



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 3 OF 2019 (OS)

ELIZABETH NTINYARI.....PLAINTIFF

VERSUS

JUDY RAUGA GICHU (The personal representative of the estate of

JOYCE KABURO RAUGA) (Deceased).....DEFENDANT

RULING

1. Before the court is the application dated 25.1.2022 seeking for orders that;- Judy Rauga Gichu the personal representative of the estate of the deceased do substitute the defendant herein; temporary injunction barring and restraining the plaintiff from selling, advertising, charging or disposing of the suit parcels of land;- leave be granted to cross examine the process server alleged to have effected service of summons against the deceased defendant; setting aside the judgment delivered on 21.4.2021; leave to file a replying affidavit in defence to the suit and lastly cancellation of the title deed to the plaintiff regarding the land registration No. Nyaki/Giaki/Kiburine/12 and any resultant subdivision(s).

2. The application is supported by an affidavit sworn on 25.1.2022 by Judy Rauga Gichu. The grounds of the application are; there was no service of summons effected upon the deceased defendant as alleged or at all; there was a previous suit namely Meru CMCC No. 274 of 2014; the land was held in trust for the children; the suitland has been subdivided in nine portions and may be disposed of by the plaintiff. The defendants are willing to defend the suit and have an arguable defence; there was non-material disclosure of the pending suit(s) and the existing court order and eviction orders in Meru Civil Suit No. 56 of 1994, and a succession cause; and lastly that; the deceased was undergoing medication outside his home and hence was not served with summons as alleged or at all.

3. In a further supporting affidavit by Judy Rauga Gichu sworn on 8.3.2022 the applicant insisted that there was no proper service of summons upon all the defendants given the deceased was recuperating in Nairobi at the alleged time and the deponent was based in the USA and his other brothers were working in Nairobi at the time; they were condemned unheard; there exists an arguable defence; any structures on the suit land are recent; and an active investigation was going on over the fraudulent activities by the plaintiff.

4. The application is opposed through a replying affidavit sworn by Elizabeth Ntinyari on 22.2.2022. On the first ground, it is stated the service of summons was effected upon the 1st defendant on behalf of the other defendants who failed to respond thereto at her home in Nkouna and that the process server was ready to be cross examined; that the plaintiff has been in occupation of the suit land since 1970 unlike the applicants who have not been on the land and have nothing thereon and that there has been no interruption or competent proceedings against him; that the following determination of the suit he subdivided the land and transferred the land to his children who were now in occupation hence the defendant's title has been extinguished and the orders sought could not issue.

5. Parties were ordered to file written submissions to the application by 3.3.2022. The applicant has submitted there were five issues for determination namely; if there was proper service; if the deceased held the suit parcel in trust; if there existed other proceedings; if there is a plausible defence and if the title and resultant subdivisions should be cancelled.

6. On the first issue the applicant has urged the court to find there was no proper service given the sickness of the deceased and his long admission in various hospitals outside Kaaga location.

7. Reliance was placed on *Elizabeth Kavere and another vs Lilian Atho & another (2020) citing with approval James Kanyitta Nderitu & another vs Marios Philotas Ghikas & another (2016) eKLR & Philip Kiptoo Chemwolo & another vs Augustine Kubende (1986) eKLR*.

8. On the 2nd issue it was submitted the defendant and her siblings ought to have been joined in the suit since the deceased held the land in trust following the grant hence the beneficiaries ought to have been personally served with summons. Reliance was placed on *Joseph Njau vs Robert Maina Chege & 2 others Eldoret HCCC NO. 136 of 2000* on the concept of necessary parties to a suit in line with order 5 rule 7

Civil Procedure Rules.

9. Regarding the 3rd issue the applicant submitted there were in existence previous and or pending matters touching on the subject matter running since 1994 one of which the advocate now for the plaintiff was on record for the plaintiff hence there was non-disclosure and abuse of the court process. Reliance was placed on **Peter M.N Simatwa vs Gatacha Farmers' Cooperative Co. Ltd & another ELC Kitale CC No. 36 of 2013 (OS)** on the implications of previous suits in a claim for adverse possession.

10. As regards the 4th issue it was submitted the respondent in his replying affidavit did not disputed the draft replying affidavits raised triable issues which went to the core of the suit inter alia, trusteeship aspects, interruption in occupation and the pending similar suits. Reliance was placed on **Gulf Fabricators vs County Government of Siaya Siaya HCCC appeal no. 10 of 2019**.

11. The issue commenting themselves for the court's determination are:-

(i) *If the applicant has made a case for the court to set aside the exparte judgment and give her an opportunity to unconditionally defend the suit.*

(ii) *If the applicant has a defence to the suit.*

(iii) *If the applicant is entitled to temporary orders of injunction pending hearing of the suit.*

12. There is no dispute that the defendant passed on 30.12.2021 and that the applicant was issued with limited grant ad litem under Section 54 of the Law of Succession Act in Meru CMCC P & A No. E009 of 2022 on 24.1.2011.

13. The plaintiff took out originating summons dated 21.2.2018 against the defendant sued as a trustee of inter alia, the applicant herein alongside Edward Mbaya Rauga, Ronald Murithi Rauga and Nicholas Mutwiri Rauga regarding L.R No. Nyaki/Giaki/Kiburine/12 measuring 8.2 ha alleging adverse possession. He attached a copy of the register showing the defendant now deceased was holding the land in trust for the named beneficiaries.

14. By an affidavit of service sworn by Joseph Kithinji M'Kiambati deposed on 25.1.2019 at 2.30 pm he effected service on Joyce Kaburo Rauga at Nkoune village Igoki sub-location where she accepted service but refused to acknowledge service through a signature after being identified to him by Dorothy Kathure.

15. In yet another affidavit sworn on 15.5.2019 the said process server stated he served a mention notice dated 14.5.2019 for directions on 28.6.2019 upon Joyce Kaburo Rauga at Nkoune.

16. Even though the mention notice included the names of Judy Rauga Gichu, Edward Mbaya Rauga, Ronarld Muirithi Rauga and Nicholas Mutwiri Rauga, the process server did not explain if he ever enquired about the said necessary parties or he ever attempted to effect any service upon any of them.

17. Similarly the process server did not say if Joyce Kaburo Rauga accepted the service of summons for and on behalf of the rest of the named parties to the mention notice, or hearing notices.

18. The same position above appears in the affidavits of service sworn on 5.8.2019, 5.9.2019, 14.7.2020, 18.2.2021 notice dated 28.6.2019 and bundle of documents dated 21.8.2019. Mention notice dated 12.9.2019, 17.10.2019 and hearings on 21.6.2020, 12.10.2020.

19. In **Muthaiga Road Trust Co. Ltd vs Five Continents Stationers Ltd and 2 others (2003) eKLR** the court held the principles to be followed for setting aside were set out in **Patel EA Cargo Handling Services Ltd (1974) E.A 75**, the main concern of the court being to do justice to the parties. The court went on to state even where there was a regular judgment, the court would not usually set aside judgment unless it was satisfied that there was a defence on merits raising triable issues.

20. In **Mungai vs Gachuhi and another (2005) eKLR** the court citing with approval **Signature Tours and Travel Ltd vs NBK** held a court's decision stand as a final decision only when a proper hearing had taken place the parties and those who ought to be enjoined as parties had been fully heard and their presentation concluded unless they chose to forego the opportunity.

21. Order 12 Rule 7 Civil Procedure Rules grants the court power to set aside or vary a judgment.

22. In **John Mukuha Mburu vs Charles Mwenga Mburu (2019) Mohammed & another vs Shoka (1990) IKLR 463 eKLR** the court held the correct approach to an application for setting aside was first whether there was a defence on merits, if there could be any prejudice and thirdly if there was an explanation for delay.

23. In **James Kanyiita Nderitu & another vs Marios Philotas Ghitas & another (2016)** the court held under Order 10 rule 11 Civil Procedure Rules the court had unfettered discretion to set aside an order taking into account inter alia reasons for the failure to enter appearance or defence, length of delay, if the defence raises triable issues, prejudice to the opposite party and, if it was in the interest of justice to set aside the judgment.

24. Further, the court held an irregular judgment is where judgement had been entered against a defendant who had not been served with summons to enter appearance. In the latter case the court held it would set aside the judgment *ex debit justicia* (as a matter of right) without considering whether there has been inordinate delay or there existed triable issues since such a party had been condemned unheard without

notice of the allegations against him or an opportunity to be heard given the right to be heard before an adverse decision was made was fundamental and permeated the entire justice system.

25. Applying the above principles it is not in dispute the plaintiff brought the originating summons against the deceased as a trustee for disclosed beneficiaries who have now approached this court claiming they were not served with summons to enter appearance and or other court processes before the matter was heard and determined. They have also given reasons for the delay and the lack participation in the proceedings since they were not notified of the suit.

26. Further the applicants have raised three significant issues among them pending suits and orders between their deceased parents with the plaintiff herein. The plaintiff has not denied the existence of those previous suits and orders issued against him as per the pleadings and documents attached to the supporting and further affidavits by Judy Rauga.

27. In my view a beneficiary to the estate of the deceased is a necessary party to the proceedings and a interested party likely to be adversely and or directly affected by the outcome as held in *Joseph Njau vs Robert Maina Chege and another (supra)* and as provided under Order 5 Rule 7 of Civil Procedure Rules.

28. Such a party has constitutional rights to be heard and without more must be given an opportunity to ventilate his or her defence. The plaintiff is the one who disclosed the parties and was ordered to serve them in at least five occasions by the court. The affidavits of service have not disclosed any attempts to reach out to the disclosed parties as per both the mention notice and the two hearing notices. Once the applicant raised the doubts on proper service it was expected that the process server would swear an affidavit to clarify service over the beneficiaries. My finding therefore is that applicants were not aware of the suit, the reason for not appearing was not deliberate or through evasion and the delay is sufficiently explained. See *Shah vs Mbogo (1967) E.A 116*, *Pithon Waweru Maina vs Thuku Mugiria Nairobi C.A No. 27 of (1982) Patel vs E.A Cargo handling services Ltd (1974) E.A 75*.

29. Looking at the facts, circumstances, both prior and subsequent and the respective merits of the parties together with the speed with which the plaintiff subdivided and or transferred the land, coupled with the fact that he withheld material facts before court, I am inclined to find the defendants deserving an opportunity to be heard on merits and for orders preserving the suit property and all the resultant subdivision.

30. I proceed to set aside the judgment herein and all the subsequent orders. A temporary order of injunction is hereby issued barring and restraining the plaintiff from selling, transferring, disposing off, or charging the suit property and all resultant subdivisions.

31. Further, the court grants orders of inhibition to be registered against the suit property and the resultant subdivisions to subsist for one year only. The defendant(s) and any other interested parties are granted leave to respond to the O.S within 60 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Mutuma for applicant

HON. C.K. NZILI

ELC JUDGE