



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

**ENVIRONMENT AND LAND CASE NO. 21 OF 2005**

**PETERSON MOTURI MORANGA.....PLAINTIFF**

**VERSUS**

**KENNEDY MARUBE NYABUTO.....1<sup>ST</sup> DEFENDANT**

**GEORGE MORARA NYABUTO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. What I have before me is an application by the 1<sup>st</sup> defendant brought by way of Notice of Motion dated 26<sup>th</sup> March, 2014 seeking the following orders:-

i. **Spent.**

ii. **Spent.**

iii. **THAT the honourable court be pleased to set aside the ex parte judgment delivered on the 24<sup>th</sup> January, 2014 and all consequential orders/decrees emanating therefrom.**

iv. **THAT the costs of the application be provide for.**

2. The application is supported by the affidavit sworn by the 1<sup>st</sup> defendant on 26<sup>th</sup> March 2014 in which the 1<sup>st</sup> defendant has stated that; this suit was filed against him and the 2<sup>nd</sup> defendant who is his brother on 2<sup>nd</sup> March 2005. The suit was heard ex parte and judgment entered against them on 24<sup>th</sup> January 2014. Following the entry of the said judgment, they are now threatened with eviction. He has deposed further that, his father, one, Andrew Nyabuto Momanyi (hereinafter referred to as “Momanyi”) was at all material times and still is the registered proprietor of all that parcel of land known as LR No. Central Kitutu/ Mwamosioma/1010 (hereinafter referred to as “Plot No. 1010”) from which LR No. Central Kitutu/Mwamosioma/1544 (hereinafter referred to as “the suit property”) is alleged by the plaintiff to have originated. He has stated that the suit property was acquired and registered in the name of the plaintiff through acts of forgery and fraud. He claimed that Momanyi still retains the original title deed for Plot No. 1010 and that he did not sell any portion of the said parcel of land to the plaintiff. The 1<sup>st</sup> defendant has stated further that he was not served with the summons to enter appearance that was issued herein and that he only came to learn of this suit when an order was issued in another suit restraining him from interring the remains of the 2<sup>nd</sup> defendant herein who is now deceased on the suit property.

3. The 1<sup>st</sup> defendant’s application was opposed by the plaintiff through a replying affidavit sworn on 17<sup>th</sup>

June 2014. The plaintiff has stated in the said affidavit that he filed this suit against the defendants because they had trespassed on the suit property which is registered in his name as the proprietor. He has stated that the defendants were duly served with summons to enter appearance but chose to ignore the same. When the defendants failed to enter appearance as aforesaid, he sought interlocutory judgment in default of appearance that was duly entered after which the suit was fixed for formal proof. A final judgment was thereafter entered in his favour on 24<sup>th</sup> January 2014 and a decree issued. The plaintiff has stated that the defendants have no interest in the suit property in respect of which they are not the registered owners. The plaintiff has contended that Plot No. 1010 that was previously owned by Momanyi is non-existent. He has stated that the register for the said parcel of land was closed upon subdivision that gave rise to the suit property and its title was cancelled by the land registrar.

4. The plaintiff has contended that the suit property was sold to him by Momanyi and he is now the registered owner thereof. The plaintiff has contended that the defendants are trespassers on the suit property and as such have no defence to this suit. The 1<sup>st</sup> defendant filed a supplementary affidavit with leave of the court on 15<sup>th</sup> July 2014 in which he contested the affidavit of service of one, Wilfred Nyakundi that was sworn on 12<sup>th</sup> August 2005 and filed herein on the same date. The 1<sup>st</sup> defendant reiterated that Momanyi neither sub-divided Plot No. 1010 nor sold a portion thereof to the plaintiff. He maintained that the plaintiff acquired the suit property fraudulently.

5. When the application came up for hearing on 24<sup>th</sup> November 2014, the advocates appearing for the parties agreed to argue the same by way of written submissions. I have considered the application by the 1<sup>st</sup> defendant together with the affidavits filed in support thereof. I have also considered the affidavit filed by the plaintiff in opposition thereto and the written submissions by the parties' respective advocates. The orders that were sought in prayer (i) and (ii) of the application have been overtaken by events. The application as it stands now is seeking the setting aside of the ex parte judgment entered herein on 24<sup>th</sup> January, 2014. The principles which the court apply when considering an application for setting aside judgment entered ex parte are well captured by both parties in their written submissions. In the case of **Patel –vs- E. A. Cargo Handling Services [1974] E. A 75** that was cited by both parties, the court stated as follows at page 76 regarding the court's power to set aside ex parte judgment:-

**“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 judgment as in the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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.”**

In the said case, it was held that:-

**“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just.”**

6. From my perusal of the court record, I have noted the following; this suit was filed against the defendants on 2<sup>nd</sup> March 2003. In his plaint of the same date, the plaintiff averred that he is the registered proprietor of the suit property and that the defendants had entered thereon and occupied the same without his consent or lawful cause. He sought an order for the eviction of the defendants from the suit property. The summons to enter appearance were taken out and served upon the defendants by one, Simon Tegere Ntabo a process server of this court on 2<sup>nd</sup> March 2005. In his affidavit of service sworn on 8<sup>th</sup> June 2005 and filed in court on 23<sup>rd</sup> June 2005, the said process server has stated that he served the defendants with summons to enter appearance at Daraja Mbili near Kichinjio behind Daraja Mbili Primary School on 2<sup>nd</sup> March 2005. He stated further that the 1<sup>st</sup> defendant accepted service and acknowledged receipt of the summons while the 2<sup>nd</sup> defendant accepted service but refused to acknowledge receipt of the summons. The defendants failed to enter appearance and the plaintiff requested for interlocutory judgment in default

of appearance. The court found the service by Simon Tegere Ntabo unsatisfactory because the said process server did not indicate how he identified the defendants.

7. The plaintiff engaged another process server one, Wilfred Nyakundi to effect fresh service of summons to enter appearance upon the defendants. According to his affidavits of service sworn on 12<sup>th</sup> August 2005 and filed in court on 22<sup>nd</sup> August 2005, he stated that he served the defendants with summons to enter appearance on 15<sup>th</sup> July 2005 at their homes situated next to Daraja Mbili Primary School and that they accepted service but refused to acknowledge receipt of the summons. Again the court was not satisfied with this service for the same reason that it had rejected the earlier service. This process server did not also indicate in his affidavit how he identified the defendants. The plaintiff was forced to serve summons to enter appearance upon the defendants through another process server. This time round, they engaged Peter Nyanusi Moenga. In his affidavit of service sworn on 27<sup>th</sup> December 2005, he stated that he served the defendants with summons to enter appearance on 28<sup>th</sup> November 2005 at around 9.30am at their homes situated near Daraja Mbili Primary School and that both accepted service but declined to acknowledge receipt of the summons. He stated further that the defendants were known to him at the time that he effected service upon them. The defendants did not enter appearance following the service of summons that were effected upon them through the three (3) process servers aforesaid. On the basis of the last affidavit of service by Peter Nyanusi Moenga, interlocutory judgment was entered in favour of the plaintiff against the defendants in default of appearance on 13<sup>th</sup> April 2006 after a lapse of over one year from the date when the suit was filed.

8. The suit was thereafter set down for formal proof on 23<sup>rd</sup> July 2013. Although it was not necessary to serve the defendant with a hearing notice, the plaintiff caused a hearing notice to be served upon them through yet another process server one, Isaiah Miruka. In his affidavit of service that was sworn on 17<sup>th</sup> July 2013 and filed in court on 23<sup>rd</sup> July 2013, the said process server stated that he served a hearing notice dated 2<sup>nd</sup> July 2013 upon the defendants on 9<sup>th</sup> July 2013 at Daraja Mbili Market and that the defendants accepted service but refused to acknowledge receipt of the said hearing notice.

9. The hearing of the suit proceeded and the plaintiff gave evidence and called one witness. The plaintiff's witness was the defendants' father, Momanyi who told the court that he sold the suit property to the plaintiff at a consideration of kshs. 500,000/= and that the defendants herein had refused to vacate and hand over the property to the plaintiff even after he had requested them to do so. He urged the court to grant an order for the eviction of the defendants from the suit property. Momanyi had recorded a witness statement earlier that was filed in court on 3<sup>rd</sup> January 2013 in which he had stated what he told the court in his testimony on 23<sup>rd</sup> July 2013. The court considered the evidence that was adduced by the plaintiff and his witness and in a judgment that was delivered on 24<sup>th</sup> January 2014 found that the plaintiff had proved his claim against the defendants and gave an order for their eviction from the suit property.

10. The 2<sup>nd</sup> defendant died after judgment had been entered herein. His widow's attempt to inter his remains on the suit property was stopped by this court in separate proceedings in Kisii ELCC No. 34 of 2014, Peterson Moturi Moranga -vs- Alice Moraa Morara. The restraining order was made in that suit on 10<sup>th</sup> March 2014. After the ruling by the court in that suit, the 1<sup>st</sup> defendant brought the present application on 26<sup>th</sup> March 2014 contending as I have mentioned earlier in this ruling that he was not served with summons to enter appearance and that he has a good defence to the plaintiff's claim. It is on account of the foregoing that he has sought the setting aside of the judgment entered herein on 24<sup>th</sup> January 2014. I have highlighted at length the attempts that were made by the plaintiff to serve the summons to enter appearance upon the defendants herein. There are a total of three (3) affidavits of service by different process servers stating that they served the defendants with the summons to enter appearance that were issued herein. Of the three (3) affidavits of service, the 1<sup>st</sup> defendant has only contested one, by Wilfred Nyakundi that was not even the basis upon which interlocutory judgment was entered against the defendants. The 1<sup>st</sup> defendant has not contested the affidavits of service by Simon Tegere Ntabo and Peter Nyanusi Moenga sworn on 8<sup>th</sup> June 2005 and 27<sup>th</sup> December 2005 respectively.

The 1<sup>st</sup> defendant has also not contested the affidavit of Isaiah Miruka sworn on 17<sup>th</sup> July 2013 in which he stated that he served the defendants with a hearing notice for the formal proof that was scheduled for 23<sup>rd</sup> July 2013.

11. I am satisfied on the material before me that the defendants were served with summons to enter appearance but chose to ignore the same as contended by the plaintiff. In the case of **Miruka –vs- Abok & Another [1990] KLR 541**, it was held that:-

**“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect..... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”**

In the case of **Karatina Garments Ltd –vs- Nyanarua [1976] KLR 94**, the court stated that:-

**“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”**

12. As I have stated above, the 1<sup>st</sup> defendant has only contested one affidavit of service. He has not contested service upon him by the other three (3) process servers. Even for the contested affidavit of service, the 1<sup>st</sup> defendant has not demonstrated that the content thereof is incorrect. I don't think that an affidavit of service can be termed as false merely because the process server has not stated now he identified the person he served. The 1<sup>st</sup> defendant did not deny that his home is next to Daraja Mbili Primary School and that he was at home on 15<sup>th</sup> July 2005 when he is said to have been served by Wilfred Nyakundi. The 1<sup>st</sup> defendant did not also seek leave of the court to cross examine the said process server on this affidavit of service.

13. Due to the foregoing reasons, it is my finding that the summons to enter appearance issued herein were duly served upon the defendants and that both interlocutory and final judgments that were entered herein against them were regular. I now need to consider whether the 1<sup>st</sup> defendant has any defence to the plaintiff's claim. The plaintiff has contended that the defendants are trespassers on the suit property. In their draft statement of defence attached to the present application, the defendants have denied that they have trespassed on the suit property. They have contended that they are in occupation of Plot No. 1010 owned by their father, Momanyi. They have contended that the said parcel of land was allocated to them by Momanyi and as such they are in lawful occupation thereof. The defendants have also contended that the title held by the plaintiff for the suit property is a forgery. As I have stated earlier in this ruling, Momanyi who the defendants' claim to be the owner of Plot No. 1010 and from whom they derive a right to occupy the said parcel of land was the plaintiff's witness when this suit came for formal proof and he confirmed that he sold the suit property to the plaintiff.

14. I have seen the affidavit sworn by Momanyi on 16<sup>th</sup> July 2014 in support of his application to be joined in this suit as a party. I have noted that Momanyi has denied in the said affidavit that he made a statement herein and that he appeared before this court and testified on behalf of the plaintiff in this case. Momanyi has also denied in the said affidavit that he sub-divided Plot No. 1010 and sold to the plaintiff the suit property which is a portion thereof. This turn of events is quite interesting. It is not surprising however, coming after the court had restrained the widow of the 2<sup>nd</sup> defendant from interring the body of the deceased on the suit property. It is not clear to me why Momanyi would wish to be a party to this suit. If he is serious that he never entered into any agreement for sale with the plaintiff and that Plot No. 1010 was fraudulently sub-divided and a portion thereof namely, the suit property transferred to the plaintiff, he should have filed a suit against the plaintiff over the alleged fraud. He should have also reported the forgery of his signature in the purported agreement for sale, the mutation and the witness statement that was filed herein to the police for investigation and necessary action. Momanyi has not done any of these.

15. I have also noted that neither the 1<sup>st</sup> defendant nor Momanyi has commented on Kisii HCCC No. 79 of 2009 that concerned a portion of Plot No. 1010 namely, Central Kitutu/Mwamosioma/1545 (“Plot No. 1545”) that was decreed to belong to one, Daniel Kagwana Nyagokana. Momanyi cannot be taken seriously in his contention that he never sub-divided Plot No. 1010 and that he allocated the said parcel of land to the defendants. I wonder when he did all that and how that was possible in the face of a decree of this court to the effect that a portion of that parcel of land namely, Plot No. 1545 belongs to one, Daniel Kangwana Nyagokana aforesaid. I don’t think that the affidavit of Momanyi aforesaid can be taken seriously. In my view, the said affidavit is not of any assistance to the defendants’ case.

16. On the material before me, I am satisfied that the plaintiff is the registered proprietor of the suit property which is a sub-division of Plot No. 1010. I am also satisfied that Plot No. 1010 is no longer in existence, the same having been sub-divided and its register closed. I am not persuaded therefore that the 1<sup>st</sup> defendant is in occupation of Plot No. 1010 as he has contended in his draft defence. There is also no evidence that Plot No. 1010 was allocated to the defendants by Momanyi. Furthermore, there is no evidence that the plaintiff acquired title to the suit property through forgery or fraud. In the court of appeal case of **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd. [2004] 2KLR 269**, it was held that:-

**“Fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.”**

17. There is no evidence of whatsoever nature before me pointing at the fraud and forgery that the plaintiff is alleged to have committed. There are also no particulars of the said fraud and forgery in the defendants’ draft statement of defence that I have referred to above. Considering the defence that has been put forward by the defendants to the plaintiff’s claim in light of the evidence and other material before the court, I am not satisfied that any triable issue has been disclosed that should go trial.

18. The upshot of the foregoing is that the 1<sup>st</sup> defendant has not only failed to give reasonable or any explanation why he failed to enter appearance or to attend court for the hearing of this case notice of which was duly given to him but has also failed to demonstrate on a prima facie basis that he has a defence to the plaintiff’s claim that he should be given an opportunity to put forward. In the case of **Shah –vs- Mbogo and Another [1967] E. A 116**. The court stated as follows at page 123:-

**“I have carefully considered in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex parte. This discretion is intended 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.”**

19. From my analysis of the events that occurred before and after judgment was entered herein against the defendants, I have formed the view that the defendants refused deliberately for reasons only known to enter appearance and to defend this suit. The plaintiff went to great length to notify them of this suit to the extent that he used the services of three process servers to serve summons upon the defendants. Even after interlocutory judgment was entered, the plaintiff again served the defendants with a notice for the formal proof which was again ignored by the defendants.

20. Taking all factors into account, I don’t think that the defendants deserve to have the discretion of this court exercised in their favour. In the circumstances, the 1<sup>st</sup> defendant’s application dated 26<sup>th</sup> March, 2014 has no merit. The same is accordingly dismissed with costs to the plaintiff.

**Delivered, Dated and Signed at Kisii this 24<sup>th</sup> day of July, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

N/A for the plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Milcent Maore Court Assistant

**S.OKONG'O**

**JUDGE**