



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO.108 OF 2015**

**STEPHEN A. MUKHABI.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**DANIEL ODHIAMBO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ROBERT ODHIAMBO NDIEGE.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is the Notice of Motion dated 28th May 2021 brought pursuant to Order 22 Rule 22, Order 12 Rule 7 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and Articles 40 and 50 of the Constitution of Kenya.
2. The 2<sup>nd</sup> Defendant/Applicant seeks orders:
  - a) *Spent.*
  - b) *Spent.*
  - c) *That this Honourable court be pleased to set aside and vacate its Ex parte judgement delivered on 18<sup>th</sup> March 2021 (for want of service) and proceed to allow the Applicant to defend the suit on merit.*
  - d) *That costs be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs 1 to 6 of the application.
4. The application is supported by the 2<sup>nd</sup> Defendant/Applicant's affidavit sworn on 28<sup>th</sup> May 2021. He deponed that he is the registered owner of the suit property vide a letter of allotment issued by Nairobi City Council. He added that as required by the said letter, he went on to pay ground rent and stand premium.
5. He deponed that he has never been served with suit papers in the instant case and only learnt of it from his tenant who insinuated there is a judgement against him prompting him to obtain the judgement on Kenyalaw.org.
6. He also deponed that he has invested heavily on the suit property by putting up a two storey residential flat with the due approval of planning department of the City Council of Nairobi and as such; execution of the judgement in this matter would visit untold and irreparable loss upon him as the same requires his eviction from the subject matter. He further deponed that execution of the judgment would violate his proprietary rights without him having been heard and or afforded a fair hearing which is an affront to the Constitution and his rights granted thereunder.
7. He urged the court to grant him an opportunity to be heard by setting aside the judgement delivered herein on 18<sup>th</sup> March 2021 for want of service and have him defend the suit on merit. He deponed that he has a prima facie case and issued an undertaking to abide by any condition as to security that this court may deem fit to grant.
8. The application is opposed by the Plaintiff/Respondent vide his replying affidavit sworn on 30<sup>th</sup> December 2021.
9. He deponed that the 2<sup>nd</sup> Defendant was all through the proceedings served with the suit documents and notices but he squandered the opportunity to be heard therefore there is no justifiable reason to set aside the judgement.

10. He also deponed that the letter of allotment annexed by the 2<sup>nd</sup> Defendant to his supporting affidavit is not authentic and even if it was issued to the him, it could not supersede a lease which has been granted to him.

11. He further deponed that the annexed proof of payment of premiums are a bunch of suspicious documents issued in 2013 which was long after he had acquired the suit property and obtained the lease and they relate to a different property.

12. He added that the 2<sup>nd</sup> Defendant is a trespasser who completed construction when these proceedings were ongoing and with notice of challenge to his possession of ownership and was therefore in breach of the Plaintiff's rights since 2007 and as such cannot claim breach of his rights to property to justify the application.

13. On the 21<sup>st</sup> July 2021, the court with the consent of the parties directed that the notice of motion be canvassed by written submissions.

#### **The 2<sup>nd</sup> Defendant/Applicant's submissions.**

14. They are dated 29<sup>th</sup> September 2021. The Plaintiff raised the following issues:-

- a) *Was the Applicant served with the suit herein?*
- b) *Whether the Applicant has a good defence with triable issues.*
- c) *Was the application made timeously?*
- d) *Does the Plaintiff stand to suffer irreparable colossal damage?*
- e) *What are the remedies available to the Applicant?*

15. He submitted that the Plaintiff did not tender evidence to show that he indeed served him. He added that he has a good defence since he has an allotment letter while the Plaintiff/Respondent only annexed an undated and unregistered lease with Nairobi City Council as proof of ownership.

16. He also submitted that he has shown that he has developed the suit property with due approvals of the Planning Department of the City Council of Nairobi which can only give approvals to persons upon evidence that the person applying is the owner of the suit property and the Plaintiff did not enjoin it to negate the said documents.

17. He further submitted that an eviction order will visit untold and irreparable loss upon him and his rights will be violated. He submitted that ownership of the suit property can only be determined on merit but the issue at hand is whether the Plaintiff served the 2<sup>nd</sup> Defendant with the pleadings.

18. He also submitted that he moved timeously upon extracting the judgement from Kenya Law reports. He relied on the cases of **James Kanyita Nderitu v Marios Philotas GhikaS & Another [2015] e KLR** and **Erastus Adoro Goro v Nicodemus Waita Muraguri & 2 Others [2006] e KLR**.

#### **The Plaintiff's /Respondent's submissions**

19. They are dated 10<sup>th</sup> October 2021. The Plaintiff submitted on the following issues:-

- a) *Whether the 2<sup>nd</sup> Defendant has met the threshold for setting aside the judgement.*
- b) *Whether the Defendant has met the threshold for stay of execution of the judgement delivered on 18<sup>th</sup> March 2021.*

20. The Plaintiff submitted that the 2<sup>nd</sup> Defendant did not meet the Principles for setting aside a judgement which were set out in **Pithion Waweru Maina v Thuka Mugiria [1983]e KLR**. He added that the 2<sup>nd</sup> Defendant did not prove that he was not served with the summons.

21. He also submitted that the orders being sought by the Applicant are discretionary and as such; a party who seeks discretionary orders should come to court with clean hands and practice utmost honesty before the court.

22. He cited **Aberdare Cheese Limited & Another v Oriental Commercial Bank [2005]e KLR** to submit that the application should be disallowed as the Applicant deliberately sought to obstruct and or delay justice. He further submitted that on two occasions, service was effected upon the 2<sup>nd</sup> Defendant while on the disputed land and he acknowledged service but refused to sign on the principal copy stating that the property belonged to the 1st Defendant and he was only his agent. He cited the affidavits of service sworn by one John Ochieng Ouma on 10<sup>th</sup> August 2015 and on 13<sup>th</sup> August 2015.

23. He also submitted that the court can exercise its discretion where it is satisfied that a Defendant has a good defence but since the 2<sup>nd</sup> Defendant has not sought leave to defend this suit and has not attached a draft defence that he intends to place reliance on when defending the suit, the court has nothing upon which to consider whether the 2<sup>nd</sup> Defendant has a good defence and whether or not it raises triable

issues.

24. On the issue of stay of execution, he submitted that the 2<sup>nd</sup> Defendant did not meet the threshold set for grant of stay under Order 42 Rule (6) (1) and (2) of the Civil Procedure Rules. He added that the application was not filed timeously and the 2<sup>nd</sup> Defendant has not proved the substantial loss that he will suffer. He relied on the case of **Antoine Ndiaye v African Virtual University [2015] e KLR**.

25. He also relied on the case of **Equity Bank V Taiga Adams Company Ltd** to submit that the 2<sup>nd</sup> Defendant should not be granted stay since he has not offered any kind of security as he only gave an undertaking that he would abide by any conditions as to security.

26. I have considered the notice of motion and the supporting affidavit. I have also considered, the replying affidavit, the rival submissions and the authorities cited. the issues for determination are:-

*(i) Whether the Application meets the threshold for setting aside on ex parte judgment.*

*(ii) Who should bear costs of this application?*

27. It is the 2<sup>nd</sup> Defendant's/Applicant's case that he was never served with the copies of plaint and summons to enter appearance in this suit. I have gone through the court record. By an Amended plaint dated 17<sup>th</sup> July 2015, the 2<sup>nd</sup> Defendant/Applicant was enjoined in these proceedings. There are undated summons to enter appearance on record and addressed to the 2<sup>nd</sup> Defendant. The court record shows that service was effected upon the 2<sup>nd</sup> Defendant/Applicant while on the suit property. He acknowledged service but declined to sign on the principal copy stating that the suit property belonged to the 1<sup>st</sup> Defendant and he was only his agent.

28. The affidavit of John Ochieng Ouma sworn on the 10<sup>th</sup> August 2015 and filed in court on the 11<sup>th</sup> August 2015 shows that the 2<sup>nd</sup> Defendant was served. In paragraph 3, the process server states:-

***“That on 8<sup>th</sup> July 2015, I proceeded to Dandora to serve the 2<sup>nd</sup> Defendant through his cellphone number (07263xxxx) and about five minutes, he came and after going through the court documents he told me he is not the one and he is going to call the one. That after about ten minutes he told me that he is just a “fundi” on the site and he does not own the land, and the house belongs to the 1<sup>st</sup> Defendant herein. Hence he told me that I can even do a search to prove this”***

The above averments have not been challenged by the 2<sup>nd</sup> Defendant/Applicant.

29. In another affidavit sworn by John Omudanga, on the 12<sup>th</sup> August 2015, the process server states in paragraph 4:-

***“That on arrival in Dandora the Plaintiff's wife who guided me to the construction site where she pointed out to me the 2<sup>nd</sup> Defendant one Robert Odhiambo Ndiege”.***

*In paragraph 5 he states:-*

***“That I together with the said Patricia Muthina Mukhobi approached the 2<sup>nd</sup> Defendant herein to whom I introduced myself and the purpose of my visit, he accepted service of the court documents but refused to sign on my principal copy claiming that the property and construction belonged to the 1<sup>st</sup> Defendant and he was just an agent.”***

Again these averments were not challenged by the 2<sup>nd</sup> Defendant/Applicant.

30. These are affidavits sworn by two different process servers stating that they served the 2<sup>nd</sup> Defendant who was on site. On these occasions he claimed the construction was the 1<sup>st</sup> Defendant's. The 1<sup>st</sup> Defendant on his statement of defence maintained that he had no interest on the suit property.

31. This court is not convinced by the 2<sup>nd</sup> Defendant's/Applicant's allegation that he was not aware of these proceedings. He was served but he chose to keep away from these proceedings.

32. I have looked at the documents by the Plaintiff. His letter of allotment is dated 8<sup>th</sup> September 1993. It refers to Dandora IV Shops Plot No 46822 measuring 0.20 hectares. The stand premium to be paid is Kshs.12,000/- and the ground rent is Kshs2,400/- making a total of Kshs.14,400/-. The letter of allotment is signed by Ziporah Wandera (Mrs) the then Town Clerk. There are receipts dated 1993 showing that the Plaintiff paid the said amounts. He was also issued with a Beacon Certificate for the said plot on 31<sup>st</sup> July 1997 confirming the location of the plot on the ground. There is a duly executed Lease between the Plaintiff and the City Council of Nairobi for Plot No 46822 Dandora Shops. There are letters dated 28<sup>th</sup> September 2005 and 3<sup>rd</sup> November 2014 from the City Council of Nairobi and Nairobi City County respectively confirming that the plot No 46822 Dandora IV shops belongs to the Plaintiff.

33. On the other hand, the 2<sup>nd</sup> Defendant's letter of Allotment is dated 1<sup>st</sup> July 2001. It is for Plot NO 46822 Dandora Site and Service Scheme Infills. It measures 0.005 hectares and the premium to be paid is Kshs.10,800. From the letter presented it is not clear who signed it as the Town Clerk. The accompanying documents refers to Plot No 6822 Dandora site and service. The Demand for rates from the Nairobi City County refers to Plot No 6822 Dandora Site and Service. There are other receipts which refer to Plot No 6822.

34. It is clear from the foregoing that the 2<sup>nd</sup> Defendant's/Applicant's Plot is different from what the Plaintiff was allocated. The 2<sup>nd</sup> Defendant/Applicant has failed to demonstrate that he has an interest on Plot NO 48622 Dandora IV shops. The documents he has presented do not add up.

35. This explains his behavior at the time of service. The 2<sup>nd</sup> Defendant/Applicant seeks to set aside the Judgment of 18<sup>th</sup> March 2021 but he has not annexed a draft defence to the application. How, will the court know if his defence raises triable issues?

36. I find that he has failed to demonstrate that he has sufficient grounds to warrant the judgment of 18<sup>th</sup> March 2021 to be set aside. I also find that this application falls short of the requirements that would warrant this court to set aside the judgment of 18<sup>th</sup> March 2021.

37. The 2<sup>nd</sup> Defendant's/Applicant's claim that he has invested heavily on the suit property is neither here nor there as the approvals refers to LR NO 48622 which is not the suit property.

38. In conclusion, I find no merit in this application and the same is dismissed with costs to the Plaintiff/Respondent

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 10TH FEBRUARY 2022**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Rotich for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Mr. Njugi for the 2<sup>nd</sup> Defendant

Steve - Court Assistant