



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 77 OF 2012

SAMMY KARANJA MAINA.....PLAINTIFF/APPLICANT

VERSUS

BERNARD MURAGE MURIITHI.....1ST DEFENDANT/RESPONDENT

GERISHON KIBUGI GACHAGI.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff filed this suit at the High Court in Embu on 19th October 2007 seeking a permanent injunction to restrain the defendants, their servants, employees or anybody acting through them from selling, disposing of or entering or in any other way interfering with land parcel No. MWERUA/KAGIONI/1151 and declaring the plaintiff to be the legally registered owner of that land (hereinafter the suit land) and that the Title Deed held by the defendants is a forgery and therefore of no consequences.

Simultaneously with the filing of the suit the plaintiff sought and obtained an order injunctioning the defendants from interfering with the suit land till the case is heard and also an order inhibiting the registration of any dealing with the suit land till the dispute is heard interparte.

Meanwhile, the defendants filed a defence in which they pleaded, inter alia, that the plaintiff in fact obtained the Title Deed to the suit land illegally and fraudulently.

The suit was later transferred to this Court by Ong'udi J. on 7th November 2012 and after several mentions a date was taken by consent for hearing of the suit on 12th November 2014.

When the suit came up for hearing on 12th November 2014, there was no appearance by either Mr. Momanyi advocate for the plaintiff or his client and Mr. Ngigi for the defendant urged the Court to dismiss the suit for want of prosecution and also lift the inhibition

order placed on the suit land. The Court obliged and granted those orders as there was no representation for the plaintiff or any explanation for his absence or that of his advocate yet the date had been taken by consent in Court.

The dismissal of the suit on 12th November 2014 provoked two applications being:-

- 1. An application by the defendants seeking that M/S Quickline Auctioneers be authorized to remove the plaintiff or his agents from the suit land. This application was dated and filed on***

23rd April 2015.

- 2. An application by the plaintiff dated 18th May 2015 and filed on 22nd May 2015 seeking a stay of execution of the orders dated 12th November 2014 and secondly, that the orders made on 12th November 2014 dismissing this suit be set aside together with all consequential orders arising therefrom and that this suit be reinstated and proceed to full hearing.**

Both applications were opposed and when counsels appeared before me on 7th July 2015, it was agreed that they be canvassed by way of written submissions. Those submissions were subsequently filed as directed.

I have considered the two applications dated 23rd April 2015 and 18th May 2015 together with the respective rival affidavits and submissions by counsels.

Although the application dated 18th May 2015 seeking the setting aside of the orders dismissing this suit on 12th November 2014 is the latter of the two applications, I find it prudent to determine it first because if it is up-held, there would be no need to consider the application dated 23rd April 2015 though it is the earlier of the two.

With regard to the application seeking to set aside the order of 12th November 2014 dismissing this suit, both the plaintiff (SAMMY KARANJA MAINA) and a Court clerk in the firm of MOMANYI GICHUKI

Advocates who are on record for him have sworn supporting affidavits and what comes out from the supporting affidavit of the plaintiff is that on 8th October 2014 when the date for hearing this suit was agreed as 12th November 2014, another advocate Mr. Njeru held brief for Mr. Momanyi but unfortunately, Mr. Momanyi did not diarize that date and therefore did not inform his client the plaintiff.

On his part, the Court clerk in the firm of MOMANYI GICHUKI Advocate (MR. JOHN NZUKI MUIINDE) has confirmed that although he was indeed in Court when the hearing date was fixed, he forgot to diarize it in their diary. He readily admits that it was his mistake.

In opposing this application, Mr. Ngigi Advocate for the defendants filed grounds of opposition alleging that the application is

incompetent, bad in law and does not meet the threshold of setting aside judgments or orders. On their part, the two defendants BERNARD MURAGE MURIITHI and GERISHON KIBUGI KACHAGI have filed a replying affidavit in which they depone, inter alia, that the plaintiff has been procrastinating since this suit was filed in 2007 and indeed even on 13th February 2014, the plaintiff had been granted a last adjournment and was ordered to pay costs of Ksh. 3,000/= which remain un-paid. Further, that on 8th October 2014 when the hearing date was taken, there was a counsel holding brief for Mr. Momanyi yet neither the plaintiff nor his counsel attended the hearing on 12th November 2014 and therefore this application is meant to delay the execution of the orders issued on 12th November 2014. The other issues raised in the replying affidavit really touch on the lack of merit of the plaintiff's case and those are not matters to be canvassed at this stage.

It is not in doubt that when the hearing of this suit was fixed by Court on 8th October 2014, Mr. Momanyi Advocate for the plaintiff was not in Court. However, Mr. Njeru Ithiga held his brief. Mr. Momanyi's Court clerk JOHN NZUKI MUIINDE who was present in Court on 8th October 2014 and who asked Mr. Njeru Ithiga to hold Mr. Momanyi's brief when the hearing was fixed for 12th November 2014 has deponed that he forgot to diarize that hearing date and therefore Mr. Momanyi Advocate was not aware of the same and neither was the plaintiff. What is therefore being raised in this application is that due to the mistake on the part of the plaintiff's advocate whose clerk did not diarize the hearing date of 12th November 2014, there was a default on the part of both the plaintiff and his advocate as neither of the two were aware about the hearing date. Is this therefore a proper case for the setting aside of the order dated

12th November 2014?

The Court has a discretion to set aside ex-parte orders such as the one issued by this Court on 12th November 2014. However, this power is meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error. It is not meant to assist a litigant who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice – **SHAH VS MBOGO & ANOTHER 1976 E.A 116** which was up-held by the Court of Appeal in **MBOGO & ANOTHER VS SHAH 1968 E.A 93**. In this matter now before me, although allegations of procrastination have been levelled against the plaintiff in the handling of this suit when it was still in Embu, there is really nothing to suggest that the plaintiff has deliberately sought to delay or obstruct this suit. The record shows that both parties have at different times not been ready to proceed. It is true that on 13th February 2014 this Court granted the plaintiff the last adjournment to 19th May 2014 but the Court did not sit on that day. Previously, what has been coming up in this matter when it was still in the High Court Embu were several applications. The record before me does not demonstrate an attempt to deliberately delay this case on the part of the plaintiff. It is also clear from the affidavit of JOHN NZUKI MUIINDE that he only learnt of the dismissal of this suit when they were served with the application by the defendants dated 23rd April 2015. The plaintiff therefore moved with haste and filed this application on 18th May 2015. In my view, the plaintiff is deserving of the orders sought in his application dated 18th May 2015 and filed herein on 22nd May 2015.

Further, it is the plaintiff's case that the failure to attend the Court on 12th November 2014 was due to an error on the part of his advocate's clerk who failed to diarize the hearing date. Therefore, the root of the default in attending the trial was due to a mistake by the office of plaintiff's advocate. There is abundant authority that mistakes by an advocate are not reason for denying an otherwise deserving applicant of a favourable exercise of the Court's discretion in setting aside an order obtained in his absence. I can do no more than cite the very lucid pronouncement by **MADAN J.** (as he then was) in **MURAI VS WAINAINA (NO. 4) 1982 K.L.R 38** where he said this of an advocates' mistakes:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior counsel though in the case of a junior counsel this Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person who ought to have known better. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of the laws and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a

final Court of Appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interest of justice”.

It is conceded that it was due to an error on the part of the office of the plaintiff's advocate that led to both he and his advocate failing to attend Court to prosecute this suit on 12th November 2014. This error has been admitted, and the plaintiff having expressed his desire to be heard by this Court and finally bearing in mind that this dispute involves land which is a fairly emotional subject, it is only fair that the plaintiff is given an opportunity to prosecute his case. Clearly, it would be unjust to condemn the plaintiff unheard due to the mistake of his advocate.

Ultimately therefore, having considered all the matters herein, I find that this is a proper case in which to exercise my discretion to set aside this Court's orders dated 12th November 2014. The plaintiff will however meet the defendants costs and must also immediately pay the costs of Ksh. 3,000/= that were earlier ordered to be paid on 13th February 2014. As the orders obtained on 12th November 2014 have now been set aside, it is clear that the inhibition orders issued by Khaminwa J. will still remain in force until this case is heard and determined. It is therefore not necessary to consider the plaintiff's application

dated 23rd April 2015.

The parties are hereby advised to take the earliest hearing dates in the registry once the diary for 2016 is opened as this suit was filed in 2007.

It is so ordered.

B.N. OLAO

JUDGE

26TH OCTOBER, 2015

26/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Momanyi for Applicant – absent

Mr. Ngigi for Respondent – present

COURT: Ruling delivered this 26th day of October, 2015 in open Court.

Mr. Momanyi for Applicant absent

Mr. Ngigi for Respondent present.

B.N. OLAO

JUDGE

26TH OCTOBER, 2015