



**REPUBLIC OF KENYA**

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

**Environmental & Land Case 586 of 2008**

**JOSEPH MBAU GITAU.....1<sup>ST</sup> PLAINTIFF**

**-VERSUS-**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**ESTHER WACHEKE MWANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The 2<sup>nd</sup> Defendant's Notice of Motion dated 9<sup>th</sup> December 2011 is before the court for determination. The Notice of Motion is brought under Order 10 Rule 10 and 11; Order 22 Rule 22 and Order 51 of the Civil Procedure Rules and sections 1A and 1B, 3 and 3A of the Civil Procedure Act. The 2<sup>nd</sup> Defendant is seeking orders:-

1. That this Honourable Court be pleased to issue a stay of proceedings in the entire matter pending the hearing and determination of this Application.
2. That this Honourable Court be pleased to grant a stay of execution of the interlocutory judgment and all consequential Orders pending the hearing and determination of the Application interpartes or until further orders of this Honourable Court.
3. That this Honourable Court be pleased to set aside the interlocutory judgment entered herein on 20<sup>th</sup> December 2010.
4. That this Honourable Court be pleased to grant the 2<sup>nd</sup> Defendant leave to file her Defence and to unconditionally defend the suit.

This application is based on the grounds that interlocutory judgment was entered on 20<sup>th</sup> December, 2010 against the 2<sup>nd</sup> Defendant in her absence and in the absence of her then Advocates. Further, that the interlocutory judgment was made in breach of the rules of natural justice as the 2<sup>nd</sup> Defendant was not served personally and therefore she will suffer great loss and irreparable damage as a result of the order.

The application is supported by affidavits sworn on 9<sup>th</sup> December 2011 by the 2<sup>nd</sup> Defendant and her son one Daniel Isaac Gatembo, and a further affidavit sworn by the 2<sup>nd</sup> Defendant on 19<sup>th</sup> May 2012. The 2<sup>nd</sup> Defendant averred that she is currently residing and working for gain in Canada. That sometimes in February, 2007 she entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of a parcel of land situated in Ruaraka known as Plot Number 409 which is now titled as L.R.13330/171 RUARAKA

within Nairobi area. Further, that on 19<sup>th</sup> February, 2007 she paid a sum of Kenya Shillings One Million Six Hundred Thousand (Kshs.1, 600,000/=) towards the purchase price through her Advocates Kimani Kahiro & Associates and was issued with a receipt.

The 2<sup>nd</sup> Defendant further stated that the 1<sup>st</sup> Defendant then transferred the parcel of land to her in April 2007 and they signed a transfer to that effect. Further, that the 2<sup>nd</sup> Defendant paid all the necessary taxes and stamp duty fees for the said land in August 2007. She annexed the supporting documents to her supporting affidavit, including copies of a sale agreement dated 22<sup>nd</sup> February 2007 with respect to plot 409, a receipt dated 22<sup>nd</sup> February 2007 for Kshs 1,600,000/= issued by Kimani Kahiro & Associated Advocates, and of the said transfer between the 2<sup>nd</sup> and 1<sup>st</sup> Defendants dated 25<sup>th</sup> April 2007.

It is the 2<sup>nd</sup> Defendant's averment that she travelled to the United Kingdom on 8<sup>th</sup> October, 2008 and advised her son Daniel Isaac Gatembo to follow up on the completion progress with the her Advocates. Further, that when the son visited the offices of the Advocates in May 2011, he was informed that there is a pending Court case between the parties herein, and that interlocutory judgment was entered against 2<sup>nd</sup> Defendant on 20<sup>th</sup> December 2011. The 2<sup>nd</sup> Defendant averred that she was never served with any Summons to Enter Appearance neither was she aware of any advertisement in the Kenyan local daily newspapers since she has been residing in Canada.

The 2<sup>nd</sup> Defendant's Notice of Motion is opposed and the Plaintiff filed a Replying Affidavit sworn on 17<sup>th</sup> February 2012. He stated that no good reason has been advanced to warrant the setting aside of the interlocutory judgment entered against the 2<sup>nd</sup> Defendant, since she has always been aware of this suit, and at the initial stages of the suit she was represented by M/s Kimani Kahiro & Associates. Further, that he had physically stopped the 2<sup>nd</sup> Defendant from fencing the suit premises in April 2008 when he reported her trespass into the suit premises at Kasarani Police Station, and since then she has never stepped on the suit premises.

The Plaintiff also averred that despite the fact that transfer of the suit premises had been executed between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant, the same has never been registered, and the property has never changed hands. Further that he was the one in possession of the suit premises, and the 2<sup>nd</sup> Defendant will not suffer any damage incapable of being compensated as she can be paid back the purchase price by the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant's Counsel indicated to the court that he was not participating in the proceedings, and the other parties canvassed the 2<sup>nd</sup> Defendant's Notice of Motion by way of written submissions filed in court.

The 2<sup>nd</sup> Defendant's counsel filed submissions on 14<sup>th</sup> February 2013 wherein he relied on Order 10 Rule 11 of the Civil Procedure Rules and section 3A of the Civil Procedure Act on the inherent powers of the court. The counsel further relied on the decisions in **Church Commissioners of Kenya –vs- Julia Ayengo & 4 Others (2006) e KLR**, **Dr.Simon Simose –vs- Worldwide Movers Kenya Ltd, HCCC No. 342 of 2010** and **Universal Education Trust Fund versus Abbas Aminallah 2012 eKLR** for the position that an interlocutory judgment would be set aside where there has been no proper service and where a defence raises triable issues.

The 2<sup>nd</sup> Defendant's counsel submitted that the advertisement of service was placed in the *Saturday Nation* newspapers in the classified section where it was almost difficult to trace, unless one wishes to buy or sell property. More so, the 2<sup>nd</sup> Defendant was not residing in the country but was in Canada and therefore did not access the newspaper advertisement. Additionally, he submitted that the 2<sup>nd</sup> Defendant had attached a draft defence which had triable issues which could be properly addressed by proceeding to a hearing.

The Plaintiff's counsel filed submissions dated 15<sup>th</sup> March 2013. He highlighted the chronology of events

in the suit herein and stated that the two Defendants appointed the firm of M/s Kimani Kahiro & Associates to represent them in the suit until March 2008, when the said advocates withdrew from acting. Further, that upon the said withdrawal the 2<sup>nd</sup> Defendant did not appoint another advocate to act on her behalf. The Plaintiff claimed that he tried to serve the 2<sup>nd</sup> Defendant with no success, and that he was allowed by the court upon application to effect substituted service which he did through advertisement in a daily newspaper. An interlocutory judgment was thereafter entered against the applicant on 20<sup>th</sup> December 2010.

The counsel also alleged that the 2<sup>nd</sup> Defendant had been indolent as she had failed to take appropriate steps to set her Notice of Motion for hearing after it was filed in December 2011. He relied on the decision in **Shah –vs- Mbogo [1967]EA 116** where service had been effected through advertisement and the Court of Appeal declined to set aside the interlocutory judgment.

After consideration of the pleadings filed and the submissions made, I find that the issue for determination is whether this court should set aside the interlocutory judgment entered herein on 20<sup>th</sup> December 2010. Order 10 Rule 11 of the Civil Procedure Rules provides as follows with regard to the setting aside of interlocutory judgments:

**“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”**

The Court of Appeal in its decision in **Chemwolo and Another vs Kubende 1986(KLR) 492** stated the principles that guide the exercise of the Court’s discretion to set aside or vary judgment entered in default of appearance. The Court emphasized that the primary concern is to do justice to the parties and the Court would not impose conditions on itself to fetter the discretion. However, that where a regular judgment has been entered, the Court will not usually set it aside unless it is satisfied that there are triable issues which raise a *prima facie* defence which should go for trial

The overriding factor is thus that of justice to the parties, and this is determined by the fact whether there are triable issues raised in defence, which should therefore go to trial. It is also to be appreciated that the Constitution now enjoins this Court to deliver substantive justice and not to give undue regard to procedural technicalities under Article 159 (2). It is thus my view that irrespective of the fact of service on the 2<sup>nd</sup> Defendant, if she has raised triable issues in defence, then the interlocutory judgment entered herein is liable to be set aside, and that it would be in the interests of justice for the suit herein to proceed to full hearing on its merits.

The 2<sup>nd</sup> Defendant has pleaded that she bought plot No. 409 also known as LR no. 13330/171 the subject property from the 1<sup>st</sup> Defendant, and she has brought evidence of the sale agreement and the payment made and transfer entered into thereto. The Plaintiff also claims to have bought the same property from Thome Farmers No. 5 Limited in his Plaint dated 27<sup>th</sup> November 2008. I have also perused the Defence filed by the 1<sup>st</sup> Defendant dated 16<sup>th</sup> December 2010 wherein it avers that it is the registered proprietor of the said property, and has no connection with Thome Farmers No. 5 Limited. There are thus issues raised as to the ownership of the property which is the subject matter of this suit, and the legal interests if any of the Plaintiff and 2<sup>nd</sup> Defendant with regard to the said property, that warrants a hearing of the suit herein on its merits. It is thus my finding that this is a proper case for the exercise of the court’s discretion to set aside the interlocutory judgment entered herein.

I hereby accordingly allow the 2<sup>nd</sup> Defendant’s Notice of Motion dated 9<sup>th</sup> December 2011 and order as follows:

1. The interlocutory judgment entered on 20<sup>th</sup> December 2010 as against the 2<sup>nd</sup> Defendant be and is hereby set aside, and the suit against the 2<sup>nd</sup> Defendant shall proceed to be heard and determined on its merits.

2. The 2<sup>nd</sup> Defendant is granted leave to file and serve her Defence within 20 days of the date of this ruling.
3. The Plaintiff and 1<sup>st</sup> Defendant are granted corresponding leave to file and serve amended pleadings within 15 days of service of the 2<sup>nd</sup> Defendant's Defence if need be.
4. The costs of the 2<sup>nd</sup> Defendant's Notice of Motion dated 9<sup>th</sup> December 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_27<sup>th</sup>\_\_\_\_ day of \_\_\_\_May\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**