



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 190 OF 2018

WANYOIKE MUNGAI alias MICHEAL WANYOIKE MUNGAI.....PLAINTIFF/RESPONDENT

VS

BEATRICE KARANJA alias BEATRICE NYINDUMBI.....1ST DEFENDANT/RESPONDENT

BROADWAY BAKERY LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. The Plaintiff/Applicant filed the instant Notice of Motion application dated 2/11/2021 seeking Orders principally that the Honorable Court be pleased to set aside, vary and/or review its Ruling dated 30th September 2021 and consequential orders arising therefrom. The application is supported by the Affidavit of **Charles Mwangi**, the Plaintiff's Advocate of even date.
2. The gist of the application is that the Plaintiff had already obtained judgement in her favor on 1/11/2019 against the Defendant *inter alia* declaring him the lawful owner of land parcel known as L.R Number 4953/1420 (*the suit property*). That the 2nd Defendant herein through a notice of motion dated 7/12/2020 contested the said judgment as the rightful owner of the suit property having not been heard in the proceedings and urged the Court to reopen the case for fresh hearing. That the Plaintiff's former counsel Mr. Macharia J.O had filed a Replying Affidavit in opposition to the said Application but when the Ruling was delivered on 30/9/2021, he was aggrieved to learn that the Court held that the application was unopposed and proceeded to allow it. That the said Ruling is prejudicial to the Plaintiff as it was delivered in absence of the parties and ahead of the scheduled Ruling date of 4/11/2021 without notice.
3. When the matter came for hearing on the 17/11/2021 the respondents opposed the application and requested for a period of 14 days to file their responses and written submissions. By the time of writing the Ruling none had complied. The application is therefore determined on its merits.
4. The main issue for determination is whether the application is merited.
5. As to whether the Applicant is entitled to orders of stay of execution of the orders of the Court issued on the 30/9/2021 I shall rely on the provisions of section 80 of the CPA read together with order 42 rule 6(1) of Civil Procedure Rules. The Court is called upon to satisfy itself that the Applicant has filed the application timeously, that substantial loss may result to the Applicant unless the order is made and that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
6. In the instant case the Court in delivering its Ruling of the 30/9/2021 set aside the *ex parte* judgment of the Court delivered on the 1/11/2019. The orders of the Court therefore are negative orders for which stay of execution cannot arise. My perusal of the said Ruling show that there were no orders requiring any party to do anything or refrain from doing an act. The Court simply set aside its earlier orders on the ground that the 2nd Defendant being the registered owner of the land was not joined in the suit.
7. I am guided by the decisions of the Court in **Milcah Jeruto vs Fina Bank Ltd [2013]eKLR** and **Electro Watts Limited v Alios Finance Kenya Limited [2018] eKLR** where the Court held that stay orders cannot be granted where a negative order has been issued.
8. The second limb of the question to be answered by the Court is whether the Applicant is entitled to orders to set aside vary and or review the Ruling of the 30/9/2021.
9. Order 45 (1) of the Civil Procedure Rules allows the Court to review an order on grounds that there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the Applicant at the time when the decree was passed or the order made; or on account of mistake or apparent error on the face of the record or for any other

sufficient reason.

10. The Plaintiff avers that he duly filed his Relying Affidavit and submissions in opposition to the 2nd Defendant's application dated 7/12/2020. That the objections were filed by Advocate Macharia J.O before his demise through the firm of Macharia & Co. Advocates. That the Plaintiff's current firm, Ayieko & Kangethe Advocates took over the conduct of the matter vide a Notice of Change of Advocates dated 28/9/2021. Copies of the impugned Replying Affidavit sworn by the Advocate on 21/5/2021 and receipt for Kshs. 250/= were annexed as **CMK-4a & 4b** respectively. Notably the said Replying Affidavit bears this Court's stamp dated 9/7/2021 whereas the said receipt bears a stamp of even date but for Chief Magistrate's Thika Law Courts.

11. The Court record shows that when the application dated 7/12/2020 came up in Court Mr Macharia for the Applicant then sought 7 days to file his written submissions. On the 12/7/2021 Mr Mwangi counsel for the 2nd Respondent informed the Court that he had been served with the submissions of the Applicant. However, the said submissions do not appear to have been filed on record. I have seen copies of the Replying affidavit and the written submissions by the Plaintiff which are unstamped but with a handwritten date "RG 4/11/2021". Interestingly the Applicant has annexed a Court stamped Replying Affidavit dated the 21/5/2021 and it is not clear at what stage this was stamped. What is evident is that by the time the Court rendered the Ruling none of the documents were on record and the Court therefore was right when it stated on page 8 para 1 that the application was unopposed by the Plaintiff as this was the factual position at the time.

12. The Applicant has averred that the Ruling was delivered without notice however a perusal of the record shows that on the 12/7/2021 the Court fixed the Ruling date for the 4/11/2021. However the same was delivered on notice on the 30/9/2021. The Judge gave the reason for bringing forward the delivery of the Ruling date as having been occasioned by the transfer to a new station and that a notice was issued on Kenya Law portal on the 15/9/2021. This dispels the averment of the Applicant that there was no notice. It is now accepted that notices are issued electronically through the EKLR portal to both litigants and counsels aside. I have perused the said portal and it is evident that the said notice was posted.

13. Is there any prejudice to the Applicant? The Court in setting aside the exparte judgement paved way for the suit to be heard interpartes. The Court took note that there appears to be two claimants for the suit land, the Plaintiff and the 2nd Defendant. I see no prejudice that the Applicant will suffer if the suit is heard on merits so that the issue of ownership of the suit land is settled once and for all.

14. Having considered the application, the grounds and the record placed before me in totality, I find that the application is not merited. The same is dismissed with no orders as to costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff/Applicant – Kangethe

Defendant 1 – Ms Mokaya holding brief for Mr. Londo

Defendant 2 – Mwangi

Court Assistant - Phyllis