



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1655 OF 1996**

**MOUNT KENYA INVESTMENT LIMITED ..... PLAINTIFF**

**V E R S U S –**

**ALLAN NG'ETHE.....1<sup>ST</sup> DEFENDANT**

**MWANGI GAITHO..... 2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated 20<sup>th</sup> September 2011 in which the City Council of Nairobi, the 3<sup>rd</sup> defendant herein seeks for the following orders:

- 1. This application be certified as urgent and the same be heard ex parte in the first instance for purposes for prayer (2) below.***
- 2. There be a stay of execution of the judgment entered on 4<sup>th</sup> February 2011 and/or decree issued against 3<sup>rd</sup> defendant herein on or about 13<sup>th</sup> May 2010 pending the hearing and determination of this application inter partes on such date as may be ordered by the court or until further orders of the court;***
- 3. There be a stay of execution of the judgement entered on 4<sup>th</sup> February 2011 and/or decree issued against 3<sup>rd</sup> defendant herein on or about 13<sup>th</sup> May 2013 pending the hearing and determination of this application;***
- 4. The judgement entered on 4<sup>th</sup> February 2011 and/or decree issued against 3<sup>rd</sup> defendant herein on or about 13<sup>th</sup> May 2010 be and are hereby set aside and all orders or proceedings subsequent thereto be vacated;***
- 5. The time within which the 3<sup>rd</sup> defendant may file its defence herein be enlarged and the 3<sup>rd</sup> defendant be granted leave to file its defence in terms of the copy annexed to the supporting affidavit hereof out of time within such period of time as the court may order;***
- 6. The costs of this application be provided for.***

2. The motion is supported by supporting and supplementary affidavits of Aduma J. Owuor. When served with the motion Mt. Kenya Investment Ltd, the plaintiff herein, filed the replying and further

affidavits of Eliud Matu Wamae to oppose the motion. Mr. Justice Onyancha gave directions to have the aforesaid motion disposed of by written submissions. At the time of writing this ruling, the 3<sup>rd</sup> defendant was the only party who had filed submissions.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the submissions filed by the 3<sup>rd</sup> defendant. It is the submission of the 3<sup>rd</sup> defendant that Mount Kenya Investment Ltd, obtained judgment in the sum of ksh.80 million plus costs and interest against the 3<sup>rd</sup> defendant in default of appearance and defence. The 3<sup>rd</sup> defendant further pointed out that the plaintiff issued a notice to execute the decree indicating the total decretal amount owing as of 9.9.2011 to be ksh.220,141,338/=. The 3<sup>rd</sup> defendant avers that it was never served with the pleadings and summons nor was it given a right of hearing. On the basis of the above reasons, the 3<sup>rd</sup> defendant has beseeched this court to set aside the *exparte* judgment. It was argued that the 3<sup>rd</sup> defendant has a good and strong defence against the plaintiff's claim. A draft defence was annexed to the supporting affidavit. The 3<sup>rd</sup> defendant is empathetic it first came to learn of the existence of this suit on 29.3.2011, when it was served with the notice of execution of the decree. It is also stated by the 3<sup>rd</sup> respondent that this court was misled to believe that service had been properly effected upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendants thereby granting the *exparte* default judgment.

4. In his replying and further affidavits Eliud Matu Wamae went in great detail to outline the chronology of events leading to entry of judgment in default of appearance and defence. It is said that this suit was initially filed against Allan Ngethe and Mwangi Gaitho the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. In the aforesaid suit, the plaintiff sought for interalia, the eviction of the duo from the plaintiff's unsurveyed plot 'A' at Kahawa West, Nairobi and for damages for trespass. The record shows that the plaintiff obtained an interim order of injunction on 23/7/1996 in which the City Council surveyor was ordered to show the parties their respective plots. It is the plaintiff's submission that since we had only one city council in Kenya by the time, the Judge who issued the order must have been referring to the 3<sup>rd</sup> defendant. It is said pursuant to the orders issued on 23<sup>rd</sup> July 1996 Nairobi City Council surveyors visited the plaintiff's plot. In view of the aforesaid it is the submission of the plaintiff that the 3<sup>rd</sup> defendant had knowledge of the existence of this suit since July 1996. The plaintiff further pointed out that it successfully sought for leave to amend the plaint to enjoin the City Council of Nairobi as a 3<sup>rd</sup> defendant *vide* the summons dated 25-02-2002. Leave was granted on 22.2.2005 and thereafter the plaint was amended and filed in court on 04.03.2005 thus enjoining the 3<sup>rd</sup> defendant to this suit. The plaintiff further argued that service of the amended plaint and summons were effected upon the 3<sup>rd</sup> defendant's director of legal affairs M/s M. N. Ng'ethe who in turn acknowledged receipt by signing, dating and stamping on the reverse. It is said that the firm of Nyakundi & Co. Advocates entered appearance on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants but the 3<sup>rd</sup> defendant did not file an appearance nor a defence prompting the plaintiff to apply for an interlocutory judgement in default of appearance against the 3<sup>rd</sup> defendant. The suit was fixed for formal proof on 26.10.2009 and a hearing notice served upon M/s M. N. Ng'ethe who is alleged to have endorsed her signature on the reverse thereof. On 26.10.2009 the suit proceeded to hearing as a formal proof before Justice Onyancha who eventually gave judgement in favour of the plaintiff on 04.02.2010. The plaintiff beseeched this court to find that the 3<sup>rd</sup> defendant was properly served hence the motion should be dismissed.

5. In response to the replying affidavit of Eliud Matu Wamae, the 3<sup>rd</sup> Defendant, filed the further affidavit of Aduma Awuor. The 3<sup>rd</sup> defendant denied it was served with the application for amendment. It was pointed out that the affidavit of service marked as EMW5 annexed to the replying affidavit of Eliud Matu Wamae was fatally defective for want of particulars. It is said the same lacks the signing and stamping at the back as had been deposed in the body. It is submitted that the affidavit of service was false and cannot therefore be relied upon as proof of service. The 3<sup>rd</sup> defendant further argued that the purported service upon one Mr. Mwakiwiwi was defective in that he was not authorised to receive court process. The 3<sup>rd</sup> defendant further denied giving instructions to M/s Njogu & Co. to act for it in this matter and went further to state that if that was true then the plaintiff could not have purported to serve directly the

City Council of Nairobi. The 3<sup>rd</sup> defendant also raised objections against the affidavit of service of G. K. Meenye Advocate and attached to the affidavit of Eliud Matu Wamae and marked as EMN8 saying that the same was defective for lacking necessary particulars like the signing and stamping at the back as has been deposed in the body. The 3<sup>rd</sup> defendant alluded that the affidavit of service could be false hence cannot be relied upon as proof of service. Eliud Matu Wamae filed a further affidavit to respond to the supplementary affidavit of Aduma Owuor. He averred that the affidavits of service were competent and were in accordance with the provisions of Order 5 rule 3 of the Civil Procedure Rules, 2010. The plaintiff was emphatic that the amended plaint and the summons to enter appearance were effected upon the 3<sup>rd</sup> defendant which accepted service on 29.5.2008 through its then director of legal service affairs Mr. M. N. Ng'ethe.

6. The 3<sup>rd</sup> defendant has categorically denied from the beginning that it was served with the summons to enter appearance. The plaintiff has of course given a detailed explanation to show that the 3<sup>rd</sup> defendant was actually served. The 3<sup>rd</sup> defendant has attacked the credibility and competency of the affidavit of service of G. K. Meenye which is attached to the replying affidavit of Eliud Matu Wamae as EMW8. It is said the same contains mere averments but the actual proof of service through signing and stamping as averred have not been demonstrated. I have carefully examined the copy of the summons to enter appearance attached to the same affidavit and marked as EMW7. Though in the affidavit of service the deponent avers that M/s M. N. Ng'ethe acknowledged receipt of the summons to enter appearance by signing and stamping at the reverse of the summons to enter appearance, there is no evidence of such signature nor stamp. I have perused the copy of the summons to enter appearance attached to the further affidavit of Eliud Matu Wamae and marked as EMW12 and it would appear there is some signature and a stamp which is not clear. The 3<sup>rd</sup> defendant has also raised several queries on the genuinity of the affidavits of service filed herein. On my part I do not have doubt on the veracity of the averments of what is deposed in the affidavit of service. What I am not sure is whether the signature appended at reverse of the summons to enter appearance belonged to M.N. Ng'ethe as alleged. I am not also sure whether the mark which is noted at the reverse of the aforesaid summons belong to the 3<sup>rd</sup> defendant. I have already stated that the mark which is alleged to be a stamp is not legible.

7. I have therefore entertained some doubt as to whether service was actually effected upon the 3<sup>rd</sup> defendant.

8. The other serious submission which the 3<sup>rd</sup> defendant has made is that it has a good and strong defence against the plaintiff's claim. The plaintiff did not deem it fit to respond to this assertion. I have on my part examined the draft defence annexed to the affidavit of Aduma Awuor and I am satisfied the same raises very serious questions of fact and law. The draft defence expressly states that at the trial the 3<sup>rd</sup> defendant will be able to show that the letter of allotment given to the plaintiff was conditional on issuance of title, prompt payment rates and development of the land. It is alleged that the plaintiff did not meet some of those conditions prompting the 3<sup>rd</sup> defendant to repossess the same in exercise of its statutory duty. Where the court is satisfied that the applicant has a very strong defence it has the discretion to set aside and exparte judgment in default of appearance and defence even where there was proper service. The power to exercise this discretion in favour of such an applicant is sparingly used. In the circumstances of this case I am convinced I should exercise that power in favour of the 3<sup>rd</sup> defendant. This will certainly open the doors of justice to the 3<sup>rd</sup> defendant which had been locked due to the inertia and inaction by its officers.

9. This court is alive to the fact that this dispute is of public interest and implication. The 3<sup>rd</sup> defendant is a custodian of public interest in the suit property hence it is important to hear the 3<sup>rd</sup> defendant on its representations as regards the aforesaid property and the plaintiff's claims over the same.

10. It is also fair that in the circumstances of this case the plaintiff be awarded costs of the motion.

11. In the end and for the above reasons I find the motion dated 20<sup>th</sup> September 2011 as follows:

i. The judgment entered on 4.2.2011 and the consequent decree issued against the 3<sup>rd</sup> defendant on or about 13.05.2010 are set aside and all the proceedings or orders subsequent thereto are vacated.

ii. The 3<sup>rd</sup> defendant is given 10 days to file and serve its defence out of time.

iii. Costs of the motion to be agreed and or taxed is awarded to the plaintiff.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent