



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO. 89 OF 2008**

**JOHANNA ZOUARI GEISSBULHER.....PLAINTIFF**

**=VERSUS=**

**1. VIOLI FEDERIGO**

**2. LUIGI FREGUGLIA.....DEFENDANTS**

**R U L I N G**

1. On 28<sup>th</sup> November 2012, Honourable Justice Meoli directed that the Applications filed on 4<sup>th</sup> June, 2012 and 18<sup>th</sup> June, 2012 be heard together and a consolidated Ruling be delivered. The Judge disqualified herself from hearing the two Applications and directed that the matter be placed before me for hearing and disposal.
2. The Application dated 4<sup>th</sup> June, 2012 and filed on the same day by the Plaintiff seeks for the following orders:
  - a. *That the Honourable Court be pleased to stay, vary, or set aside its order dated the 30<sup>th</sup> May, 2012 striking out the Plaintiffs case upon such terms as are just.*
  - b. *That the costs of this application be provided for.*
3. The Application dated 4<sup>th</sup> June, 2012 by the Plaintiff is premised on the grounds that the Plaintiff had testified by calling witnesses, presenting evidence which is on record and closed her case; that failure to appear on the date of hearing of the Application dated 30<sup>th</sup> March, 2012 was occasioned by a failure by the advocate to diarise the date and that the Plaintiff's Advocate was sick.
4. According to the affidavit in support of the Application, the Plaintiff's counsel deponed that in spite of being served by the 2<sup>nd</sup> Defendant with the Application dated 30<sup>th</sup> March, 2012, he inadvertently did not indicate in his diary that the same was coming up for hearing on 30<sup>th</sup> May, 2012.
5. The Plaintiff's Advocate deponed that previously, the Plaintiff had called his witnesses and closed her case on 29<sup>th</sup> September 2009 and the matter was subsequently adjourned at the instance of the Defendants; that in the circumstances, it will be irregular for the court to strike out the Plaintiff's entire suit before the Defendants close their cases and that the status quo that prevailed in the case

- was reached upon by consent of the parties.
6. The 2nd Respondent filed a Replying Affidavit on 14<sup>th</sup> June, 2012 in response to the Plaintiff's Application dated 4<sup>th</sup> June, 2012.
  7. According to the depositions by the 2<sup>nd</sup> Respondent, the Plaintiff's Application is bad in law, incompetent, an abuse of the court process and that the Plaintiff is guilty of material non-disclosure.
  8. The 2nd Respondent has further deponed that the orders that were given on 5<sup>th</sup> June, 2012 by Honourable Justice Meoli staying the orders of 30<sup>th</sup> May, 2012 are irregular and unlawful and the same should be set aside *ex debito justitiae* and that the court lacked the jurisdiction to grant the orders.
  9. It is the 2<sup>nd</sup> Respondent's deposition that the Plaintiff was evicted from the suit premises by the Court bailiff on 5<sup>th</sup> June 2012 and that the orders which were issued on the same day at 3.00 pm had already been overtaken by events.
  10. The 2<sup>nd</sup> Respondent depones that the Plaintiff's Advocate was not candid to the court and is guilty of material non-disclosure and that it was surprising to see the Plaintiff's advocate and police officers on the suit premises at 7 pm alleging that the court had allowed the Plaintiff to go back to the premises; that the Plaintiff should be denied audience until the contempt is purged by giving vacant possession.
  11. It is the 2<sup>nd</sup> Respondent's deposition that he is the registered owner of plot number 966 Watamu and that his title cannot be defeated and the pendency of the suit in court is waste of judicial time; that the court was right to strike out the Plaintiff for being otherwise an abuse of the process of the court and that pleadings can be struck out at any stage of the suit.
  12. The 2<sup>nd</sup> Defendant finally deponed that the Application dated 30<sup>th</sup> March 2012 was properly served; that the Plaintiff's Advocate was not sick on the date of the hearing of the Application and that the Application dated 30<sup>th</sup> March 2012 seeking to strike out the suit and to evict the Plaintiff was not opposed by the Plaintiff.
  13. The 2<sup>nd</sup> Respondent's Application, on the other hand, is seeking for the maintenance of status quo subsisting prior to the issuance of the orders of 5<sup>th</sup> June 2012; a direction that the Plaintiff and his advocate acted in excess or in violation of the orders issued on 5<sup>th</sup> June 2012 by evicting the 2nd Respondent; in the alternative the Plaintiff and her advocate be refused audience for the application dated 4<sup>th</sup> June 2012 until they purge their contempt and that the Application dated 4<sup>th</sup> June 2012 by the Plaintiff be stayed pending the hearing and determination of the Respondent's Application and finally that the court do punish the advocate for the Plaintiff for lying to the court and for not being candid on 5<sup>th</sup> June 2012.
  14. The depositions of the 2<sup>nd</sup> Respondent in support to his Application dated 18<sup>th</sup> June, 2012 and filed on the same day are the same as the depositions in his Replying Affidavit in opposition to the Plaintiff's Application dated 4<sup>th</sup> June, 2012 which I have summarised above.
  15. The Plaintiff's advocate filed a Replying Affidavit in opposition to the 2<sup>nd</sup> Respondent's Application on 25<sup>th</sup> June, 2012.
  16. The Plaintiff's Advocate deponed that it is not true that the Plaintiff participated in the eviction of the Defendant on 5<sup>th</sup> June 2012 because the Plaintiff was away in Switzerland seeking treatment on the said date and that the eviction of the Plaintiff was not complete as alleged by the 2<sup>nd</sup> Defendant because some of the Plaintiff's items were still in the house at the time of the service.
  17. In addition to the Replying Affidavit in opposition to the 2<sup>nd</sup> Respondent's Application dated 18<sup>th</sup> June, 2012, the Plaintiff filed Grounds of Opposition dated 25<sup>th</sup> June 2012 which I have considered.
  18. The Plaintiff's Advocate filed his written submissions in respect to the Application dated 4<sup>th</sup> June 2012 and the Defendants Application dated 18<sup>th</sup> June 2012 on 27<sup>th</sup> July 2012 and 13<sup>th</sup> December 2012 respectively.
  19. The 2<sup>nd</sup> Respondent's Advocate filed his submissions in respect to his Application dated 18<sup>th</sup> June 2012 and the Plaintiff's Application dated 4<sup>th</sup> June 2012 on 4<sup>th</sup> July 2012 and 14<sup>th</sup> December 2012 respectively.

20. I have considered the written submissions by the learned counsels.
21. I have already stated in this Ruling that the court directed that two Applications be heard together and a consolidated Ruling be delivered.

### **Background**

22. A brief history of this matter will be in order.
23. The Plaintiff filed this suit by way of a Complaint on 7<sup>th</sup> November 2008. In the Complaint, the Plaintiff sought for a permanent injunction restraining the Defendants from evicting her and for the cancellation of the title in respect to plot number 966 Watamu Paradise which is in the name of the Defendant.
24. Contemporaneously with the Complaint, the Plaintiff filed an Application seeking for interim orders of injunction pending the hearing of the suit.
25. The 1<sup>st</sup> Defendant filed his defence and counterclaim on 18<sup>th</sup> November 2008. The 2<sup>nd</sup> Defendant filed his defence on the same day. The defendants also filed their respective Replying Affidavits in respect to the Plaintiff's Application seeking for injunctive orders.
26. The record shows that by consent of the parties, the Application for injunctive orders dated 7<sup>th</sup> November 2008 was abandoned and the status quo was to be maintained.
27. The main suit was set down for hearing on 19<sup>th</sup> May 2009 when the Plaintiff, PW1 gave her evidence in chief and was cross-examined. Plaintiff witness number 2 (PW 2) also gave his evidence in chief and was cross-examined on the same day.
28. The matter was adjourned to 29<sup>th</sup> September 2009 when Kazungu Anthony Karisa, PW 3 and John Kahindi Kazungu, PW 4 gave their evidence in chief and were cross-examined by the Defendants' advocates. The Plaintiff closed her case on that day.
29. The matter came up for defence hearing on 2<sup>nd</sup> December 2009, 19<sup>th</sup> April 2010, 17<sup>th</sup> December 2010 and on 20<sup>th</sup> March 2011 when it was adjourned at the Respondents' instance.
30. On 30<sup>th</sup> May 2012, the matter came up, not for the defence hearing but for the hearing of the 2<sup>nd</sup> Respondent's Application dated 30<sup>th</sup> March, 2012 and filed on 10<sup>th</sup> April, 2012. On that particular day, the Plaintiff's advocate was not in court and the 1<sup>st</sup> Respondent's advocate did not oppose the Application. The Application filed on 10<sup>th</sup> April 2012 was allowed by the Judge in the following words:

***“The Application filed on 10<sup>th</sup> April 2012 being unopposed is allowed in its entirety”.***

31. The Application filed on 10<sup>th</sup> April 2012 by the 2<sup>nd</sup> Defendant sought for two substantive orders.

***(a) That the Honourable Court be pleased to strike out the Complaint herein for being otherwise an abuse of the process of the court and;***

***(b) The Honourable court do issue an order of eviction against the Plaintiff, her agents, servants, or anyone claiming under her form CR 40813 (sub-division number 966-original number 955/7).***

32. The eviction orders were extracted by the Defendants on the same day and according to the 2<sup>nd</sup> Defendant's affidavit, the Plaintiff was evicted on 5<sup>th</sup> June 2012 at 9.30 am.
33. It would appear that the Plaintiff's Advocate was made aware of the existence of the order of eviction of the Plaintiff because on 4<sup>th</sup> June 2012, he filed an application under a certificate of urgency to stay, vary and or set aside the order dated 30<sup>th</sup> May 2012.
34. The record shows that the Plaintiff's advocate appeared before the Honourable Justice Meoli on 5<sup>th</sup> June 2012 to argue his application dated 4<sup>th</sup> June 2012 *ex parte*. The Plaintiff's advocate informed the Judge that although he was served with the Application filed on 10<sup>th</sup> April 2012 seeking the striking out of the suit and the eviction of the Plaintiff and coming up for hearing on

- 30<sup>th</sup> May, 2012, his clerk did not diarise it, thus his absence in court on 30<sup>th</sup> May 2012 when the Application came up for hearing.
35. The Judge certified the Plaintiff's Application dated 4<sup>th</sup> June 2012 and temporarily stayed the orders of eviction. The Judge fixed the application for hearing inter parties on 19<sup>th</sup> June 2012.
36. The 2<sup>nd</sup> Defendant was not impressed with the Order staying the eviction of the Plaintiff and filed the Application dated 18<sup>th</sup> June 2012. It is those two Applications that are now before the court.
37. It would appear from the 2<sup>nd</sup> Defendants affidavits that by the time the court was staying the eviction of the Plaintiff, the Defendant had already evicted the Plaintiff by removing her items from the house. However, on the same day, armed with the court order, the Plaintiff took over possession of the house again.
38. It is therefore incumbent for this court to determine, firstly, whether the Plaintiff's suit should be reinstated having been struck out and an order of eviction having been issued and secondly to determine what the status quo was as at 5<sup>th</sup> June 2012 and the consequences of the orders of the court of 5<sup>th</sup> June, 2012.
39. I have shown above that the Plaintiff closed its case on 29<sup>th</sup> September 2009 after testifying and calling three witnesses. The Defendant thereafter adjourned the matter on several occasions before coming up with the Application to strike out the suit and for an order of eviction of the Plaintiff.
40. The Plaintiff Advocate has deposed that he did not attend court to oppose the Application because his clerk did not diarise the date and he wants the orders that were issued *ex parte* stayed and set aside.
41. The orders striking out the suit and evicting the plaintiff from from the suit property were obtained *ex-parte*, the Plaintiff's Advocate having not participated in the proceedings.
42. The principles applicable for setting aside an *ex-parte* Judgment are therefore applicable in the present case.
43. It is settled that where service has been effected on a party, like in this case, any Judgment entered in default is regular.
44. It is also settled that where a Judgment, or an order for that matter, is regular, the court is vested with unfettered discretion to set aside such a Judgment or order on such terms as are just.
45. The Plaintiff's counsel has stated the reasons why he failed to attend court on 30<sup>th</sup> May, 2012.
46. The record shows that the Plaintiff and her witnesses had already testified and the suit was pending the defence hearing. According to Plaintiff's advocate affidavits, the 2<sup>nd</sup> Respondent's Application filed on 10<sup>th</sup> April 2012 did not make any reference to the fact that the matter was part heard and that in the event the Defendants do not testify, the court would have decided the suit in favour of the Plaintiff. That, in my view would have been plausible response to the 2<sup>nd</sup> Respondent's Application for the dismissal of the suit and the eviction of the Plaintiff from the suit property.
47. The consequences for the failure by the Plaintiff's Advocate to diarise the Application that was filed on 10<sup>th</sup> April 2012 should not be visited on the innocent Plaintiff who had already testified, tendered documents, called three witnesses and was waiting for the Defendants to tender their evidence in court.
48. Justice can only be done, and seen to have been done if the Plaintiff is given an opportunity to oppose the Application seeking to strike out the suit and for his eviction from the suit premises.
49. In the circumstances, I find and hold that the Plaintiff should be given an opportunity to file a response to the Application dated 30<sup>th</sup> March 2012 and filed on 10<sup>th</sup> April 2012 her Advocate having explained why he did not attend court.
50. I would therefore allow the Plaintiff's Application dated 4<sup>th</sup> June 2012 and direct that the 2<sup>nd</sup> Respondent's Application dated 30<sup>th</sup> March, 2012 be set down for hearing *inter partes*.
51. The 2<sup>nd</sup> Defendant's Application dated 18<sup>th</sup> June 2012 is basically challenging the order of the court issued on 5<sup>th</sup> June 2012 staying the orders of striking out the suit and the eviction of the

- Plaintiff from the suit premises on the ground that the said orders had already been overtaken by events.
52. It may be true, as deponed by the 2<sup>nd</sup> Respondent, that by the time the court was staying the orders of eviction, the Plaintiff had already been evicted.
53. However, there is nothing stopping the court from issuing orders reversing its earlier order if the reversal of such orders is in the interests of justice. That is what the court should and can do depending with the material that is placed before it and the prevailing circumstances. The court cannot fold its arms in a situation where it considers that justice will be better served by reversing an earlier order.
54. It is for that reason that section 3A of the Civil Procedure Act was enacted. Section 3A of Civil Procedure Act is clear that nothing can limit the power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court. This is the inherent jurisdiction that the court invoked when it stayed its decision to evict the Plaintiff notwithstanding, as claimed by the Defendants, that the Plaintiff had already been evicted. This position was clarified by the court in its Ruling of 28<sup>th</sup> November 2012 when it directed that the Plaintiff should remain in possession.
55. While staying the order of 30<sup>th</sup> May, 2012, the court must have been guided by the fact that before the ex parte order allowing the eviction of the Plaintiff, the parties had consented to allow the Plaintiff stay in the premises until the suit is heard and determined.
56. For the above reasons, I dismiss the 2<sup>nd</sup> Respondent's Application dated 18<sup>th</sup> June, 2012 and allow the Plaintiff's Application dated 4<sup>th</sup> June, 2012 on the terms that I have enumerated herein.
57. Each party shall bear his own costs.

Dated and Delivered in Malindi this **11<sup>th</sup>** day of **July**, 2013

**O. A. Angote**

**Judge**