REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 11 OF 2019

JACKSON KABIRI KARURU.....PLAINTIFF/APPLICANT

VERSUS

MARY NJOKI NJUGUNA….....DEFENDANT/RESPONDENT

RULING

There are two Applications for consideration. The first one is dated **17th August 2021,** brought by the Plaintiff/ Applicant seeking for orders that;

1. ***That the Honourable Court do cancel all dealings in land Title Number LOC.1/Kiunyu/512, measuring 3.2 Hectares and the title do revert to original title being LOC.1/KIUNYU/512.***

2. ***That upon prayer 2 being granted, the Applicant's portion of 0.17 Hectares be excised from land Parcel No.LOC.1 /KIUNYU /512 .***

3. ***That in default, the Registrar do sign the necessary documents to effect subdivision and transfer of the 0.17 Hectares portion of parcel number LOC.1/KIUNYU/512 to the Applicant herein***

4. ***That costs of the Application be provided for.***

The Application is premised on the grounds that the Plaintiff/Applicant has been in open and continuous occupation and without interruption of a portion of the suit property measuring **0.17 ha** for a period of over **40 years** . That the Plaintiff/Applicant moved the Court for orders for acquisition of the said portion of land via **Adverse Possession**, and the Defendant/Respondent was fully aware of the suit, but did not participate and the Applicant's prayers were allowed and a **Decree** was issued that he was entitled to **0.17 ha,** of the suit property by way of **Adverse Possession** and the Respondent ordered to execute the necessary documents. Further, that when the Plaintiff/ Applicant presented the necessary documents to the Land Registrar, to commence subdivision and transfer, he discovered that the Defendant/Respondent had proceeded to subdivide the Land without taking into consideration the Applicant's rights and consequently **L.R No. LOC.1/KIUNYU/512,** does not exist as the same has been cancelled and new title numbers issued. That the Respondent's actions are **illegal** and a **blatant disregard** of Court orders and result in great injustice.

In his supporting Affidavit **Jackson Kabiri Karuru** averred that with the existence of the new titles to his exclusion, he is apprehensive that the Respondent will deal with the property in a manner that is detrimental to his interest including but not limited to a sale, transfer and their eviction from their home.

The Application is opposed and the Defendant/ Respondent **Mary Njoki Njuguna,** swore a Replying Affidavit on **7th December 2021,** and averred that she has filed an Application seeking to set aside the entire Judgment since the Plaintiff/Applicant lied to Court that she had been served with **Summons** to **Enter Appearance**. That the matter proceeded ex parte and therefore the Judgment being execute by the Applicant is without merit . Further that the Applicant took advantage of her old age and ill health and proceeded Ex parte. That **L.R 512** is about **3.2 acres** and the Plaintiff/Applicant misleads the Court that it is **3.2 Ha.** That she caused a Surveyor's report to be prepared and encroachment by the Applicant is about **0.04Ha** or about **0.1 acres** . That the Decree captures the wrong details pertaining to the suit property . That she has been advised by her advocates, which advise she believes to be true that to condemn a party unheard is against the rules of natural justice .

The Plaintiff/ Applicant swore a Further Affidavit on **18th January 2022,** and averred that the Defendant/ Respondent has been served with **Mention Notices** on diverse dates, while the suit was ongoing and it is false to allege that the matter proceeded ex parte . That her old age does not warrant the company of a relative at all times. Further, that his claim for **0.17 Ha** is proper, as the same translates to approximately **0.42acres.** It was his contention that the Judgment was **regularly obtained** as evidenced by Returns of Service filed before the Court.

The 2nd one is the **Notice of Motion Application** by the Defendant/Respondent dated **26th October 2021**, for orders that;

a) ***That this honourable Court be pleased to set aside the Judgment entered in this proceedings and do allow the Defendants unconditional leave to defend this suit as per the Response to the Originating Summons attached herein.***

b) ***That this Honourable Court be pleased to make or issue orders that are just expediate in the circumstances***

c) ***That the costs of this Application be provided for***

d) ***That the Defendant be compelled to pay the cost of this Application.***

The Application is premised on the grounds that the matter proceeded exparte in the absence of the Defendant/Applicant who has never been served with any summons or any notice requiring her attendance in Court. That the Defendants/Applicant lives adjacent to the Plaintiff/Respondent and the Plaintiff/Respondent has never mentioned this case neither to the Applicant nor her children, who have constructed on **L.R 512,** now subdivided **to L.R 1555,1556,1557 and 1558**. Further that the process server lied to the Court.

That the suit property was initially registered in the names of **Njuguna Karuru (Deceased),** and his Succession Cause initiated by the Defendant/ Applicant via **Thika CM P& A No. 59 of 2014** Estate of **Njuguna Karuru** and the suit property was subdivided to his **four** beneficiaries, who the Court ordered to get **0.8 acres** each via Confirmed Grant issued on **26th March 2015.** That the same was subdivided on **4th August 2018,** before the institution of this suit. Further, that the Plaintiff/ Respondent has misled the Court in obtaining the Orders sought that the suit property measures approximately **3.2 Ha** whilst it measures **1.3 Ha,** and the Orders sought cannot be granted. That the true position is that the Plaintiff's / Respondent's has less than **6ft** entered into the suit land and all that needed to be done was to have the boundaries re-aligned.

In her supporting Affidavit, **Mary Njoki Njuguna** averred that she learnt of the suit herein when the Plaintiff/ Respondent started boasting in front of her children that he had acquired part of their land in the course of the year. That her children investigated and involved the **local Chief**, who found out that there was an ongoing suit and a **Decree** was issued on **17th February 2021.** That she is ailing and her age is failing and she relies on her children for a living . That at the time of filing this suit in **2019, L.R No.512** did not exist, as it had already been subdivided and had the said issues been brought before Court on transmission and subdivision, the Court would have arrived at a different finding.

That the Plaintiff/ Respondent is lying to the Court that he served her with the pleadings as her movements are curtailed and restricted and she does not stay alone as she constantly needs help and as such, the process server must have served her in the presence of her helper . That she had not been served with any Court pleadings and her children who intermingle with the Plaintiff/Respondent and are more involved with the land were also not served by the Plaintiff/ Respondent .

That the Plaintiff/Respondent lives and has constructed on **L.R LOC1/Kiunyu/401,** which does not belong to him and he has no land on his own and therefore no locus standi to claim the land. That the Plaintiff/ Respondent does not farm or till the suit property and no survey report has been produced to depict what size of his house has encroached on her land. That it is only fair and just that all parties are given an opportunity to present their evidence. That she has an arguable case and prays that the Court grants her a chance to ventilate her case.

The Application is opposed and the Plaintiff/Respondent swore a Replying Affidavit on **22nd November 2021,** and averred that at the time of instituting the suit, the suit property **L.R 512** was in existence and registered in the name of the Defendant/ Applicant. Further that at the time of instituting the suit, there were no title deeds issued to reflect the mutation of the suit property as alleged and that the Defendant/ Applicant was at all times aware of the suit. That he is in occupation of **L.R 401** which belonged to his late mother **Jane Wanja Karuru,** which property is adjacent to **L.R 512** and the portion which he has occupied. That the claim for **Adverse possession** was necessitated by the destructive actions of the Defendant, who invaded the portion he was occupying, wishing to have him vacate. That although he was aware his property encroached on to the Defendant's/ Applicant's land, he has resided on the said portion for over **20 years** and the Defendants/ Applicant has never had an issue or demanded that he vacate. That following the Defendant's/ Applicant's destructive actions, his Advocates advised him that he had a claim for Adverse possession for that specific portion and advised him to carry out a valuation. That his claim is proper and the Defendant/Applicant concluded the subdivision of the suit property on **28th April 2021,** to defeat execution of the Decree.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the pleadings by the parties, the annextures thereto and the relevant provisions of law and renders itself as follows;-

The Plaintiff/ Applicant in his Application seeks to execute the Judgment of the Court dated **30th November 2020**. However, the Defendant/ Applicant in her Application dated **26th October 2021**, seeks to set aside the said Judgment. The Court must then first determine whether the Defendant/Applicant has met the threshold for setting aside the Ex Parte Judgment, before it can consider the Application for execution of the said exparte Judgement.

An Exparte Judgment was delivered on **30Th November 2020** by **Lady Justice J.G Kemei,** who has since been transferred to Thika ELC. **Order 45 Rule 2** of the Civil Procedure Rules provides to whom Applications for review may be made. It provides that;

(1) ***An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on***

the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) ***If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.***

The Court is thus vested with the requisite jurisdiction to determine the Application before it. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In **Shah…Vs.. Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

"This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

The provisions of law with regards to setting aside ex parte orders are to be found under **Order 12 Rule 7 of the Civil Procedure Rules** provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

The Court has discretion to set aside or not to set aside an exparte judgment. Such discretion must be exercised judiciously. In deciding whether to set aside or not, the Court is guided by the decision of the Court of Appeal in **the case of *James Kanyiita Nderitu & Another [2016] eKLR***, where the court of Appeal stated thus:

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any Defence which raises triable issues. In **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P. held that:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

With the above in mind, the Court will proceed to make a determination on whether there is sufficient cause to set aside the Ex parte Judgment herein.

The Defendant / Applicant has contended that she was never served with the Summons to Enter Appearance and or the Originating Summons. To rebut the said allegations, the Plaintiff /Respondent has annexed to his Replying Affidavit, the Affidavits of Service to show that the Defendant/ Applicant was indeed served. The Court has carefully gone through the said Affidavits of Service and notes that the first Affidavit of Service and which is also in the Court proceedings is the one sworn on **15th July 2019,** by a Process Server one **Amos Chege Kanoga.** The Court notes that the said Affidavit of Service captures major details. However, the said Affidavit does not indicate how the Process server was able to Identify the Defendant/ Applicant. **Order 5 Rule 15** of the **Civil Procedure Rules** provides that;

(1) ***The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which***

summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

In all the subsequent Affidavits of Service, the said process server does not indicate how he was able to identify the Defendant / Applicant apart from that the fact that he had served her before. In the absence of such identification even with the detailed Affidavits of Service, the Court is unable to find that there was proper service. In the absence of proper service, the Court finds and holds that there is no **regular** judgment on record.

Assuming there was a regular Judgment on record, the Court would still be called upon to determine whether there was sufficient cause, whether the Application is brought without undue delay and whether there is a triable Defence on record.

The Application was filed on **26th October 2021**. However, the Defendants/ Applicant has not stated the exact date that she became aware of the Decree. The Court has perused the draft Replying Affidavit to the Originating Summons and finds that the same raises triable issue as there are issues as to whether the suit property exists at the time of filing the claim herein and the acreages of the portion that the Plaintiff/ Respondent seeks to acquire by way of Adverse Possession.

Therefore, this Court finds and holds that the Defendant/ Applicant has met the threshold for setting aside of the Ex Parte Judgment, that delivered by this Court on **30th November, 2020.**

On whether the Application by the Plaintiff/ Applicant dated **17th August 2021** is merited, the Court finds and holds that having set aside the **Ex parte Judgment** that was entered against the Defendant herein, then this application by the Plaintiff is rendered nugatory and the same is found not merited.

Having carefully considered the two applications herein and the written submissions together with the relevant provisions of Law, the Court finds and holds that the Defendant's/Applicant's **Notice of Motion Application** dated **26th October 2021**, is **merited** and the same is allowed entirely with costs.

In regard to the Plaintiff's/Applicant's **Notice of Motion Application** dated **17th August 2021**, the same is found **not** merited and it is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered online

In the presence of;

M/s Wanjira H/B for Mr Gachau for the Plaintiff/Applicant/Respondent

Mr Kanyi Kiruchi for the Defendant/Respondent/Applicant

Kuiyaki - Court Assistant

L. GACHERU

JUDGE