



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 143 OF 2012**

DRUSILA KEMUNTO NYAMWANGE ..... PLAINTIFF

VERSUS

EVANS N. O MAGETO ..... 1<sup>ST</sup> DEFENDANT

RICHARD OCHAKO OKUMU..... 2<sup>ND</sup> DEFENDANT

MUNICIPAL COUNCIL OF KISII ..... 3<sup>RD</sup> DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendants on 23<sup>rd</sup> April, 2012 seeking; a declaration that the plaintiff is the sole owner of all that parcel of land known as Plot No. SSS/97 within Kisii Municipality (hereinafter referred to as “**the suit property**” where the context so admits), a permanent injunction restraining the defendants from interfering in any manner, trespassing, or developing, disposing or otherwise dealing with the suit property and the costs of the suit. Together with the plaint the plaintiff filed an application by way of Notice of Motion dated 23<sup>rd</sup> April, 2012 brought under order 40 rule 1, 2 and 3 of the Civil Procedure Rules seeking among others an order:-

**“ That the defendants/respondents and their agents, servants, or employees be and are hereby restrained by way of temporary injunction from entering, alienating, fencing, developing, disposing, trespassing and/or otherwise interfering with the plaintiff’s quiet possession of the parcel of land known as Plot No. SSS/97 Kisii Municipality pending the hearing and determination of the suit herein.”**

When the plaintiff’s application come up for hearing on 15<sup>th</sup> May, 2012 before Sitati J. there was appearance for the plaintiff, the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant. There was no appearance for the 1<sup>st</sup> defendant. According the affidavit of service sworn on 3<sup>rd</sup> May 2012 by one, Justus Orondo who is a process server of this court, he stated that he served all the defendants with the Summons to Enter Appearance, plaint, and the Notice of Motion application dated 23<sup>rd</sup> April, 2012. Regarding service upon the 1<sup>st</sup> defendant, the said process server stated as follows;

2. That on 27<sup>th</sup> April 2012 I received copies of the Notice of Motion dated 23<sup>rd</sup> April 2012 summons to enter appearance and plaint from M/s Masara & Co. Advocates for service upon Evans N. Ogeto, Richard Ochako Okumu and Municipal Council of Kisii, the defendants herein.

**3. That on the same day I proceeded to Nyanchwa Site and Service Scheme where I duly served the 1<sup>st</sup> defendant Evans N. Ogeto at construction site who accepted service by retaining copies in acknowledgment but refused to sign that he needs to consult his advocate first.**

**7. That the said Evans N. Ogeto was pointed out to me by his labourer Mr. Samuel Moseti Kuria” .**

Before the hearing of the plaintiff's application commenced, the plaintiff's advocate indicated to the court that he did not wish to pursue the application as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants because he had been instructed that it is the 1<sup>st</sup> defendant who was carrying out construction on the suit property. In the absence of any objection from the advocates from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the application was abandoned as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff's application was now directed only as against the 1<sup>st</sup> defendant. The court being satisfied that the 1<sup>st</sup> defendant was served with the application, the plaintiff's advocate was allowed to proceed with the application which was now unopposed. In a ruling dated 22<sup>nd</sup> May 2012 Sitati J stated that:-

**“After carefully analyzing the submissions by counsel for the plaintiff/applicant and after considering the replying papers filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively and noting that the 1<sup>st</sup> defendant who appears to be the major culprit in this whole saga has said nothing in response to the application, I am satisfied that on a balance of convenience the plaintiff/applicant is entitled to the order of temporary injunction. The 2<sup>nd</sup> defendant/respondent Richard Ochako Okumu does not have a voice to speak on behalf of Chrisantus Okumu if the latter is dead, and in any event, he has not demonstrated that Chrisantus Okumu is dead. Since there is a tug of war over the suit premises of which the plaintiff/applicant has possession, and until the issue is sorted out by the 3<sup>rd</sup> defendant/respondent, I hereby grant the order of injunction against the defendants in terms of prayer 3 of the Notice of Motion dated 23<sup>rd</sup> April 2012, until this suit is heard and determined.”**

2. What is now before me is the 1<sup>st</sup> defendant's application brought by way of Notice of Motion dated 12<sup>th</sup> April, 2013. The application has been brought under section 3A, 20, 63 (e) of the Civil Procedure Act and Order 10 Rule 11 and Order 40 Rule 7 of the Civil Procedure Rules. In the application, the 1<sup>st</sup> defendant has sought the following orders:

- 1. That this application be certified as urgent and heard on priority basis.**
- 2. That default judgment entered on 4<sup>th</sup> July 2012 and all other and/or further consequential orders be subsequently set aside.**
- 3. That this honourable court be pleased to discharge, vary or set aside the orders of interim injunction given by this honourable court ex parte on 22<sup>nd</sup> May 2012 and the plaintiff's application dated 23<sup>rd</sup> day of April 2012 be heard on merit afresh.**
- 4. That the defence and counterclaim filed in court on 10<sup>th</sup> July 2012 be deemed as duly filed and the matter do proceed for hearing on merit.**
- 5. That the costs of this application be provided for.**

The 1<sup>st</sup> defendant's application was supported by the affidavit of one, **Thomson Nsomu Osugo Mageto** (“**Osugo**”) sworn on 12<sup>th</sup> April, 2013. In the said affidavit, Osugo has stated that the 1<sup>st</sup> defendant/applicant is his brother and that he has given him a power of attorney to protect his interest inland parcel No. **Site and Service scheme/99**, Kisii Municipality. He has annexed to his affidavit a copy of the purported power of attorney as exhibit JNO-1. He has stated further that; on 4<sup>th</sup> June 2012, he received a court order restraining the defendants including the 1<sup>st</sup> defendant/applicant from interfering with land parcel No. SSS/97. The 1<sup>st</sup> defendant/applicant

who is based in the United States of America advised him to seek services of an advocate to represent him. The 1<sup>st</sup> defendant/applicant intimated to him that he was never served with any court papers and as such he was not in a position to file any response or react to the same.

3. Osugo stated further that he approached the firm of Bosire Gichana & Company Advocates with the said court order for advice and he was advised that the temporary injunction was in respect of land parcel No. SSS/97 and not SSS/99 which belonged to the 1<sup>st</sup> defendant and where the construction was going on. He stated that on 6<sup>th</sup> June, 2012, Officer Commanding Kisii Police Station accompanied by the plaintiff visited the site of construction and ordered further construction to be stopped forthwith thus leaving materials to go to waste. They also took away working tools including wheelbarrows to the police station at Kisii. Osugo stated further that the suit property was purchased by the 1<sup>st</sup> defendant from John Ondomu Nyagarama who was the actual allottee at the time of purchase in 2006. He stated that land parcel No. Site and Service Scheme/99 belongs to the 1<sup>st</sup> defendant/applicant and that he does not know where the land parcel, Site and Service Scheme/99 is situate.
4. Osugo stated further that the 1<sup>st</sup> defendant/applicant was erroneously sued since the plot in dispute is SSS/97 and not Site and Service Scheme/99. He maintained that 1<sup>st</sup> defendant was not served with any summons to enter appearance or any application and as such non-participation of the 1<sup>st</sup> defendant/applicant in this matter since inception was not deliberate. Osugo contended that the plaintiff has not demonstrated that he effected service upon the 1<sup>st</sup> defendant who works and resides in the United States of America.
5. Osugo contended that this is a land matter and as such a judgment in default cannot be entered even where there is no appearance. He contended that the 1<sup>st</sup> defendant has filed a defence which raises triable issues which can only be determined at the hearing and that the order sought to be set aside is causing great hardship, inconvenience and financial loss particularly to the 1<sup>st</sup> defendant/applicant who has literally been forced to stop construction works and to leave building materials to go to waste.
6. The 1<sup>st</sup> defendant's application was opposed by the plaintiff/respondent. The plaintiff filed a replying affidavit sworn on 23<sup>rd</sup> September 2013 in opposition to the application. In her affidavit, the plaintiff has contended that the 1<sup>st</sup> defendant/applicant's application is misconceived, unfortunate and has been brought with the sole aim of delaying the plaintiff from enjoying the fruits of her judgment. The plaintiff has termed the 1<sup>st</sup> defendant's application an abuse of the court process. The plaintiff has contended further that the application has been brought after a period of about 1 year from the date when the injunction order sought to be set aside was made. The plaintiff has contended that there is no good reason why this court should discharge, vary or set aside the temporary injunction granted by this court on 22<sup>nd</sup> May 2012.
7. The plaintiff has contended further that the 1<sup>st</sup> defendant/applicant was indeed personally served with the Notice of Motion application for injunction, Summons to enter appearance and the plaint on 27<sup>th</sup> April 2012 but he decided not to put a response within the prescribed time. The plaintiff also pointed out the fact that a copy of the power of attorney attached to Osugo's affidavit and marked "JNO1" is not signed by 1<sup>st</sup> defendant/applicant hence it is of no value at all. The plaintiff maintained that her plot is land Parcel No. SSS/97 and not SSS/99. The plaintiff has contended that the 1<sup>st</sup> defendant/applicant chose to interfere with her plot leaving the one he allegedly bought for reasons best known to himself. The plaintiff has claimed that plot No. SSS/99 is behind her plot and it is fully developed and that the 1<sup>st</sup> defendant/applicant occupied her plot because she had not started developing the same. The plaintiff has maintained that she purchased her land(the suit property) in 1990 and that the two parcels of land are distinct. The plaintiff has denied the 1<sup>st</sup> defendant's contention that the 1<sup>st</sup> defendant/applicant was erroneously sued. The plaintiff has maintained that the 1<sup>st</sup> defendant is carrying out construction on plot No. SSS/97 in dispute and not on Plot No.SSS/99 as claimed.
8. The advocates for the 1<sup>st</sup> defendant and the plaintiff agreed to argue the 1<sup>st</sup> defendant/applicant's application by way of written submissions. The submissions were duly filed and the same are on

record. I have considered the 1<sup>st</sup> defendant's application and the affidavit filed by the plaintiff in opposition thereto. I have also considered the submissions filed by the advocates for both parties. I am of the view that the following are the issues that present themselves for determination in the present application, namely:-

1. **Was the 1<sup>st</sup> defendant/applicant served with the plaintiff/ respondent's Notice of Motion application dated 23<sup>rd</sup> April, 2012 together with Summons to Enter Appearance and plaint?**
2. **Whether the special power of attorney that purportedly gave power to one Thomson Nsomu Osugo the brother to the 1<sup>st</sup> defendant/applicant to act on his behalf herein is valid?**
3. **Whether the 1<sup>st</sup> defendant/applicant has given good grounds to warrant the setting aside of the ex parte order of injunction made herein on 22<sup>nd</sup> May, 2012 and interlocutory judgment entered herein ex parte on 4<sup>th</sup> July 2012.**

It is now well settled in law that a party who alleges that he was not served with the court process should seek to cross-examine the process server who alleges to have served him to establish the truth of the matter. In the case of **Amayi Okumu Kasiaka & 2 Others vs. Moses Okware Opari & Another [2013] eKLR** Onyango Otieno Azangalala and Ole Kantai, JJA quoted P. N Muchemi J. who had held that:

**“Although service is disputed, the applicant's did not apply to call the process server for cross examination. This is the only way to test the genuineness (sic) of the alleged service. In the absence of such examination, the court will scrutinize the affidavit of the process server against the evidence of the parties contained in their affidavits. The dates of service of the orders of the court do not reveal any concealment of the orders as alleged. The only issue worth consideration is that one Joseph Manyuru Thuoni is alleged to have pointed out the appellants to the process server the first time they served. ....on close scrutiny of the affidavit of service, I find that they all contain vivid details. The date, the time and place of service is shown. The mode of identification of the applicant's has been explained as required. The affidavits are therefore reliable and are satisfactory evidence of service.”**

9. In the present case, it is interesting to note that only the 1<sup>st</sup> defendant/applicant has claimed not to have been served with the plaintiff's Notice of Motion application aforesaid. The other defendants entered appearance and filed their respective grounds of opposition/replying affidavit in opposition to the application. I have considered the affidavit of service the excerpts of which I have set out herein above. I have no reason to doubt that the 1<sup>st</sup> defendant was served with the Summons to Enter Appearance and the Notice of Motion application in contention on 27<sup>th</sup> April, 2012. The process server has stated clearly where he served the 1<sup>st</sup> defendant and how he came to know the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has not placed any evidence before the court to prove that he was not at the place at the time when he is said to have been served. Although, the 1<sup>st</sup> defendant has claimed that he was out of the country on the date when he is said to have been served he has not placed before the court a copy of his passport or any acceptable evidence in proof of that fact. In my view, the content of the process server's affidavit has not been challenged in any material particular. With that affidavit of service, the burden shifted upon the 1<sup>st</sup> defendant/applicant to prove that indeed he was not served. Since the 1<sup>st</sup> defendant/applicant has not put any material before me to prove that he was not served, it is my finding that he was indeed served. Having reached the conclusion that the 1<sup>st</sup> defendant was duly served, it follows that the ex parte injunction order and interlocutory judgment entered herein against the 1<sup>st</sup> defendant in default of appearance were both regular and the 1<sup>st</sup> defendant needs to give good reasons why the same should be set aside.
10. On the issue of the power of attorney relied upon by Osugo who is the 1<sup>st</sup> defendant/respondent's brother to institute the present application, I am in agreement with the submission by the plaintiff's advocate that the same is a worthless piece of paper which is not capable of conferring

any legal power or authority on any one. The purported power of attorney is neither dated nor signed by the 1<sup>st</sup> defendant/applicant or Osugo. It has also not been stamped. In **Michael Waweru Ngene vs. Dorothy Ikamba Muturi [2012] eKLR** Ougo J held that:-

**“I have however perused the said copy of the power of attorney attached and it has no evidence of stamp duty as required by section 18 of the Registration of Documents Act which states that: A document the registration of which is compulsory under this Act shall not, unless duly registered, be received as evidence in any transaction affecting the property to which the document relates, condition as the court may impose.**

**.....A power of attorney is one such document that must be registered as provided under section 4 of the said Act Cap 285 and Stamp Duty Act cap 480 section 19. Counsel for the defendant has clearly dealt with the issue of the plaint being defective in page 2 of his submissions. I agree with him that the purported power of attorney is a nullity abinitio and invalid for failure to comply with sections 4, 9 and 18 of the Registration of Documents act Cap 285 and the Stamp Duty Act Cap 480 and as a consequence thereof the plaint filed herein is incompetent.”**

11. I am in total agreement with this decision of my sister. In the instant case, the purported special power of attorney by the 1<sup>st</sup> defendant to Thomson Nsomu Osugo was neither signed, dated, registered nor stamped. It was therefore null and void for all intents and purposes. Accordingly, the Notice of Motion application dated 12<sup>th</sup> April 2013 that was brought by Osugo on the strength of that power of attorney is equally misconceived, incompetent and unsustainable.
12. The upshot of the foregoing is that the 1<sup>st</sup> defendant has failed to satisfy this court that good grounds exist to warrant the setting aside of the ex parte temporary injunction granted herein on 22<sup>nd</sup> May, 2012 and the interlocutory judgment entered herein on 4<sup>th</sup> July, 2012. The 1<sup>st</sup> defendant's application is for reasons given above incompetent and an abuse of the process of the court. The 1<sup>st</sup> defendant has also not explained the delay of about 1 year before bringing the present application. In addition, the 1<sup>st</sup> defendant has not come out clearly in his draft defence and counter-claim as to the defence that he wishes to put forward. There is no attempt at all by the 1<sup>st</sup> defendant in the said defence to demonstrate that the construction that he is carrying out is on Plot No. SSS/99 and not on Plot No. SSS/97 owned by the plaintiff. I have said enough to show that the 1<sup>st</sup> defendant's application is not for granting. The application dated 12<sup>th</sup> April, 2013 is dismissed with costs to the plaintiff.

**Delivered, signed and dated at Kisii this 29<sup>th</sup> day of May 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Okachi for the plaintiff

Mr. Bosire for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

Mr. Bosire for the 3<sup>rd</sup> defendant

Mr. Mobisa Court Clerk

**S.OKONG'O**

**JUDGE**