



**No. 188**

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 88 OF 2011(O.S)**

**ABISHAI NYAMWEYA MWEBI ..... PLAINTIFF**

**VERSUS**

**JOANES ABUTO ..... DEFENDANT**

**RULING**

1. The Plaintiff filed this suit against the defendant on 12<sup>th</sup> May, 2011 by way of Originating Summons of the same date. In his Originating Summons, the Plaintiff sought; a declaration that he is the absolute proprietor of all that parcel of land known as **L.R. No. West Kitutu/Bogusero/872** (hereinafter referred to as **“the suit property”**) which he had occupied, used and possessed peacefully, openly and without interruption for a period of over 29 years, an order that the defendant do execute all necessary documents for the transfer of the suit property to the Plaintiff failing which the Deputy Registrar or the Executive officer of the court be authorized to do so and, an injunction restraining the defendant by himself or through his agents, family members or legal representatives from in any way interfering with the Plaintiff’s quiet enjoyment, occupation and possession of the suit property. The Plaintiff’s suit was brought on the ground that the Plaintiff had occupied and used the suit property which is registered in the name of the defendant for uninterrupted period exceeding 29 years and as such the Plaintiff had acquired ownership thereof by adverse possession. In his affidavit sworn on 12<sup>th</sup> May, 2011 in support of the Originating Summons, the Plaintiff claimed that he purchased the suit property from the defendant in 1976 after which he took possession immediately and commenced development thereon. The Plaintiff claimed that the defendant failed to apply for and obtain the requisite consent of the Land Control Board for the purposes of transferring the suit property to the Plaintiff. The Plaintiff however remained in open, quiet, peaceful and uninterrupted possession of the suit property from the year 1976 when he was granted vacant possession thereof by the defendant. From the record, the defendant is said to have been served with the Summons to enter appearance together with the Originating Summons by one, James Moracha Ntabo a process server of this court sometimes on 13<sup>th</sup> May, 2011 but failed to enter appearance. The Originating Summons was listed for hearing on 5<sup>th</sup> February, 2013. Although it was not necessary to serve the defendant with a hearing notice the defendant having failed to enter appearance, the Plaintiff is said to have caused a hearing notice to be served upon the defendant through the same process server who stated in his affidavit filed in court on 5<sup>th</sup> February, 2013 that he served a hearing notice upon the defendant on 27<sup>th</sup> January, 2013. The defendant did not appear in court when the matter came up for hearing on 5<sup>th</sup> February, 2013. Upon satisfying myself from the affidavit of service of the said process server that the defendant was duly served with a hearing notice, I allowed the Plaintiff’s advocate to proceed with the hearing of the Originating Summons in the absence of the defendant. The Plaintiff

testified that, on 12<sup>th</sup> March, 1976, he entered into an agreement for sale with the defendant by which the defendant sold to him the suit property. He produced as an exhibit, a copy of the said agreement. He stated further that following the said agreement, he took possession of the suit property and developed the same by putting up one (1) permanent house and a semi-permanent house. In addition, he also put up on the suit property, a permanent toilet, a cow shed and a bore hole. He has also planted trees and fenced the compound. The Plaintiff stated that although he paid the purchase price in full to the defendant, the defendant refused and/or became reluctant to apply to the land control board for the necessary consent so that the suit property can be transferred to the Plaintiff. The Plaintiff testified that the suit property was still registered in the name of the defendant and that he had been in occupation of the same for 37 years as at the date of the hearing. He produced a certified copy of the register for the suit property to prove the existence of the suit property and the fact that it is registered in the name of the defendant. The Plaintiff stated that he had filed an earlier case against the defendant in the High Court namely, **KISII HCCC No.44 OF 2005** by way of a Plaint which he withdrew so that he may institute the present suit by way of Originating Summons. The Plaintiff did not call any witness. At the end of the Plaintiff's testimony, the Plaintiff's advocate closed the Plaintiff's case and notified the court that he wished to rely on the evidence on record.

2. By a judgment delivered on 19<sup>th</sup> April, 2013, I entered judgment for the Plaintiff against the defendant. I made a declaration that the Plaintiff has acquired title to the suit property by adverse possession and ordered the defendant to transfer the suit property to the Plaintiff within 21 days failure to which the Deputy Registrar should execute the necessary documents for the transfer of the suit property to the Plaintiff. I also issued a permanent injunction restraining the defendant from interfering with the Plaintiff's enjoyment, use and possession of the suit property. Following this judgment, a decree was duly extracted and executed by the transfer of the suit property to the Plaintiff. The transfer was executed by the deputy registrar after the defendant was said to have declined to execute the same.
3. What is now before me is an application brought by the defendant by way of Notice of Motion dated 26<sup>th</sup> July 2013 in which the defendant is seeking among others the following orders:-
  - a. **That this honourable Court be pleased to set aside the ex-parte proceedings of 5<sup>th</sup> February 2013 and judgment delivered on 19<sup>th</sup> April, 2013.**
  - b. **That this honourable court be pleased to grant the applicant leave to file his statement of defence out of time.**
  - c. **That this honourable court be pleased to make an order that the annexed draft replying affidavit be deemed as properly filed and served upon payment of requisite court filing fees.**

The defendant's application which is supported by the defendant's affidavit sworn on 26<sup>th</sup> July, 2013 has been brought on the grounds that the defendant was not served with Summons to enter appearance together with the Originating Summons and as such the ex parte proceedings of 5<sup>th</sup> February, 2013 that led to the judgment of 19<sup>th</sup> April, 2013 were irregular. The defendant has contended further that he has a good defence to the Plaintiff's claim which he should be given an opportunity to put forward. The defendant has contended that as at 19<sup>th</sup> April, 2013 when this court entered judgment in favour of the Plaintiff in which it declared the Plaintiff to have acquired the suit property by adverse possession and ordered the suit property to be transferred to the Plaintiff, the suit property was not in existence the same having been sub-divided sometimes in the year 2010 and portions thereof transferred to third parties. The defendant contended that these facts were within the knowledge of the Plaintiff who had in fact participated in an earlier suit in which the Plaintiff had challenged the sub-division of the suit property. The defendant has accused the Plaintiff of obtaining judgment through concealment of material facts to the court. The defendant has contended further that in view of the previous suits between the Plaintiff and the defendant over the suit property, the Plaintiff's claim to the suit property through adverse possession is not maintainable.

4. The defendant's application has been opposed by the Plaintiff. Through a replying affidavit sworn on 30<sup>th</sup> July, 2013, the Plaintiff has contended that the judgment delivered by this court on 19<sup>th</sup>

April, 2013 has been executed fully and as such the defendant's application has been overtaken by events. The Plaintiff has contended that the suit property has been transferred to his name and that he is in occupation of the same. The Plaintiff has contended further that the defendant was duly served with the Summons to enter appearance and that he has all along been aware of the existence of this suit. The Plaintiff has disputed the defendant's claim that the suit property was subdivided in the year 2010. The Plaintiff has contended that the purported sub-division of the suit property into three (3) portions was the work of fraudsters and that some of the land registry officials who were involved are under criminal investigation. The Plaintiff termed the certificates of official search for the purported sub-divisions of the suit properties exhibited by the defendant in support of the present application as forgeries and nullities the same having been created according to him, without lawful authority. The Plaintiff has accused the defendant of perjury and contended that whatever right the defendant had on the suit property had been extinguished by operation of law.

5. When the application came up for hearing before me on 29<sup>th</sup> August, 2013, Mr. Nyambati, advocate appeared for the defendant/applicant and Mr. Nyariki, advocate for the Plaintiff/respondent. In his submission, the defendant's said advocate reiterated the contents of the defendant's affidavit in support of the application which I have already highlighted herein above. He submitted that the suit herein having been heard ex parte, the defendant was condemned unheard. He contended that the applicant was not served with the summons and the entire process that gave rise to the judgment sought to be set aside herein was irregular. The defendant's advocate submitted that the affidavit of service that had been filed in court to the effect that the defendant was served with the summons was full of falsehood. Counsel submitted that the defendant resides at Oyugis and as such could not have been served with the court process at Mosochi as alleged in the affidavit of service filed in court. The defendant's advocate submitted that the fact that the defendant does not stay at the suit property which is situated at Mosochi is admitted by the Plaintiff in his affidavit in opposition to the defendant's application herein. The defendant's advocate submitted that want of service alone entitles the defendant to the orders sought. The defendant's advocate submitted further that the defendant has a good defence to this suit. He submitted that as at the time of filing this suit the suit property, **LR No. West Kitutu/Bugusero/872** did not exist and that this fact was within the knowledge of the plaintiff. He submitted that the suit property was sub-divided into three portions two of which are now registered in the names of third parties. He submitted that the proceedings that took place herein amounted to an infringement on these third parties' proprietary rights over these sub-divisions. The defendant's advocate submitted further that the draft replying affidavit which he intends to file in response to the originating summons which he has annexed to the affidavit in support of the application herein raises weighty issues of law and fact. The defendant's advocate urged the court to set aside the ex parte proceedings and judgment delivered herein on 19<sup>th</sup> April, 2013.
6. In his reply to the defendant's advocate's submissions, Mr. Nyariki advocate submitted that the Originating Summons was properly served upon the defendant. He referred the court to the affidavit of service sworn by James Moracha Ntabo on 15<sup>th</sup> June, 2013. He submitted that the defendant was served at his residence at Mosochi and not on the suit property. The Plaintiff's advocate submitted that paragraph 6 of the process server's affidavit left no doubt that the defendant was served. He pointed out that the defendant informed the process server that he had sold a portion of the suit property which information the process server could not have obtained save from the defendant. He submitted that the affidavit of service sworn by the same process server on 26<sup>th</sup> September, 2011 reinforces the Plaintiff's contention that the defendant was duly served with the Originating Summons herein and that he knew all along of the existence of these proceedings. The Plaintiff's advocate submitted that the service upon the defendant was proper only that the defendant was not interested in defending the suit. The Plaintiff's advocate submitted that the defendant was busy scheming to defeat the cause of justice by sub-dividing the suit property and selling the portions thereof to unsuspecting buyers. The Plaintiff's advocate submitted that the suit property has never been sub-divided and that the alleged sub-division was fraudulent and the same is a subject of criminal investigations. He submitted that the defendant was involved in the creation of fake documents relating to these alleged sub-divisions. The Plaintiff's advocate submitted further that the defendant only decided to come to court when he discovered that his fraudulent schemes had failed and he was called upon to surrender the

fraudulent titles in his possession and that he only ran to court to save face. The Plaintiff's advocate submitted that if the suit property was regularly sub-divided, it is the owners of the sub-divisions who should have come to court to challenge the decree issued herein. He submitted that it would not be fair to disturb a proper decree issued herein. Counsel submitted that if it is true that the suit property does not exist then, there is no basis for the present application. The Plaintiff's advocate submitted that no basis has been laid to warrant the setting aside of the judgment issued herein.

7. I have considered the defendant's application together with the affidavit filed in opposition thereto. I have also considered the submissions by the advocates for both parties. In the court of appeal case of, **Pithon Waweru Maina vs. Thuku Mugiria (1982-88)1KAR 171**, Potter J.A stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or defence or upon failure of either party to attend a hearing; **"This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948, to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law. Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E: "There is 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. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules."** Secondly, as Harris J. said in **Shah vs. Mbogo [1967] EA 116 at 123B**, **"This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice"**. That judgment was approved by the court of appeal in **Mbogo vs. Shah [1968] EA 93** and in **Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48** Biggs JA said at 51 **" I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised"**.
8. It is on the foregoing principles that I have to decide the present application. The defendant's application is premised on two grounds. The first is that he was never served with the Summons to Enter Appearance to the Originating Summons and as such the judgment entered against him ex parte was irregular and as such should be set aside *ex debito justitiae*. The second ground on which the application has been brought is that the defendant has a good defence to the Plaintiff's claim which the defendant should be given an opportunity to put forward. I have looked at the two affidavits of service sworn by James Moracha Ntabo which are on record. The first one was sworn on 15<sup>th</sup> June, 2011 and it concerned service of among other documents, Summons to Enter Appearance and the Originating Summons herein upon the defendant. According to this affidavit, the Summons to Enter Appearance and a copy of the Originating Summons were served upon the defendant on 13<sup>th</sup> May, 2011 at the defendant's home situated at Riotoigo area of Mosocho. The second affidavit of service was sworn on 26<sup>th</sup> September, 2011. This affidavit concerned service of a request for interlocutory judgment upon the defendant. It is not clear to me why the Plaintiff decided to serve a request for interlocutory judgment upon the defendant. I even have doubts whether such a request can be made with respect to Originating Summons. That notwithstanding, the process server according to the affidavit of service aforesaid, stated that he served the said request for interlocutory judgment upon the defendant on 26<sup>th</sup> September, 2011 at his home in Riotoigo within Mosocho division. In the affidavit of service sworn on 15<sup>th</sup> June, 2011, the process server stated that when he effected service of among others, the Summons to Enter Appearance upon the defendant the defendant informed him that he had already sub-divided the suit property and sold some portions thereof. In the affidavit sworn on 26<sup>th</sup> September, 2011, the process stated that the defendant accepted the request for interlocutory judgment that was served

upon him, wrote his identity card number and date of service on the process servers duplicate copy of the said request for interlocutory judgment but declined to sign the same terming the suit herein a waste of time. I have looked at a copy of request for interlocutory judgment that was served upon the defendant and which the process server returned to court. I have noted that there is a date, 26<sup>th</sup> September, 2011 written at the back thereof and below it are numbers 3470683. These numbers which the process server claims to have been given by the defendant as his identity card number corresponds with the defendant's identity card number which is indicated in exhibit "JA 04" to the defendant's affidavit sworn on 26<sup>th</sup> July, 2013. I am persuaded from the two affidavits of service mentioned herein above that the defendant was served with Summons to Enter Appearance together with the Originating Summons herein and that the defendant knew all along of the pendency of these proceedings. As submitted by the Plaintiff's advocate, there is no way the process server would have known that the defendant had sub-divided the suit property and sold some portions thereof to third parties. Again, there is no way the process server would have known the identity card number for the defendant. The defendant has only challenged the two affidavits of service on the ground that the same process server had sworn another affidavit of service on 8<sup>th</sup> May, 2013 in which he indicated that he had served the defendant with a court order at Oyugis on 2<sup>nd</sup> May, 2013. Interestingly, even for this service, the defendant has not admitted having received the said court order/decreed. In his affidavit in support of this application, he has stated that he came to know of this suit when the lands office served him with a letter dated 22<sup>nd</sup> July, 2013 notifying him of the nullification of his title over the suit property in execution of the judgment made herein. The process server stated very clearly in his affidavits of service sworn on 15<sup>th</sup> June, 2011 and 26<sup>th</sup> September, 2011 that he served the defendant at his home at a place known as Riotoigo in Mosocho. He did not say that he served the defendant on the suit property. It is the hearing notice that the process server stated in his affidavit sworn on 4<sup>th</sup> February, 2013 to have served upon the defendant at the suit property where the defendant is said to have been at the material time with three other people whose names are given by the process server. The defendant has not denied that he had a home at Riotoigo in Mosocho in the year 2011 when he is said to have been served with the summons to enter appearance and a request for interlocutory judgment. The defendant has not denied that he gave the process server his identity card number. He has also not denied that he was with Sagini Momanyi, Aroni Samusi and Joseph Magaki on 27<sup>th</sup> January, 2013 when he is said to have been served by the process server with a hearing notice for the Originating Summons herein. He has not denied knowing these gentlemen. It is my finding from the foregoing that the defendant was properly served with the Summons to Enter Appearance and the Originating Summons herein but chose for reasons only known to him not to appear in court and defend this suit. This finding alone would have disposed of this application. It is apparent from the material placed before me that as at 19<sup>th</sup> April, 2013, when the court delivered its judgment in which the Plaintiff was declared to have acquired the suit property by adverse possession and an order was made transferring the suit property to the Plaintiff, the suit property had already been subdivided into three (3) portions, namely, **LR Nos. West Kitutu/Bugusero/ 4342, 4343 and 4344**. This fact is very clear from the letter dated 22<sup>nd</sup> July, 2012 that was addressed to the defendant and two other persons by the District Land Registrar, Kisii County which has been annexed by both parties to their affidavits filed herein in support of and in opposition to the present application. The fact that the suit property had been sub-divided was not brought to the attention of the court. At the exparte hearing of the Originating Summons herein, the Plaintiff had maintained as I have stated at the begging of this ruling that the suit property was still in existence. In his response to the present application, the Plaintiff seems to have admitted the fact that the suit property had been sub-divided. He has contended however that the sub-division was fraudulent and is a subject of criminal investigation. Whether the sub-division of the suit property was fraudulent or not is an issue which should have been determined at the hearing of the originating summons. In fact, the court should have been called upon to cancel the purportedly fraudulent subdivisions before it could order the suit property to be transferred to the Plaintiff. As things stand now, the decree of the court seems to have been issued against a non-existent property and that the same has been executed going by the letter aforesaid from the District Land Registrar upon properties which were not the subject of this suit. This court did not at all order the surrender or the cancellation of the titles for **LR Nos. West Kitutu/Bugusero/ 4342, 4343 and 4344** as the

District Land Registrar purported to do. The court could not have done this because, first, these parcels of land were not the subject of this suit and, secondly, Joseph Magaki Isaboke and Joshua Felix Machogu who are the registered proprietors of **LR Nos. West Kitutu/Bugusero/ 4343 and 4344** respectively were not parties to this suit. A court of law would not issue an order or a decree in vain. A decree issued herein on 19<sup>th</sup> April, 2013 could not attach to the suit property as it did not exist as at the date of the decree. The Plaintiff's insistence that the suit property did exist cannot stand in the face of the letter that I have referred to herein above from the District Land Registrar, Kisii County. The decree of this court has apparently been executed against properties which were not in dispute in this suit and contrary to the express terms thereof. The defendant herein who is aggrieved by such a decree and the execution thereof has a right to have the decree set a side. I am also of the view that when it is brought to the attention of the court that it has issued a decree which is in vain, the court should seize the first opportunity in exercise of its inherent power to set such decree a side.

9. I have said enough to show that the defendant's application has merit. Although the defendant was served with the Summons to Enter Appearance and has not given any reasonable excuse why he failed to enter appearance within time, I am persuaded that the defendant has a good defence to the Plaintiff's claim which he should be allowed to put forward. I am also satisfied that this is an appropriate case in which the court should exercise its discretion in favour of setting aside an ex parte judgment. For the above reasons, the defendant's application dated 26<sup>th</sup> July, 2013 is allowed. The Judgment delivered herein on 19<sup>th</sup> April, 2013 and the subsequent decree extracted therefrom and issued on 2<sup>nd</sup> May, 2013 are set aside. All consequential actions taken in execution of and/or pursuant to the said judgment and decree are equally set a side and stand reversed. The defendant is granted leave to file a replying affidavit to the Originating Summons herein within 14 days from the date hereof. Subject to the orders issued hereinabove, in view of the allegations of fraud raised by the Plaintiff in relation to the sub-division of the suit property which may have to be determined in this suit, there shall be an inhibition inhibiting any dealing of whatsoever nature with **LR. Nos. West Kitutu/ Bugusero/ 4342, 4343 and 4344**, and out of abundant of caution, **LR. No. West Kitutu/ Bugusero/ 872 (if at all it exists)** pending the hearing and determination of this suit. Any person having interest in any of the said parcels of land who is not already a party to this suit shall have the liberty to apply in relation to this order of inhibition. The defendant shall pay to the Plaintiff throw away costs and the cost of this application assessed in the total sum of Ksh. 15,000.00 within 21 days from the date hereof. In default, the Plaintiff shall be at liberty to execute for the recovery of the same.

**Delivered, dated and signed at KISII this 24<sup>th</sup> day of January 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Odhiambo for Nyariki for the Plaintiff

Mr. Kerongo h/b for Nyambati for the Defendant

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**