



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 408 of 2007**

**BENSON TIRIA NJONJO .....1ST DEFENDANT/APPLICANT**

**REUBEN MWAURA NDUBA.....2ND PLAINTIFF/RESPONDENT**

**SIMON NJUGUNA KARIUKI .....3RD PLAINTIFF/RESPONDENT**

**VERSUS**

**GRACE WAKONYO THIONGO.....1ST DEFENDANT/APPLICANT**

**WILSON NGURO THIONGO.....2ND DEFENDANT/APPLICANT**

**PETER NGURURU THIONGO.....3RD DEFENDANT.**

**RULING**

The applicants/defendants have filed a Notice of Motion dated 4th April 2011 under order 5 Rule 8, Order 10 Rules 2 and 11, Order 19 rule 2(1), Order 22 Rule 6, 22 (1) 28 civil procedure rules 3A Civil procedure Act and all other enabling provision of Law seeking the following orders;

1. Spent
2. That there be an immediate ex parte stay of the decree dated 4th March 2011, proceedings and judgment dated 2nd December 2010 Hon. Muchelule pending hearing and determination of this suit.
3. That the said decree ex parte judgment and proceedings of Hon. Muchelule dated 2nd December 2010 be set aside and the defendant granted leave to file defence and matter do proceed for full hearings interparties.
4. That such other or further orders be granted as the Court deems fit to grant.

The application is based on the following grounds;

- a) The defendants were never served with summons to enter appearance or the formal proof hearing notice.
- b) The judgment was issued on a false statement by the process server.

- c) The issue raised is serious as involves eviction from a land parcel where the defendants reside permanently.
- d) The defendant stand to suffer irreparable loss.
- e) To avoid a serious miscarriage of justice.
- f) Other grounds to be adduced at the hearing.

The 1<sup>st</sup> defendant/applicant Grace Wakonyo Thiongo filed a supporting affidavit of 4th April 2011. She depones as follows; that on 23rd March 2011 an unknown person dropped an envelope at the home of the 2nd Respondent containing a Notice of Execute dated 16th February 2011 and Decree dated 4th March 2011 indicating they were to be evicted 60 days from 2nd December 2010. That they have never been served. That their advocates advised them to peruse the Court file and found there are three separate affidavits of service filed by one Julius Kilonzi on 24th January 2002, 26th September 2002 and 14th July 2003 trying to explain how the summons were served which are all full of lies and contradictions in particular.

The affidavit filed of 24th January 2002 states that both not 3 defendants were served and they alleged it was family matter. That they were served at Kikambura which doesn't exist but Gikambura. The affidavit filed on 26th September 2002 states she was served at Kikambura which does not exist, they were served on 27th October (with no year) and that they served all the defendants in their homes without explaining if lived together. Affidavit filed on 14th July 2003 states each defendant served separately on 27<sup>th</sup> October 2002 not 2001. That the affidavit of service filed on 9th November 2010 for the formal proof hearing by Francis Mwaura does not explain how he identified the elderly 1<sup>st</sup> defendant, what time he served, who identified and if he explained to her in a language she understood or the fate of the other defendant. That they have also perused the plaint from the Court file and found the Respondents misdirected the Court that there was no pending or previous suit yet they were aware succession cause 2176 of 2000 estate of Erasto Nguro was pending over the same property and has a hearing dated on 13th April 2011. That the plaint was filed by Ngare & Co. who were also representing the same plaintiff's father in the aforesaid case. That the eviction relates to not only the 1st applicant who is a party in succession 2178 of 2000 but involves the 2nd and 3rd defendant who had a right to be heard and had a good defence. That the documents relied on in the formal proof related to on Gitau Tiria who died on 24th May 2010 and the plaintiff lied to the Court that he was a brother to the original owner Erasto Nguro yet his funeral programmed that is attached clearly shows his father was Tiria Kimani and his mother Kabura Tiria. That the plaintiffs late father Gitau Tiria to whom they claim ownership was not even buried on the subject parcel and they have been showing buyers as they have no interest. That they stand to suffer great and irreparable loss as they have no other land to go and have our homes and families there. That including the 3 defendants there are one Joseph Nganga and Mathew Njihia who also reside on the land with their families and need to be included as interest parties. That the respondents are being selfish and will suffer no prejudice as they have their own parcels of family land given by the original owner or grandfather through their home in particular Reuben Mwaura Nduba the 2nd Plaintiff owns Karai/Gikambura/162 and T.400 while Simon Njuguna Kariuki the 3rd plaintiff Karai/Gikambura/T.44. That for the said reasons they pray for setting aside the judgment/proceeding of 2nd December 2011.

Reuben Tiria Njonjo the 1<sup>st</sup> plaintiff filed a replying affidavit dated the 1st June 2011 where he depones as follows; that the application is no meritorious and a waste of courts time and the same ought to be dismissed. That the applicants are not honest to the matters that are before this Court, and more particularly to the matter relating to the suit property. That the suit property is duly registered in the plaintiffs' names and they have the ownership of the said property and the defendants are trespassers to their property. That the process server who did the service of the plaint is ready and willing to testify in this honourable court in support of his affidavit of service, because the applicants are person who are well known to him and he has on many occasions served them with the Court processes. That the hearing Notice for the formal proof was duly served by Francis Mwaura who is the Court process server. During the service of this notice, the 1<sup>st</sup> plaintiff personally accompanied him to the homes of the applicants/

defendant and identified them to the process server for service. That the allegations that the 1st defendant is elderly and cannot know that she saw served are just mere excuses because she is illiterate person and the other defendants are persons who have gone to school and they know how to read and write. Further, this was not the first Court documents that were served to them, but they have been served many other documents before that touches Court matters, hence they know the consequences of not responding to the Court document. That the applicant's are not honest as the plot which is the subject of this suit is a vacant plot, which they claim ownership by cultivating on it, and the defendant have never stayed in this plot, because they don't have ownership. That the averments of the applicant in paragraph 5 of the their supporting affidavit is false because the succession cause No. 2176 of 2000 relates into issues which are not directly related to the plaintiffs/respondents but between the defendants and Gitau Tiria who is already deceased. That the letter of confirmation of grant in the Estate of Erastus Nguro were granted to Gitau Tiria who distributed the Estate of Erastus Nguro in relation property L.R Kara/Gikambura/165 to plaintiff/Respondent to hold as trustees for other children of the family. That in trying to contain the Estate of Erastus Nguro the 1st defendant went and applied for the revocation of the grant that was applied by Gitau Tiria, but the Honourable Court dismissed the application for revocation of that grant and confirmed that the certificate of grant issued to Gitau Tiria was the proper one hence the certificate of confirmation earlier issued to 1st defendant became null-avoid. That the applicant having lost their application of revocation, decided to appeal against the ruling of Justice of Okubasu in appeal under No. NAI 55 if 2004 which was later struck out for lacking merit. That by virtue of the certificate of confirmation that was issued to Gitau Tiria, the property known as L.R. Karai/Gikambura/165 was legally transferred to the plaintiff/respondents to hold the property as trustees of other children and the applicants should not pretend that they have the right of ownership, because the 1st applicant is married and she has her own properties where they stay. That the defendants have another parcel of land where they reside and that is where the late husband of the of the 1st applicant Timothy Thiongo Njihia was buried. That plot no. Karai/Gikambura 162 is not owned by Reuben Mwaura Nduba but plot No. Karai/Gikambura T 400 was transferred to him through the family line by his father Nduba Tiria which in no way related to this case. The same to plot No. Karai/Gikambura T. 44 which was transferred to Simon Njuguna Kairuki by his mother which is also not related to this case. That the orders sought by the applicants are not genuine and wants to deprive the rights of the children of whom this property is in trust. That it is dishonesty of the highest order for the applicants to claim that Gitau Tiria was never related to Erastus Nguro, and were blood brothers.

Parties filed written submissions which I have read and considered. The defendant/applicant reiterated what is deponed in his affidavit and relied on the following cases ***Nicodemus Waite Muraguri & another Vs. Consolidated Sales & Service (Tech Ltd 2006) e. KLR, Yusuf Abdi Vs. KPLC High Court Milimani Civil Case No. 645 of 2004 e.KLR, Civil Procedure Rules/Act.*** The defendant relied on the following cases; ***Costal Kenya Enterprises Limited vs. Krishan Behal & Sons and NIC Bank Limited Vs. Steel Reinforcement Ltd & others.*** The plaintiff submitted on whether service of the summons and plaint was proper, whether they were issues in the succession cause No. 2386/1996 and 32/1990 and whether the two cases related to different parties

The plaintiff also submitted on who were the registered owners of suit the property and the defendants rights in relation to the property in dispute. The principles to be considered by this Court in deciding whether or not to set aside an exparte judgment are well settled in law. It is the defendant's case that they were not served with the summons and plaint and that the affidavits of service are flawed. That they have a good defence. I note that three affidavits were filed by the plaintiff on service upon the defendants. The 1<sup>st</sup> affidavit is the one dated 24<sup>th</sup> January 2002. In this affidavit the process server indicate that both defendants ( who are not named) were served in their homes on the 27<sup>th</sup> October 2001 and they refused to sign and that he had effected several service upon them before. Then there is the supplementary affidavit filed on the 26<sup>th</sup> September 2002. The process server Mr. Julius Kilonzi states that he served the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants at their homes on the 27<sup>th</sup> of October at 3 pm. The 3<sup>rd</sup> affidavit of service a further affidavit of service which states that the same process server on the 27<sup>th</sup> of October 2002 met the 1<sup>st</sup> defendant who sent a child to call the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and he served them and that the 2<sup>nd</sup> plaintiff pointed the three defendants to him. The dates of service in these affidavits are different and counsel of the defendant has submitted that there are typing errors that cannot disqualify the

effectiveness of service. The process server was not summoned to establish this in Court although the 2<sup>nd</sup> plaintiff has deponed that he accompanied the process server to identify the defendants. In my mind am not persuaded that there was proper service upon the defendants due to the errors pointed out. Service of summons and plaint is an integral part in considering whether an exparte judgment should be set aside. (see *Shah-Vs. Mbogo & another (1967) E. A 116*). A purported defence has been attached by the applicants. It is apparent that the parties have a dispute on ownership of the said suit property on the basis of who is on occupation. The defence attached GW4 raise triable issues at paragraphs 4 to 10 which this Court cannot ignore. The plaint filed in Court on the 17<sup>th</sup> August 2001 prays for an order of eviction against the defendants and claims that paragraphs 6 that the defendants have been wrongfully, illegally and unlawfully occupying the land. An eviction order is a final order in a matter. The plaintiffs' submissions has further highlighted the issues between the parties in this suit at paragraph b, c and d and in my view it is only proper that the defendants be given a chance to be heard on the issues raised. I will therefore exercise my discretion and allow the defendants to be heard as the main concern of this Court is to do Justice. (See *Patel Vs. E.A Cargo Handling Services 1974 E. A*). I therefore set aside the exparte judgment and proceedings of Hon. Muchelule dated 2<sup>nd</sup> December 2010 and grant the defendants leave to file their defence and the matter to proceed for full hearing. Costs shall be in the cause.

Orders accordingly.

**R. OUGO  
JUDGE**

Dated, signed and delivered this 8<sup>th</sup> day of March 2013

In the presence of:

.....1st DEFENDANT/APPLICANT.

.....2nd DEFENDANT/APPLICANT.

.....3rd DEFENDANT/APPLICANT.

.....1<sup>st</sup> PLAINTIFF/RESPONDENT

.....2<sup>nd</sup> PLAINTIFF/RESPONDENT

.....3<sup>rd</sup> PLAINTIFF/RESPONDENT

.....COURT CLERK