



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ENVIRONMENT AND LAND COURT DIVISION

ELC CASE NO. 62 OF 2014

LUCY MUTHONI KAGWITHI.....PLAINTIFF

VERSUS

JOHNSON IRERI NJIRU.....1ST DEFENDANT/APPLICANT

JACINTA NGUNGI NDWIGA....2ND DEFENDANT/APPLICANT

RULING

On 27th July 2012 the plaintiff/respondent filed this suit against the defendants/applicants seeking an order that they vacate his land KYENI/KIGUMO/6513 or they be forcibly evicted therefrom. She also sought an order for costs and any other relief that this Court may deem fit to grant. The suit was premised on the plaintiff/respondent's pleading that whereas she is the registered and absolute owner of the land parcel KYENI/KIGUMO/6513 (the suit land) having bought it from the previous owners **JANET WAMBUGI NJAGI, FRANCIS MWANIKI MUTUA, ANSELIMU NJAGI KAMANJA** and **NICHOLAS M. MUTUA** vide a sale agreement dated 14th July 2011, the defendants/applicants had illegally trespassed onto the said land.

The record shows that the two defendants/applicants filed separate defences but through the same advocate namely **MOMANYI GICHUKI & CO. ADVOCATES**. The 1st defendant/applicant filed his defence on 28th July 2012 while the 2nd defendant/applicant filed her defence on 5th October 2012. Both defences are mere denials of the plaintiff/respondent's claim.

After several abortive hearings, the case came up for trial on 16th July 2014 when Ms Ndorongo advocate holding brief for Mr. Momanyi advocate for the defendants/applicants sought a further adjournment on the ground that Mr. Momanyi was un-able to trace his clients. Mr. Ithiga advocate for the plaintiff/respondent strongly opposed the application for adjournment and in doing so, referred the Court to previous proceedings in which counsel for the defendants/applicants had failed to comply with Court orders. The Court considered all the above and rejected the application for adjournment whereupon the plaintiff/respondent proceeded to testify in support of her case and in a reserved judgment delivered on 25th September 2014, this Court entered judgment for her as prayed in her plaint.

On 13th November 2014, the defendants/applicants filed a Notice of Motion citing **Section 3A of the Civil Procedure Act, Order 22 Rule 25 and Order 10 Rule 11 of the Civil Procedure Rules** and all enabling provisions of legislation seeking the following orders:-

1. *Spent.*

2. *Spent.*
3. *That there be a stay of execution of the judgment entered on 25th day of September 2014 till the hearing and determination of EMBU CHIEF MAGISTRATE'S CIVIL SUIT No. 248 of 2011.*
4. *That the judgment entered on 25th day of September 2014 be set aside together with all consequential orders arising therefrom.*

The application is founded on the grounds set out therein and supported by the affidavit of **JACINTA NGUNGI NDWIGA** the 2nd applicant herein sworn on behalf of the 1st defendant/applicant and from the contents of that affidavit, it is the defendants/applicants case that although they have been living on the suit land since 2008 the same having been bought by their father, they have now been served with a notice to vacate the same or be forcefully evicted therefrom. This is notwithstanding the fact that they were not aware about the hearing of this case. The 2nd defendant/applicant depones further that she is the wife of the 1st defendant/applicant who is the son of one **NJIRU MUCHERE KARAGO** who had entered into an agreement regarding the sale of land parcel No. KYENI/KIGUMO/1450 with one **JANET WAMBUGI NJAGI** on 22nd March 2008. By that agreement the said **NJIRU MUCHERE KARAGO** was to take possession immediately and that the defendants/applicants set up a home on that land. Unknown to both the defendants/applicants and **NJIRU MUCHERE KARAGO**, the said **JANET WAMBUGI NJAGI** had in fact sub-divided the said land into KYENI/KIGUMO/6513 and 6512 which she had transferred to **LUCY MUTHONI KAGWITHI** and **FRANCIS MUTUA** respectively and so **NJIRU MUCHERE KARAGO** filed **EMBU CHIEF MAGISTRATE'S CIVIL CASE NO. 248 of 2011** against **JANET WAMBUGI NJAGI**. Then in 2012, the plaintiff/respondent filed this suit against the defendants/applicants but the summons were served upon **NJIRU MUCHERE KARAGO** who took them to his lawyers to file a defence. However, the defendants/applicants were not informed about this case and only learnt about it when they were served with the Notice to give vacant possession of the suit land. It is their case that **EMBU CHIEF MAGISTRATE'S COURT CIVIL CASE No. 248 of 2011** has a bearing on this suit and their advocate on record did not have their contact and therefore did not inform them of the hearing date.

The application is opposed and the plaintiff/respondent **LUCY MUTHONI** has filed a replying affidavit in which she has deponed, inter alia, that both defendants/applicants entered appearances and filed their defences through the firm of Momanyi Gichuki advocate and the case came up for hearing on 16th July 2014 when Miss Ndorongo advocate holding brief for Mr. Momanyi advocate sought an adjournment which was rejected and the trial proceeded culminating in the judgment sought to be set aside. The defendants/applicants cannot now claim that they were not aware about this case when all Court processes were being served upon their advocate who appeared in Court more than three times on their behalf. The defendants/applicants have not appealed against the judgment and she is not a party to the sale agreement between **NJIRU MUCHERE KARAGO** and **JANET WAMBUGI NJAGI** neither is she a party to **EMBU CIVIL CASE NO. 248 of 2011** whose plaint has not even been annexed to this application. Further, that the defendants/applicants have previously been served with notices to vacate the suit land but have never challenged the same and neither have they challenged the transfer of the suit land or questioned the validity of the title. That the defendants/applicants were given all the opportunity to be heard and if their advocate failed to notify them she cannot be blamed. The plaintiff/respondent therefore sought the dismissal of the application.

Submissions have been filed both by the firm of Momanyi Gichuki Advocates for the defendants/applicants and Njeru Ithiga Advocates for the plaintiff/respondent.

I have considered the application, the parties affidavits and annexures thereto as well as the submissions by counsel.

I must start with the issue taken up by counsel for the plaintiff/respondent that this application is brought under the wrong provisions of the law and ought to have been brought under **Order 12 Rule 7 of the Civil Procedure Rules** and not under **Order 10 Rule 11**. That may be so but it is clear from the provisions of **Order 51 Rule 10 (2) of the Civil Procedure Rules** that an application shall not be defeated simply because it is founded under the wrong provisions of the law. **Article 159 of the Constitution** also cures that.

There are two remedies sought in this application being:-

1. ***Stay of execution of the judgment dated 25th September 2014 till the hearing and determination of EMBU CHIEF MAGISTRATE'S COURT CIVIL CASE No. 248 of 2011.***
2. ***Setting aside of the judgment dated 25th September 2011 together with all consequential orders arising therefrom.***

Essentially therefore, the core remedy here is to set aside the judgment dated 25th September 2011. This Court cannot make any orders relating to **EMBU CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 248 of 2011** for the simple reason that the parties herein are not parties in **EMBU CHIEF MAGISTRATE'S COURT CIVIL CASE No. 248 of 2011** which involves **NJIRU MUCHERE KARAGO** and **JANET WAMBUGI NJAGI**. This Court would have no basis in making orders affecting another suit at the behest of parties who are strangers to the same.

The Court has a wide discretion in setting aside a judgment obtained ex-parte. That power, however, is intended to avoid injustice or hardship resulting from in-advertence or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice – ***MBOGO VS SHAH (1968) E.A 93***. The main concern is to do justice to the parties. Where the judgment sought to be set aside is regular, the Court will not normally set it aside unless it is satisfied that there is a defence on the merit which need not necessarily be a defence that will succeed but one that raises triable issues. The Court may even consider any issues raised by affidavits. The Court should always remember that parties who have expressed an interest to be heard in their case should be given an opportunity to do so and that to deny a party a hearing should be the last resort of the Court particularly where the other party can adequately be compensated by an order of costs. However, where the judgment sought to be set aside is an irregular judgment obtained without proper service of summons, then the Court will be obliged to set it aside ex debito justitiae.

In determining this application therefore, this Court will look for the following:-

1. ***Was there proper service of the summons and plaint***
2. ***Was the judgment sought to be set aside regular or irregular***
3. ***Should the judgment be set aside with or without conditions?***

In paragraph 14, 15, 16 and 17 of her supporting affidavit, the 2nd defendant/applicant has deponed as follows:-

14 ***“That our father NJIRU MUCHERE KARAGO was served with the summons which he took to his lawyers who filed defence”***

15 ***“That unfortunately, we were not informed of the development”***

16 ***“That the 1st respondent and I came to know of this case when we were served with Notice to give vacant possession”***

17 ***“That all through, we have never been informed of any hearing date”***

Among the annexures to that supporting affidavit is the affidavit of **DANCAN MOKAMBA** who works with the firm of Momanyi Gichuki & Company Advocates who are on record for the defendants/applicants. In that affidavit (annexture JNN 5) **DANCAN MOKAMBA** has deponed as follows in paragraphs 3 to 9:-

3 ***“That I know the late NJIRU MUCHERE KARAGO”***

4 ***“That the said NJIRU MUCHERE KARAGO filed EMBU CMCC No. 248 of 2011 through our firm”***

5 ***“That sometime in the year 2012, the said NJIRU MUCHERE KARAGO came to our offices but it was only the secretary who was in the office”***

6 ***“That the said NJIRU MUCHERE KARAGO called me and informed me that he had been served with summons in respect of his children and also in respect of the land in this case”***

7 ***“That I told him to leave the papers with the secretary”***

8 ***“That we later prepared a defence”***

9 ***“That the said NJIRU MUCHERE KARAGO did not leave the contacts of the applicants”***

What comes out from all the above is that the defendants/applicants were not served with the summons and plaint in this case. I have looked at the record herein to find out on whom the summons and plaint were served and it is clear that there is no affidavit of service showing that the defendants/applicants were served. This Court can therefore only conclude that the summons were served upon **NJIRU MUCHERE KARAGO** who took them to the offices of Momanyi Gichuki Advocates who, without even confirming the details and contacts of the defendants/applicants, proceeded to file defence on their behalf. Indeed that explains why the said defences are bare denials of the claim yet the supporting affidavit is quite exhaustive. That would also explain why the defendants/applicants counsel Mr. Momanyi sought an adjournment on 16th July 2014 claiming that he could not contact his clients and also why he could not file their statements. Simply put, counsel filed defences even without receiving instructions from the defendants/applicants. That was un-professional. I shall revert to that later in this judgment.

It is clear from the record herein that the defendants/applicants were infact never served with any summons to enter appearance and file defence and that the firm of Momanyi Gichuki Advocates filed the defence only upon receipt of the summons from a third party. The defendants/applicants were therefore not aware about this case until they were served with notices to vacate the suit land. The judgment dated 25th September 2014 was therefore irregular as the defendants/applicants were not aware about this suit and did not give any instructions to the firm of Momanyi Gichuki Advocates. That judgment will therefore be set aside ex debito justitiae

Having said so, the conduct of Mr. Momanyi advocate for the defendants/applicants is clearly not above board. As an officer of this Court, he owes a duty both to his clients and to the Court. He deliberately mis-led the Court on 26th November 2013 by asking for two weeks within which to file their statements in compliance with the provisions of the ***Civil Procedure Rules*** yet, as his own employee Mr. Mokamba has deponed in paragraph 9 of his affidavit, their firm did not even have the contacts of the defendants/applicants. That was dishonest on his part. He also filed a defence on behalf of the parties without even taking instructions from them. That was not only mischievous but was also calculated to mislead the Court. I have toyed with the thought of ordering him to personally meet the costs of this application. For to-day, however, I shall not take that route but I must express my displeasure at counsel's conduct and a reprimand will do for now bearing in mind that the plaintiff/respondent's counsel is himself not entirely blameless having served a stranger to these proceedings.

Ultimately therefore, this Court allows the defendants/applicants Notice of Motion dated 13th November 2014 in the following terms:-

1. ***The judgment dated 25th September 2014 and all consequential orders are hereby set aside.***
2. ***Each party shall meet their own costs.***

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling delivered, dated and signed this 13th day of May 2016 in open Court.

Mr. Ithiga for the Plaintiff/Respondent present

Mr. Momanyi for the Defendant/Applicant absent

B.N. OLAO

JUDGE

13TH MAY, 2016