



REPUBLIC OF KENYA

High Court at Meru

Civil Case 16 of 2011

ABDUL RAHIM DAWOOD.....PLAINTIFF/RESPONDENT  
VERSUS

MARTHA KITHIRU.....1<sup>ST</sup> DEFENDANT/APPLICANT

STEPHEN M'TWAMWARI.....2<sup>ND</sup> DEFENDANT/APPLICANT

MARGARET M. NKUENE.....3<sup>RD</sup> DEFENDANT/APPLICANT

R U L I N G

The applicants through an application dated 10<sup>th</sup> July, 2012 brought under Order 10 Rule 11 Civil Procedure Rules and Section 1A, 3 and 3A of Civil Procedure Act seeks the following orders:-

- a) *This application be certified urgent and be heard ex-parte in the 1<sup>st</sup> instance, service of the same be dispensed with in the 1<sup>st</sup> instance.*
- b) *The court do issue an order for stay of execution of the judgment dated 10/7/2012 pending the hearing of this application, or until further orders of this court.*
- c) *The Hon. court do set aside the judgment dated 10/7/2012, order the plaintiff to serve the applicant with summons and plaint for the case to start de novo and heard on merit.*
- d) *The Hon. court do issue further orders as may meet the ends of justice.*
- e) *Costs of this application be provided for.*

The application is based on the grounds on the face of the application and further supported by affidavit of Martha Kithuru 1<sup>st</sup> applicant dated 10<sup>th</sup> July, 2012 and further supporting affidavit by Stephen Mbaabu M'Twamwari, 2<sup>nd</sup> applicant dated 11<sup>th</sup> October, 2012. The application is opposed by the respondent. The respondent swore an affidavit dated 17<sup>th</sup> September, 2012.

When the application came up for hearing both Counsel opted to give oral submissions. I have carefully listened and considered oral submissions by Miss Mwangi learned Advocate for the Applicants/defendants and oral submissions by Mr. Mutuma learned Advocate for the respondent. The court has also considered the pleadings and the respective opposing positions of both sides. The court has further considered the affidavits in support of the application and affidavit in opposition to the

application.

The brief history of this suit is that the respondent/plaintiff filed this suit on 15<sup>th</sup> February, 2011. That by an affidavit of service by one Joseph Mburu Kungu dated 15<sup>th</sup> March, 2011 he purported to have served the documents at the homestead of 1<sup>st</sup> defendant/applicant in Nkoune village upon the 1<sup>st</sup> defendant/applicant who accepted the documents by taking on her behalf and on behalf of the 3<sup>rd</sup> defendant but declined to sign. That on the same day the process-server averred that he served the 2<sup>nd</sup> defendant at 3.30 p.m at Makutano market, Meru County who accepted service but declined to sign on his return copy. The process server averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were pointed to him by the respondent who was well known to them.

That interlocutory judgment was entered in favour of the respondent on 27<sup>th</sup> April, 2011 and the matter came before me up for formal proof on 28<sup>th</sup> April, 2012. That judgment was subsequently entered in favour of the plaintiff/respondent on 10<sup>th</sup> July, 2012.

The 1<sup>st</sup> applicant/defendant contention is that she knows the suit land No. Ntima/Igoki/676 which she alleges emanated from land parcel No. Ntima/Igoki/2177 which land she contends belonged to her now deceased husband one M'Ituamwari Mburugu and his brother Naaman M'Mwirichia. That the applicant contends she has all her life lived on this land and she is now around 80 years. That at one time applicant's husband gave a portion of his land to his brother Naaman M'Mwirichia, deceased, who the applicant contends sold his portion to the plaintiff/respondent and transferred the portion to the plaintiff/respondent.

The applicant averred that the respondent at one time went to see her and told her that he wanted her to sign a document alleging it was an acknowledgement of the title deed to the portion belonging to her late husband. The applicant averred that she did not suspect the respondent and on being taken to his office at Meru Town she duly thumb-printed on the space that the respondent showed her. The applicant has now averred that she came to learn later that the document she thump-printed is now what the respondent refers to as an agreement/Memorandum of understanding. The applicant denied having gone to any lawyer for the purposes of executing sale agreement between herself and the respondent.

The 1<sup>st</sup> applicant deny having been served with summons to enter appearance and contends that had she been served she would have appeared and defended the suit. She contends that she came to be aware of this suit through her grandson who was in court when the plaintiff was giving evidence in this matter.

The applicant has further averred that the respondent had been eyeing their land and has been using all tricks to get the land. That the respondent has retained both title deeds for M'Mwirichia and applicant's husband after sub-division in the year 2003 and the applicant's efforts to get back her husband's title has been fruitless and that the applicant had not realized that the respondent had transferred her husband's land into his name.

The 2<sup>nd</sup> applicant/defendant on the other hand denied service of any summons to enter appearance upon himself and reiterated the averments by 1<sup>st</sup> applicant in support of the applicant. The 2<sup>nd</sup> applicant contends that the respondent wrongfully registered his father's land in his name hence he cautioned the land. That the respondent approached the 2<sup>nd</sup> respondent to remove the caution on the grounds he was ready to sub-divide the land and give applicants their title. That upon removal of the caution the respondent sub-divided the land but instead of releasing the title, he registered the two portions in his name. the applicants contend that the respondent became dishonest and wants to grab the applicant's land and that it why he did not serve them with summons to enter appearance.

The respondent's contention is that the applicants were duly served with summons to enter appearance but chose not to defend the suit as they have no defence. The respondent contends that he bought the land from Naaman M'Mwirichia on 8<sup>th</sup> May, 2003 for a consideration of Kshs.2,900,000/- with full knowledge of the applicants. That the respondent caused subdivision of parcel land No. Ntima/Igoki/3901 into two portions. That the seller died before giving vacant possession. The respondent further contends the agreement to give vacant possession was made before a lawyer and not at respondent's offices. He further contends the suit land never belonged to the late M'Itwamwari Mburugu as alleged by the applicants but the land Ntima/Igoki/3901 solely belonged to Naaman M'Mwirichia. He further contends the applicants do not live and have never lived on the suit land as the same is for commercial purposes and there is a bar.

The issue for determination is whether the applicants have defence on merits and whether there would be any prejudice if the application is allowed and thirdly whether there is an explanation for delay to be considered.

The court of Appeal in a decision of **SWALEH A. HASSAN & ANOTHER –V- MBARAKA SHOKA CIVIL APPEAL NO. 163 OF 1989**(Unreported) laid down the test to be followed in setting aside an ex-parte judgment that is:-

***“Whether there is a defence on merit or whether there would be prejudice and thirdly that the explanation for any delay be considered.”***

In the instant application the applicants denied service. The respondent on his part filed an affidavit stating that the applicants were served. The process server stated that the applicants were pointed to him by the respondent. He did not give details as of the time they were pointed to him and whether they admitted they were indeed the defendants. The respondent in his replying affidavit casually under paragraph 4 stated:-

***“That the applicants were duly served with summons and plaint but chose not to defend the suit as they had no defence. This is evident from affidavit of service on record. The Process Server is ready to be cross-examined on service.”***

The respondent in his affidavit do not mention being at the scene of service of summons to enter appearance upon 1<sup>st</sup> applicant at her homestead. The Process Server states that at the time of service the said 1<sup>st</sup> defendant and 2nd defendant were pointed to him by 1<sup>st</sup> plaintiff's agent one Mr. Mutembei who was well known to them. Strange enough the 1<sup>st</sup> plaintiff's agents, and the 1<sup>st</sup> plaintiff being stranger in this matter, as there is only one plaintiff, did not make any affidavit to confirm that he indeed knew the applicants and indeed pointed them to the process-server.

Under Order 5 Rule 15(1) of Civil Procedure Rules is it provided:-

***15. (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.***

The affidavit of service is required to be in Form No.4 of the Appendix A with such variations as circumstances may require. It is mandatory for process server in affidavit of service to indicate date of service, or place of service, time of service and indicate whether the person being served, was known to him/her or if not so who identified the person being served giving his address and indicate whether the person being served admitted that he or she was the defendant. The affidavit of service must also be

signed before Commissioner for oaths or Magistrate.

In the instant affidavit of service the alleged identifying person's address and particulars are not properly given. He is simply referred to as 1<sup>st</sup> plaintiff's agent Mr. Mutembei. There is only one plaintiff in this matter and unless it is a typing error, the 1<sup>st</sup> plaintiff is unknown in these pleadings. Secondly full names of identifying person has not been given. In Meru Mutembei is a common name and it could be any one going by the name Mutembei.

Further the people purported to have been served did not admit they were the 1<sup>st</sup> and the 2<sup>nd</sup> defendants/applicants. This could mean the process server served any one pointed to him by the alleged a Mr. Mutembei. I am not therefore convinced that there was any proper service and that the applicants were served. I tend to agree with what the applicants stated that they were not served with summons to enter appearance.

On the issue of defence the defendants/applicants counsel submitted that they could not file draft defence having not been served with summons to enter appearance, however from their affidavit it is clear that they are stating that the transfer was through misrepresentation or through fraud as the deceased never sold the property. The applicants have disclosed their defence in their affidavit is on merit and whether they will succeed or not is not material at this stage as they have demonstrated their defence is not a shame.

The matter in issue concerns a prime land within Meru Township. The applicants are claiming the land as theirs and claim to be in occupation. The respondent has a title and claims the land as his own. The respondents' title is not at this time being cancelled or being interfered with but by refusing to set aside the exparte judgment the applicants rights and interest would be prejudiced. This is a land matter and matters related to land should be handled with a lot of caution and patience so as to ensure justice is not only seen to be done but is done to all parties. No party in land related matters should be denied to be heard even where a party has defaulted in filing defence in time as land is everything for Mwanachi in this country.

Article 50(1) of the Constitution of Kenya, 2010 provides:-

***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

Further under Article 40(1) of the Constitution of Kenya, 2010 it is provided:-

***"40. (1) (a) and (b) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***  
***(a) of any description; and***  
***(b) in any part of Kenya."***

Under Article 159(2) (a) (d), (e) of the Constitution, 2010 provides:-

***159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a) justice shall be done to all, irrespective of status;***

***(b).....***

***(c).....***

***(d) Justice shall be administered without undue regard to procedural technicalities; and***

***(e) The purpose and principles of this Constitution shall be protected and promoted.***

In view of the Constitutional provisions stated herein above, this court is enjoined in the administration of justice to do justice to all parties and ensure each person has the right to have any dispute that can be determined by the application of law decided in a fair manner. This can be achieved by affording all parties an opportunity to be heard and ventilate their case before court before final determination of any matter. It is against the rules of natural justice to deny a party to any dispute to present his case to the best of his capabilities.

Having considered all the issues raised in this matter I am inclined to grant the application and I proceed to make the following orders:-

***1. That the exparte interlocutory judgment applied for on 30/3/2011 and exparte judgment dated 10/7/2002 granted by this court, and all consequential orders thereof be and are hereby set aside.***

***2. The applicants/ defendants be served with summons to enter appearance through their Advocates and do file their defence within the prescribed period from the date of service.***

***3. Costs be in the cause.***

DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF MARCH, 2013.

**J. A. MAKAU**  
**JUDGE**

***DELIVERED IN OPEN COURT IN THE PRESENCE OF:***

1. Mr. M. Kariuki h/b for Miss E. G. Mwangi for applicants
2. Mr. Muriuki h/b for Mr. Mutuma for the respondent.

**J. A. MAKAU**  
**JUDGE**