



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC SUIT NO 130 OF 2012

PETER KINYANJUI OLE NTAIYA.....PLAINTIFF

VERSUS

SAMSON LEMELIA OLE NTAIYA.....DEFENDANT

RULING

1. This is a ruling on a notice of motion filed by the defendant, dated **7th August, 2013** seeking orders that; the hearing of the plaintiff's case set for formal proof be stayed pending the inter parties hearing of the defendant's prayer seeking unconditional leave to defend and canvas the merits of his defence herein as well as costs of the application.
2. The application is premised on the grounds on the face of the application and is supported by the affidavit of the defendant. He depones that this matter was set down for formal proof after the defendant allegedly failed to enter appearance and file his defence; that the defendant was never served with either the pleadings nor summons to enter appearance; that the Affidavit of Service presented by the plaintiff was fabricated and that the said process server should be called for cross-examination.
3. He further depones that he only became aware of the current suit through a replying affidavit sworn by the plaintiff filed in **CMCC No 1159 of 2011** which involved the same subject matter(L.R. No Narok/Cis-Mara/Enabelibel/Enengetia 454); that being the registered owner of the suit land and having acquired his interests pursuant to the confirmed grant issued by the High Court in **Nakuru HC Succession Cause No 519 of 2011**, denying him a chance to participate in this suit will greatly prejudice him as the plaintiff seeks to have his title cancelled; that he has a good, solid and meritorious defence which if allowed, will not occasion any prejudice to the plaintiff as the matter will proceed to full hearing where the plaintiff's claim will be determined on merit.
4. The application is opposed vide the Replying Affidavit of the Plaintiff sworn on **4th December, 2013**. He depones that the application is ill-conceived interlocutory judgement having been entered properly and relies wholly on the Affidavit of Service of **Tom Mungai Gathogo**, a licensed process server, sworn on **4th May 2013**. He states that he has no problem with the process server being cross-examined. He further depones that the confirmed Grant was fraudulently obtained and so was the title deed held by the plaintiff; that he had entered into an agreement with the late Joseph Nteiya before his death, paid the full purchase price for the suit property and had been in occupation of the same until 2011 when the defendant started interfering with his quiet possession and use thereof.
5. On **19th February, 2014** when the application came up for inter parties hearing, Counsels for the respective parties with the concurrence of the court, agreed to have the application be disposed off by way of written submissions. The defendant filed their written submissions on **16th June, 2014** while the

plaintiff filed theirs on **3rd July, 2014**.

6. Counsel for the defendant submitted that in exercising its inherent power and discretion to achieve justice, the court should be mindful of **Sections 95, 3A and 63** of the Civil Procedure Act as well as **Order 7 Rule 1** of the Rules and allow the defendant's application. He relied on the case of **Kenya Commercial Bank Ltd v Nyataige & another** [1990]KLR 443.

7. He further submitted that **Order 6 Rule 1** of the Civil Procedure Rules had not been complied with as summons to enter appearance were not served upon the defendant. The said affidavit of service also did not comply with **Order 5 Rule 15(1)** as the process server did not identify the defendant. To buttress this point he relied on the case of **Kenya Steel Fabricators Ltd v Kenya Auto Electrical**, Nairobi CA No.315 of 2012.

8. On his part, Counsel for the Plaintiff submitted that the affidavit of service was valid and he was willing to have the process server cross examined. He further submitted that the defence raised no tribal issues and that the plaintiff bought the suit property land lawfully from the late Joseph Nteiya.

9. In one of the cases relied on by counsel for the defendant, **Kenya Commercial Bank Ltd v Nyataige & Another** (supra) , **Bosire J**, had this to say on what courts should consider when setting aside an ex parte pronouncement of the court;

“Order IXA rule 10 Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just: The discretion is a free one (Patel v EA Cargo Handling Services [1974] EA 75. The discretion is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice (Shah v Mbogo [1967] EA 116). The discretion being a judicial one must be exercised upon facts not on whims or caprice (Shabir Din v Ram Parkash Anand 22 EACA 48).”

10. In exercising Judicial authority, courts shall be guided by among other principles; **that justice shall be done to all, irrespective of status; justice shall be administered without undue regard to procedural technicalities**. See **Article 159** of the Constitution. This has also clearly been stated in **Sections 1A and 1B** of the Civil Procedure Act.

11. Applying the above principles to the circumstances of this case, I do not see what prejudice will be suffered by the plaintiff if the defendant is allowed to file his defence and the case heard on merit. Even assuming that the defendant was properly served with summons and failed to enter appearance, wouldn't the court still have a duty to hear the case on merit so as to reach an informed decision?

See the case of **Joel Mutua Ndambuki v Daniel Kimeu Musau & 2 Others** [2014] eKLR, where the court relying on an earlier case, observed **“However, as stated in the case of Philip Chemnolo & Another –vs- Augustine Kebende (1982– 1988) KAR: “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits.”**

12. The prayers sought by the plaintiff in this case include cancellation of the title held by the defendant. Fraud has also been alleged by the plaintiff. The only way to determine the real question in controversy between the parties is to have the suit proceed to full hearing when both parties can adduce evidence in support of their cases. Having also perused the Draft Defence, I find that it does raise some serious triable issues which can only be addressed during trial.

13. The upshot of the foregoing is that the defendant's application dated **7th August, 2013** is allowed in the following terms:

1. The Ex parte orders granted on **23rd October, 2013** are hereby set aside.

2. The defendant to file his defence within 14 days hereof or in the alternative the draft statement of defence be admitted upon payment of the requisite fees.

3. The defendant to pay throw away costs to the Plaintiff of Kshs. 20,000/= plus costs of this application.

Dated and signed at Nyeri this 12th day of February 2015

L.N. WAITHAKA

JUDGE

Delivered by Justice A. Mshila at Nakuru this 19th day of February 2015

A. MSHILA

JUDGE