



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 114 OF 2014

PETER NJUGUNA GITAU.....PLAINTIFF

VERSUS

AGNES MUTHONI NYAGA.....1ST DEFENDANT

MARK KABUTE.....2ND DEFENDANT

LEWIS KABUTE.....3RD DEFENDANT

MERCY WAWIRA.....4TH DEFENDANT

RULING

The Respondent herein (**PETER NJUGUNA GITAU**) had sued the Applicants (**AGNES MUTHONI NYAGA, MARK KABUTE, LEWIS KABUTE** and **MERCY WAWIRA** (1st to 4th Applicants respectively) seeking a declaration that they are illegal trespassers on land parcel No. GICHUGU/SETTLEMENT/SCHEME/232 (the suit property) and that they or any other beneficiary of the Estate of the late **CYRUS NYAGA KABUTE** are not entitled to remain, enter, trespass or in any way interfere with the respondent's occupation of the same. He also sought an order of permanent injunction to restrain the applicants or any other beneficiary of the Estate of the late **CYRUS NYAGA KABUTE** from cultivating, sub-dividing, entering, trespassing onto the said suit property and an order for their eviction therefrom and demolition of their structures thereon as well as an order for costs.

The applicants resisted the claim and in a joint statement of defence pleaded, inter alia, that the sale of the suit property by Housing Finance Company of Kenya was fraudulent and in the subject of a pending case in the Court of Appeal being Civil Appeal No. 6 of 2008. It was further their defence that the respondent had conspired with the Housing Finance Company of Kenya to defraud the late **CYRUS NYAGA KABUTE** of the suit property. The applicants therefore denied being trespassers on the suit property adding that in fact this suit is res-judicata in view of **WANGURU SPMCC No. 40 of 2011**.

The suit first came up for hearing on 5th March 2015 when the applicants' counsel Mr. Ndegwa sought an adjournment on the ground that he had just come on record. The case was by consent put off to 23rd April 2015 when it was adjourned because Mr. Ndegwa was indisposed. When it next came up for hearing on 29th September 2015 Mr. Nganga holding brief for Mr. Ndegwa sought an adjournment on the ground that Mr. Ndegwa needed time to get some documents and also to amend the defence. Notwithstanding the very strenuous objection by Mr. Ngigi advocate for the respondent, this Court granted the applicants a further adjournment and leave to file and serve their defence within seven (7) days. The Court made the following order:-

“In the circumstances, I grant the defendant leave to file and serve the amended defence within 7 days from today with corresponding leave to the plaintiff.

Thereafter, hearing to proceed on 12th October 2015. Costs to plaintiff. Defendant meets Court adjournment fees”

The import of the above order was therefore that the applicants were granted leave to file and serve their amended defence within seven (7) days from 29th September 2015 and further, the hearing date of 12th October 2015 was fixed with the consent of both parties.

On 12th October 2015 when the case came up for hearing, there was no appearance either by the applicants or their counsel Mr. Ndegwa. Mr. Ngigi advocate for the respondent addressed the Court saying he was ready to proceed. He stated as follows:-

“The hearing date was taken by consent. I am ready to proceed with the plaintiff’s case. The defendant did not file and serve any defence. That was just an excuse. Even the defendants are not present”

Having confirmed the above, the Court allowed the respondent to prosecute his case and in a reserved judgment delivered on 27th November 2015, proceeded to enter judgment for the respondent as per his plaint giving the applicants six (6) months from the date of service upon them of the decree herein to remove their structures from the suit property or be evicted therefrom.

The applicants by their Notice of Motion dated 13th February 2016 and which is the subject of this ruling have now moved this Court seeking the following orders:-

(a) Spent

(b) Spent

(c) Spent

(d) Spent

(e) That the judgment entered on 27th November 2015 as against all the defendants/applicants be and is hereby set aside

(f) That the defendants/applicants filed defence be set down for hearing.

(g) That the costs of this application be in the cause.

The application is based on the grounds set out therein and supported by the affidavit of **AGNES MUTHONI NYAGA** the 1st applicant. From what I can glean from the said application and the supporting affidavit and supplementary affidavit, the applicants’ case is that their advocate was not served with the hearing notice when the case came up for hearing on 12th October 2015 and therefore the applicants were not given an opportunity to defend themselves. That the applicants had filed their defence which is in the Court file and they stand to suffer irreparable harm and loss if they are evicted from the suit property which has been their home for 40 years and it is therefore just and equitable that they be allowed to adduce evidence in their defence. That their advocate Ndegwa Njiru handled this case in a **“lackluster and un-professional manner”** and they are in the process of taking legal action against him since he did not communicate with them about the hearing date and this Court has the power to set aside the judgment.

In opposing the application, the respondent filed a replying affidavit in which he deponed, inter alia, that the applicants’ application is full of falsehoods as the hearing date of 12th October 2015 was taken by consent yet there was no appearance by either the applicants or their advocate and further that previous

suits filed by the late **CYRUS NYAGA KABUTE** with regard to the suit property have all been dismissed and their complaint should be addressed to their advocate.

Submissions have been filed both by the respondent's advocates **ROBERT NDUBI & COMPANY** as well as the firm of **SAID WANJA & NYANGAYO** advocates who are now on record for the applicants.

I have considered the application, the rival affidavits and submissions by counsels.

This is an application to set aside the judgment delivered on 27th October 2015 and it is settled law that a Court has the discretion to set aside an ex parte judgment. In the case of **SHAH VS MBOGO & ANOTHER 1967 E.A 116**, it was held as follows:-

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in-advertence 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 cause of justice” emphasis added.

And in the case of **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75** the Court added that the nature of the case should be considered and the defence, if any should also be considered. Where there is a regular judgment, the Court will not usually set it aside unless it is satisfied that there is a defence on the merits. The Court in the **PATEL** case (supra) went on to state that a defence on the merits does not mean a defence that must succeed but rather, a triable issue that raises a prima facie defence which should go to trial for adjudication. See also the cases of:-

- 1. D.N VS ANAND 1955 22 E.A.C.A 48**
- 2. MOHAMED VS SHOKA 1990 K.L.R 463**
- 3. SEBEI DISTRICT ADMINISTRATION VS GASYALI 1968 E.A 300** and
- 4. TREE SHADE MOTORS LTD VS D.T DOBIE 1995-98 E.A 324** among others.

The principles that can be summarized from those cases are that the Court has unfettered discretion to set aside an ex-parte judgment but in so doing, it must take into account whether there is a defence on the merits, the explanation given by the applicants and the prejudice, if any, that will be caused to the other party. Each case must of course be considered on its particular circumstances.

From the grounds set out in the Notice of Motion and the 1st applicant's supporting affidavit, it is the applicants' case that neither they nor their advocate then on record were aware of the hearing date. In the first ground of the application, it is stated as follows:-

“That neither the defendants/applicants herein nor their previous Advocate was served with a hearing notice for the ex-parte hearing that took place on the 17th day of October 2015”

And in paragraph 18 of the supporting affidavit, the 1st applicant has deponed as follows:-

“That I am further advised that the plaintiff/respondent proceeded for hearing ex-parte on 12th October 2015 without satisfying the mandatory provisions of the Civil Procedure Rules and therefore was bad in law as my previous advocate and I were never served with a hearing notice in the matter”

The record shows that when counsel for the parties appeared before me on 5th March 2015, they informed the Court that they had complied with all the necessary legal procedures and were ready to take a hearing date. More significantly and as already indicated above, the hearing date of 12th October 2015 was taken by consent of counsel and there was therefore no need for any hearing date to be served on the applicant's counsel. If there was any mistake or error on the part of the applicants' counsel for his failure

to appear on the hearing date, the Court would have expected to be informed of why there was no appearance by counsel or the applicants. Courts are generally ready to accommodate parties where there is a mistake by counsel - ***MURAI VS WAINAINA (No. 4) 1982 K.L.R 38.*** However, there has been no attempt in the circumstances of this case by counsel then on record, to demonstrate that there was any excusable mistake or error on his part which should not be visited on the applicants. How then is this Court expected to exercise its discretion in favour of the applicants bearing in mind that they have falsely alleged that their advocate was not aware about the hearing date which was in fact taken by consent? What was so difficult about Mr. Ndegwa then advocate for the applicants swearing an affidavit of any excusable error on his part that led to the case proceeding to hearing ex-parte on 12th October 2015 yet he so readily filed a consent placing the firm of **SAID WANJA & NYANGAYO** Advocates on record for the applicants? This Court can only conclude that there was an attempt by the applicants to obstruct or delay this case and that would not entitle them to the exercise of this Court's discretion in their favour. Where a party is not candid, as is now clear from the circumstances of this case, such conduct deprives him of any equitable relief from this Court.

This Court has nonetheless proceeded to consider the defence filed by the applicants. It is instructive to note that despite this Court's orders of 29th September 2015 directing the applicants to file their amended defence within seven (7) days, no such defence had been filed by 12th October 2015 when the hearing proceeded ex-parte. None has been filed to-date.

I have considered the applicant's defence dated 27th May 2014. It questions the propriety of the sale by public auction of the property by Housing Finance Company of Kenya to the respondent and alleges fraud and conspiracy to defraud the late **CYRUS NYAGA KABUTE** of the suit property. The applicants also deny that Court of Appeal case No. 6 of 2008 relating to the suit property was finalized and pleads that in fact it is still pending. A perusal of the record herein shows that the late **CYRUS NYAGA KABUTE** had filed **NAIROBI HIGH COURT CIVIL CASE No. 4610 of 1990** seeking to stop Housing Finance Company of Kenya from selling the suit property and by a ruling delivered by **E.M. GITHINJI J.** (as he then was) on 10th July 1996, the Judge allowed the said Company to sell the suit property which had been given as security for a loan. An appeal against that ruling was dismissed by the Court of Appeal in Civil Appeal No. 158 of 1996 on 14th October 1997. Another application filed in **EMBU HIGH COURT CIVIL CASE No. 149 of 2008** by the late **CYRUS NYAGA KABUTE** also seeking to stop the said Housing Finance Company of Kenya and two others from transferring the suit property was again dismissed with costs by **W. KARANJA J.** (as she then was) on 13th October 2010. Therefore, given all the above, the applicants' defence in which they allege fraud in the manner in which the suit property was sold cannot raise any triable issues as the same have been canvassed upto the Court of Appeal. It cannot therefore be open to this Court to order the Police to investigate and ascertain the validity of the respondent's ownership of the suit property as sought in the defence.

Ultimately therefore, I find no merit in the applicants' Notice of Motion dated 13th February 2016 seeking the setting aside of this Court's judgment entered on 27th November 2015. The same is accordingly dismissed with costs.

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Ruling dated, delivered and signed in open Court this 19th day of August, 2016

Mr. Nyangayo for Applicant present

Mr. Macharia for Mr. Ndubi for Respondents present.

B.N. OLAO

JUDGE

19TH AUGUST, 2016