



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL SUIT NO. 49 OF 2004

ANTHONY KABIRU KABUKU.....PLAINTIFF

VS

MWENDE WAMUGUNDA

JACKSON WAMUGUNDA

CHARLES MAINA

JOSPHAT MWANGIDEFENDANTS

RULING

On the 21.5.2004, Anthony Kabiru Kabuku (*hereinafter referred to as the Plaintiff*) lodged a Plaint in this court against Mwendu Wamugunda, Jackson Wamugunda, Charles Maina and Josphat Mwangi (*hereinafter referred to as defendants*) praying for orders to vacate the Plaintiff's land and in the alternative the defendants be evicted from the plaintiff's parcel of land No. KIIME/GACHARO/404. The plaintiff prayed further that the defendants be restrained by a permanent instruction from entering or occupying the suit land after they are evicted.

On the 16.6.2004 the Plaintiff filed an application for a temporary injunction against the defendants or their servants or agents restraining them from committing any act of waste on, or interfering with the suit property. The court held that since the property was in possession of the respondents, the matter could not be certified as urgent.

On the 15.7.2004, the joint statement of defence for 2nd, 3rd and 4th Defendants was filed the said defendants acting in person.

On 22.7.2004, the Plaintiff filed a reply to defence and Counter claim. On the 12.8.2004, the Honourable Justice Khamoni appeared disturbed by the conduct of parties when he suggested to them to fast track the suit but they did not heed the same and therefore left the matter to the parties to decide whether to proceed with application or main suit. A lot happened in this matter between 22.7.2004 and 23.3.2009 a whole 4 years that could have been utilized in hearing the main suit had the advice of Justice Khamoni been followed. On the 3.3.2005 the firm of Motanya & Co. Advocates filed a Notice of Appointment of Advocate on behalf of the Defendants and gave their address on Kirinyaga Tea Growers Sacco Building, 2nd Flour Room No. 9. P.O Box 121 Kerugoya.

On the 7.4.2009, Mr. Kebuka Wachira's representative appeared in the registry in the absence of the defendants and fixed the matter for hearing on 29.7.2009. I have seen the invitation to fix a hearing date dated 28th March 2009 drawn by Kebuka Wachira & Co Advocates addressed to the defendants in person, however there is no evidence that the same had been served on the defendants.

On the 29.7.2009 Wachira appeared for Plaintiff but neither the defendants nor their advocate appeared. The Honourable Justice Makhandia allowed the case to proceed for hearing after being satisfied that the defendants were served with the hearing notice. He dismissed their counterclaim with costs for want of evidence and allowed the plaintiff to proceed.

Judgment was entered on 29.7.2009 in favour of the Plaintiff as against the defendants jointly and severally in terms of the Plaint. The defendants were given 30 days from the date of the judgment to vacate the suit land voluntarily failing of which they were to be forcefully evicted.

By application dated 3.10.2012, defendants applied for the setting aside of the judgment entered on 29.7.2009 on grounds that it was irregular. The alleged service of the hearing notice on the applicants was improper and amounted to no service and that application for execution was made before the Notice to show cause was issued and served.

The application is supported by the affidavit of JOSPHAT MWANGI THAGANA who states that he lives on the suit land together with the other applicants who are his mother and brothers respectively. The suit land belonged to his late father, Thagana Kabiru who was the husband to the first applicant. He believes that the respondent used fraud to transfer the suit land to himself. The applicants have been waiting for the case to be fixed for hearing only for the respondent to serve them with an application for eviction in execution of a court order.

That upon being served, they rushed to the advocate on record and requested him to peruse the court file and find out the current position after perusing the file advised them that *ex parte* judgment was entered against the applicants on 29.7.2009. That service of hearing notice was allegedly served upon Josphat Mwangi for himself and the rest of the applicants, which service was in any event irregular and insufficient. The said Josphat Mwangi never even signed anywhere for the said service. Despite the above there was neither notice of entry of judgment as required by the law nor notice to the applicants to show cause why execution should not issue.

The applicants contend that they failed to attend the hearing because they were never served with a hearing notice. They have a good defence and a counterclaim and should be allowed to ventilate both as they are the true owners of the suit land as the heirs of the original owner Thagana Kabiru.

The Plaintiff responded to this application by filing a replying affidavit sworn on 3.12.2012. The gist of the affidavit is that the current advocates are not properly on record because the applicants have since 23rd March 2005 been represented by the firm of MOTANYA & Co. Advocates and yet the Notice of Appointment of Advocate dated 3rd October, 2012 is silent on whether there has been any change of advocate or they are acting together. That to the best of his knowledge and information the said firm of Advocates has never withdrawn from this case hence the application is misconceived and incompetent. He depones that before the court allowed him to formally prove his case it was satisfied that he had on numerous occasions served the applicants with hearing notices That between the year 2004 and 2009 my advocate had invited the applicants to fix hearing dates but they never turned up .

That it was not incumbent upon his advocates to serve the applicants personally with the hearing notices since by that time an advocate was still on record for them. However his advocate went out of his way to send a process server to serve both the advocate and the applicants and he cannot be faulted for doing so. That the applicants failed to turn up for the hearing of this case and after the court was satisfied that they were properly served, it proceeded to hear the plaintiff's case, the judgment that followed cannot be termed as irregular.

The respondent believes that if the applicants had any interest in this case it could not have taken

them more than 3 years to realize that judgment was already delivered but they chose to ignore the suit until they were served with the application for eviction. Their past conduct shows that they have come to court with unclean hands. According to the applicants they are likely to suffer substantial loss if the judgment is stayed or set aside because they have followed the due process and yet the applicants have been indolent.

He has also filed the replying affidavit of the process server, Simon Gibson Gichuki who states that on 18th December 2008 he received a hearing notice dated 8.12.2008 with instructions to serve the same upon M/s Motanya & Co. Advocates for the defendants. On the same date he moved to Kerugoya where he found M/s Motanya and Co. Advocates had closed their offices and moved to unknown place.

He reported his findings to M/s Kebuka Wachira and Co. Advocates office for further advise but does not state the advice he received from the advocate. On 4th March 2009 he proceeded to Gacharo village Kirinyaga District in the company of the Plaintiff herein who pointed out the 1st applicant/defendant one Mwendu Wamugunda who received service on her behalf and on behalf of her three sons who are 2nd, 3rd and 4th applicant/s defendants but declined to sign the original copy.

Mr. Julius M. Motanya, the advocate for the defendants as at the date of hearing depones that he is still in practice in the name and style of Motanya & Co. Advocates at Kerogoya. He further states that it is true that he has been on record for the applicants/defendants herein. He is also aware that the firm of Waweru Macharia & Co. Advocates have been appointed to act for the defendants in this matter.

He has no objection to the said firm of advocates also being appointed to act for the defendants. He states that since his appointment by the defendants on 23.3.2005, he has been available for service but the plaintiff never served him with notice of hearing or any notice of entry of judgment and believes that there was no service of the hearing notice in this matter as the address of service was clearly his office and the court should have probed deeper why the plaintiff could purport to serve his clients while he was on record. That in any event, the plaintiff never even attempted to seek leave to serve the defendants by substituted service and he should not have bypassed his office without the court's leave.

Mr. Felix Kebuka Wachira filed a further affidavit deponed by himself stating that Mr. Motanya has never appeared in court though he filed a Notice of Appointment. He has never given any information concerning his physical address but the process server was able to trace his office at first but later on 18.12.2008 the process server found the advocates office empty. The import of the affidavit is that the application was properly served but the defendants remained indolent.

In a further affidavit deponed by Mr. Athony Kabiru Kabuku the Plaintiff/Respondent denies the allegations that Mr. Motanya still operates in the office he had in 2005 as he relocated without informing the respondents advocate.

The gist of the applicant's submission is that at the time Simon Gibson Gichuki purporting to serve the hearing notice in issue there was an advocate on record for the defendants thus Motanya & Co. Advocates. Purporting to serve one of the Defendants personally at Gachero Village in Kirinyaga District was clearly contrary to the provision of the Civil Procedure Rules. Moreover that each of the defendant if eligible, were to be served personally. The 2nd, 3rd, and 4th issues raised in the submissions shall abide by the court's decision on the 1st issue.

Mr. Kebuka Wachira argues that Order 12 rule 2 of the Civil Procedure Rules which is applicable in the place of Order IXB rule 3 of the Civil Procedure Rules (repealed) presupposes that if the court is satisfied that the hearing notice was duly served it may proceed *ex parte* and therefore the orders issued by the court cannot be termed irregular. To this extent I agree with Mr. Kebuka Wachira's argument. He proceeds to state that he invited the advocate who was on record for the defendants to fix hearing dates, however he never turned up to fix the dates. This appears true from the record however, the last invitation dated 28.3.2009 was addressed to the defendants and not their advocates. There is no evidence that they were served with the invitation. The hearing notice dated 9.4.2009 was also addressed to the defendants directly though they had an advocate on record.

The process server states that he served the defendants directly and personally despite having an advocate on record because their advocate on record then had closed office and moved to an unknown place. This argument does not hold because the invitation to take a date and hearing notice were drafted in Mr. Kebuka Wachira's office and clearly they indicate the persons to be served as the Defendants and not their advocate. The decision to serve the defendants was made by the Plaintiff's Counsel and not the process server. The respondent's advocate had an obligation to inform the court of this failure to serve the defendant's advocate to enable court to grant him leave for substituted service.

Order 12 Rule 2 paragraph (a) gives this court the power to proceed ex parte with the hearing of a matter where only the plaintiff attends provided that the hearing notice was ***duly served***.(emphasis is mine)

Though the respondent argues that it took the applicants more than three years to realize that judgment had been entered, the court finds that the confusion in the matter begun with service of the defendant personally when they had appointed an advocate to act on their behalf. Mr. Josphat Mwangi Thagana states in paragraph 6 that they had been waiting for the case to be fixed for hearing only for the respondent to serve them with an application for eviction in execution of a court order.

On the 1st and 2nd issues raised in the applicant's submissions, I do hold that any service effected on a party while he has engaged an advocate who has filed a Notice of Appointment renders the said service irregular and therefore a nullity and any action taken by the court on an irregular service is a nullity as it affects a party's right to be heard and fair administration of justice.

Where a party or his advocate becomes evasive during service of documents, the party seeking to serve the said documents has a duty to obtain leave of the court for substituted service. It is highly unprocedural to serve a party directly with a hearing notice when the said party relies on the appointed advocate. ***Order III Rule 11 of the Civil Procedure Rules(repealed)*** which provided for the removal of an advocate who could not be found should have been applied by the respondent to remove Motanya and Company advocate from record before proceeding to serve the defendants in person.

On the issue of the appointment of Waweru Macharia Advocate in the place of Motanya & Co. Advocates, i do find the same to be irregular because the law is very clear. ***Order 9 Rule 7 of the Civil Procedure Rules 2010*** provides for a notice of appointment of advocate only where a party ***is acting in person*** .

The applicant's advocate was bound by law to file a notice of change of advocate and not the notice of appointment as there was an advocate on record. However this court is guided by Sections ***1A and 1B Of The Civil Procedure Act Cap 21 laws of Kenya*** that provides for the overriding objective of the Act , thus ***to facilitate the just,expeditious, proportionate and affordable resolution of civil disputes governed by the Act***. For the court to determine this dispute in a just manner, it should look at the substantive justice and not technicalities. Furthermore I'm guided by the provisions of ***Article 159 of the Constitution of Kenya that urges the court not to put undue regard on procedural technicalities***.

Having found the process of service irregular, I do find that judgment herein entered on 29.7.2001 is based on procedural irregularity hence cannot stand and the same is set aside as well as all subsequent orders. Costs of the application in the cause.

DATED AND SIGNED AT ELDORET THISDAY OF..... 2015

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 27TH DAY OF JANUARY,2015

LUCY WAITHAKA

JUDGE