



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC 658 OF 2011**

**DEEPAK ASHWINKUMAR MARU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RAHEMAT ESSA DOSANI &**

**BENSON OKUMBI.....DEFENDANTS**

**RULINGS**

By a Notice of Motion dated 28<sup>th</sup> May, 2013 , the applicants herein, **Rahemat Essa Dosani** and **Benson Okumbi Kusimba**, have sought for various Orders. The Notice of Motion is brought under **Order 10 Rule 11, Order 40 Rule 1,2,(2) 4(1) and Order 51 Rule 1 of the Civil Procedure Rules , 2010 , Section 1A, 1B, 3, 3A, 63( c) and 63(e) of the Civil Procedure Act** and all the enabling provisions of the law.

The applicants have sought for these Orders:-

- (i) Setting aside an exparte judgment issued on 17<sup>th</sup> December, 2012 in favor of the Plaintiff herein.
- (ii) Temporary Injunction or any dealing on LR No. **209/3345 LR No. 8195.**
- (iii) A mandatory Injunction to restore the Defendants on **LR No. 209/3345 LR 8195.**

The application was supported by the grounds on the face of the application and by the supporting affidavits of **Rahemat Essa Dosani and Benson Okumbi Kusimba** .

The main grounds were that, the Judgment in default of appearance and Defence was entered against the Defendants herein; that further the Defendants were not served with summons to Enter Appearance and the Plaint as required by the law; that Defendants were also not served with Notice of Judgment as per the requirement of Law and that, the 1<sup>st</sup> Defendant is the wife of the late **Dinesh Ishwarlal Maru** and she only became aware of the suit on the 17<sup>th</sup> may, 2013 when she was evicted from the suit land by **Keysan Auctioneers**. The application was opposed by **Deepak Ashwinkumar Maru** who filed his Replying Affidavit and averred that he is a registered owner of LR No. 209/3345 together with one **Bharat I Maru** . He also hold specific Power of Attorney **No. P/A No. 49181** donated by

**Bharat I Maru** and general power of Attorney by **Labhuben Ishwarlal Maru** as per “**DAM2**” and “**DAM3**”. Respondent denied that 1<sup>st</sup> Defendant was the wife of the late **Dinesh Ishwarlal Maru** and that Defendants were duly served with all the Court documents but ignored to Enter Appearance nor file Defence.

The parties herein canvassed the Notice of Motion by way of written Submissions. I have now carefully considered the Written Submissions and the pleadings and the relevant law and make the following findings:-

There is no doubt that, the Plaintiff herein filed this suit in the year 2011. There is evidence that the original file went missing from the court registry. What is before me is a reconstructed file. What is not in doubt is that, the Defendants herein, did not Enter Appearance and the suit proceeded for hearing *ex parte*. Judgment was issued on 17<sup>th</sup> December, 2012 by Justice Odunga . It is that Judgment that the Defendants seeks to set aside. I have seen copies of several hearing notices and affidavits of service confirming that the Defendants herein who were known to the process server were duly served.

The Defendants did not Enter Appearance nor file Defence. Defendants in their application stated that they were not served with the suit papers and were not aware of the suit until when 1<sup>st</sup> Defendant was evicted by the auctioneers.

I have considered the Affidavits of service in which the process server deponed that he served the Defendants with the Hearing Notices and they were personally known to him as he had served them before. I have no reason to doubt that deposition. In this case, I find that there was proper service on the Defendants but they failed to appear in Court. The Court will therefore, not hold that there was no proper service.

The factors to be considered in setting aside *ex parte* Judgment were laid down in the case of **Shanzu Investment Ltd Vs the Commissioner of Lands, Civil Appeal No. 100 of 1993** where it was held that tests for setting aside Judgments are:-

- (i) Defence on the merits
- (ii) Prejudice
- (iii) Explanation for the delay.

Ordinarily, a Court will not interfere with a regular Judgment unless it is satisfied that there is a Defence on merits which discloses triable issues. I have considered the Draft Defence and the counter claim thereon. The 1<sup>st</sup> Defendant alleges that she is a wife of the late **Dinesh Ishwarlal Maru**. The Plaintiff has denied that allegation and has attached the marriage certificate for **Dinesh Ishwarlal Mari** to one **Rashimita Somchand Hirji Shah** dated 4<sup>th</sup> July, 1977.

The 1<sup>st</sup> Defendant alleged that Plaintiff obtained registration of the suit land through fraud. However, it is clear that, Plaintiff obtained the said registration through succession cause. The 1<sup>st</sup> Defendant has challenged the grant issued to the Plaintiff herein and Court has not decided on that issue. It cannot be held therefore, that Plaintiff herein, obtained registration through said fraud and illegality.

1<sup>st</sup> Defendant signed Tenancy Agreement in the year 2008 and has tried to offer an explanation. However, there is no reason given why she did not attempt to file for grant of letters of Administration to the Estate of **Dinesh Ishwarlal Maru** if she was indeed a wife. The application herein, seems to be an afterthought. The Court finds that the Draft Defence filed by the Defendant herein, has no merit and it is filed with the aim of delaying the matter herein. The overriding objective of **Section 1A of the Civil Procedure Act** is for the Court to facilitate expeditious and just disposal of Civil disputes before the Court. The application herein by the applicant does not support the spirit of Section 1A & 1B of the Civil Procedure Act.

It is evident that, the defendants herein have filed an application at the Family Division for revocation of the Grant to the Plaintiffs herein. An injunction Order has already been issued by the Family Division Court which is a Court of competent jurisdiction. There is therefore no prejudice that will be occasioned to the Defendants herein if the *ex parte* judgment is not set aside. The Court finds that, the Defendants /applicants have not given any proper explanation for the delay in entering appearance and defending the suit given that the court has found that there was proper service. The facts that, the matter involve land is not a ground for setting aside the *ex parte* judgment. This was the finding in the case of **Katee Kanyenze and others Vs Mutisya Ngii and another , civil appeal No. 12 of 1992;** where the Court held that :-

*“ The fact that the subject matter is land is not necessary ground for setting aside ex parte judgement”.*

The Court finds that the Judgment delivered by Justice Odunga on 17<sup>th</sup> December, 2012 is a regular Judgment and I find no reason to set it aside.

The second prayer is for interlocutory injunction to restrain the Plaintiff herein. The same was opposed. The applicants had the duty to demonstrate that they have a prima-facie case with high chance of success, that they will suffer irreparable damages and balance of convenience tilts in their favour as was held in the case of **Giella Vs Cassman Brown Co.Ltd 1973 ( EA) 358.** Though the 1<sup>st</sup> Defendant alleged that , she was the wife of the late **Dinesh Ishwarlal Maru**, she did not produce any documents to prove that . However, the Plaintiff herein has attached to his replying affidavit Letters of Administration issued to him as an administrator of the estate of **Dinesh Ishwarlal Maru**. The said Grant was also confirmed and Plaintiff became the registered as one of the proprietor of the suit land as per annexure ‘**DAM1.**

There is also evidence that, the Defendants have been evicted and the Court cannot restrain what has already happened. Again there is an injunction issued by the Family Division Court over the suit land in a Succession Cause No. 3253 of 2007. The Court also finds that there are documents showing that the 1<sup>st</sup> Defendant was a Tenant on the suit property. The Court finds that in prayer No.2, the applicants have not met the threshold for issuance of injunctive relief.

On the third prayer of mandatory injunction, the Defendants have already been evicted. The Plaintiff has the title to the suit property. The same has not been revoked and there is a regular judgment in favour of the Plaintiff herein. The Defendants/Applicants have not demonstrated existence of special circumstances to warrant issuance of mandatory Injunction as was held in the case of **Mombasa HCCC 83 of 2003; Qualitronic Ltd Vs Shaban Swedi ,** where it was held;

*“A Mandatory Injunction can be granted on an Interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff, mandatory Injunction will be granted on an interlocutory application”.*

The letters of administration have not been revoked and the Plaintiff herein is one of the registered owners of the suit property. That registration has not been cancelled. The Court also finds that the Applicants/Defendants have not demonstrated to this Court that there are good reasons for court to grant them Mandatory Injunction they have sought herein.

For the above reasons, the Court dismisses the Applicants’/Defendants Notice of Motion dated 28<sup>th</sup> May, 2013 with costs to the Plaintiff/Respondent.

It is so Ordered.

**Dated, Signed and delivered this 26<sup>TH</sup> day of July, 2013.**

**L N GACHERU**

**JUDGE**

**In the Presence of:-**

.....for the Applicant

.....for the Defendant

**Anne Court Clerk**

**L N GACHERU**

**JUDGE**