting to obtain the necessary consent to transfer the suitland.***
3. ***The Plaintiff intends to transfer the Suitland to other parties to render this suit nugatory.***
4. ***There is need to have the Suitland preserved until this suit is heard and determined.***
5. ***The Plaintiff shall not suffer any prejudice at all if the order sought herein is granted.***

The parties filed Written Submissions. Whether to grant or not to grant orders sought in the 2nd application will depend on the determination of the 1st Application.

The applicant says that the Court has unfettered discretion to set aside a judgment in default of appearance and filing of defence.

The applicant blames the Court process server for having misled him. He admits that he was properly served. He claims that the process server advised him that he would wait for further information concerning the suit. He says that he is a rural person who had no knowledge of the Court processes.

The Plaintiff/ Respondent says that the Court has unfettered discretion in matters such as this but says that such discretion should be employed to enable it administer justice to all parties in a suit. The Plaintiff terms the allegations that the applicant was misled by the process server as unfounded. He terms the applicant as a pathological liar and ascribes this status to the applicant's failure to call the Court process server for cross-examination or to file an affidavit in support of his assertion.

The Plaintiff avers that the decree in this suit was executed in December, 2013 by a Court bailiff and the Defendant /Applicant was evicted from Land parcel No. ITHIMA/NTUNENE/40 long before he belatedly obtained stay orders on 23/04/2014.

Judgment in this matter was delivered on 19/09/2013. The apposite decree was effectively executed against the Defendant/Applicant in December, 2013. A Court bailiff, JAPHET R. NKONGE AUCTIONEERS, duly filed a return of the order.

The parties have filed a plethora of authorities in support of their Submissions. The authorities are good law in the circumstances in which the decisions contained therein were delivered.

In the Circumstances of this application, where the Judgment was delivered on 19.09.2013 almost 7 months before this application was filed and where the decree arising out of the apposite judgment had been successfully executed, I refuse to exercise this Court's discretion to set aside the apposite Judgment. **I, therefore, dismiss the application dated 17th day of April, 2014.**

**Having dismissed the application dated 17th day of April, 2014 , I find that the 2nd application, which seeks an order of inhibition restraining dealings in Land Parcel No. ITHIMA/NTUNENE/ 40 , lacks Merit. It is, therefore, dismissed.**

**Costs in both applications are awarded to the Respondent.**

**It is so ordered.**

Delivered in open Court at Meru this *30th day of March, 2016* in the presence of:-

CC: Lilian

Harun Gitonga for the Applicant

Kitheka h/b Carlpeters Mbaabu for the Respondent

**P. M. NJOROGE**

**JUDGE**