



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 165 OF 2013

WANJUE GICHOVIPLAINTIFF

(Suing as legal representative of Estate of KITHERE NAMU (Deceased))

VERSUS

PATRICK NAMU GICHOVIDEFENDANT

RULING

On 5th June 2013, this Court having been satisfied that the defendant had been duly served with a hearing notice and his absence at the trial was not explained, proceeded to hear the plaintiff's case against the defendant and thereafter delivered a judgment on the same day granting the plaintiff the prayers sought in her plaint filed herein on 26th September 2011.

Following the delivery of that judgment, the defendant instructed counsel who filed this application under **Order 12 Rules 2 and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking that the said judgment be set aside. The application which is the subject of this ruling is supported by the defendant/applicant's affidavit and based on the grounds, inter alia, that the defendant/applicant was never served with the hearing notice and that the affidavit of service sworn on 4th June 2013 by one Jackson Muriithi is false and if infact defendant/applicant had been served, he would have attended Court. The same averments are repeated in his supporting affidavit in which he adds that he only discovered the hearing notice lying near his house and in any event, the plaintiff/respondent still had an application pending on the file.

The application was opposed by the plaintiff/respondent's replying affidavit in which she depones, inter alia, that the defendant/applicant has always been served but has said he will never attend Court and infact during the subsistence of this suit and notwithstanding orders issued restraining him, the defendant/applicant has gone ahead to sub-divide and transfer the suit land. Further, it is the plaintiff/respondent's case that the defendant/applicant, knowing very well that the plaintiff/respondent is sickly and old, wants to delay this suit in the hope that the plaintiff/respondent will die in the process. Both parties asked the Court to rely on their respective affidavits bearing in mind the advanced aged of the plaintiff/respondent.

I have considered the respective affidavits of the parties and the pleadings herein. I wish to start by observing that in the plaintiff/respondent's replying affidavit, she depones at paragraph 11 that notwithstanding the injunctive orders issued herein on 13th March 2013 with respect to the suit property, the defendant/applicant has gone ahead to sub-divide and transfer the same. That is a serious allegation and if the Court had been given sufficient evidence as to when infact such transfer and sub-division was done, this Court would have had no hesitation in taking appropriate action against the

defendant/applicant. Court orders must be respected and I take this chance to caution the defendant/applicant to fully comply with the orders dated 13th 2013 March which restrained him from dealing with the property L.R. NGANDORI/NGOVIO/1297 or evicting the plaintiff/respondent therefrom till this case is heard and determined.

The application before me seeks the setting aside of the judgment delivered on 5th June 2013 on the ground basically that the defendant/applicant was not served with the hearing notice. I have perused the affidavit of service of Jackson Muriithi, the process server who says he served the defendant/applicant on 4th June 2013 who accepted service and refused to sign saying he would never case with the plaintiff. The process server depones further that the defendant/applicant was personally known to him. This is not denied by the defendant/applicant in his affidavit in support of this application and neither has he sought to cross-examine the process server on his affidavit of service. It is clear to my mind that the defendant/applicant was duly served with a hearing notice on 4th June 2013 but for reasons known to himself, he opted not to attend trial. He claims in his supporting affidavit that he only discovered the hearing notice outside his house on 13th June 2013. That is quite strange that documents left outside his house would still be lying there ten (10) days later. And even after finding those documents outside his house, it took him upto 25th June 2013 to instruct counsel to file this application. Clearly the defendant/applicant is being evasive and economical with the truth. The claim that he was not served with the hearing notice is untrue and is for rejection.

Having said so, the power to set aside a judgment is wide with the main concern being to do justice to the parties and in so doing, one of the issues that the Court will consider is whether there is a defence on record. In this case, there is a defence on record and as was held in **SEBEI DISTRICT ADMINISTRATION VS GASUALI 1968 E.A 300**, it should always be remembered that to deny a party a hearing should be the last resort of any Court. In this case now before me, I also take into account that the defendant/applicant was only served on 4th June 2013 yet the hearing date had been fixed as far back as 14th May 2013. The period between 4th June 2013 and the hearing of 5th June 2013 was quite short but that does not explain why the defendant/applicant took no action in the matter till 25th June 2013 when he appointed counsel.

Taking everything into account, it is clear that the defendant/applicant was served with the hearing notice but decided to take no action till judgment was delivered against him. Nonetheless, the Court has a wide discretion to set aside ex-parte judgments on such terms as it deems just. In the circumstances of this case, I make the following orders in respect to the defendant/applicant's Notice of Motion dated 25th June 2013.

- 1. The application is allowed and the judgment dated 5th June 2013 set aside on the condition that the defendant/applicant pays the plaintiff/respondent's costs which I assess at Ksh. 5,000/= within 14 days of this ruling being delivered.***
- 2. The defendant/applicant's counsel to file and serve the plaintiff/respondent with the issues for determination in this suit and thereafter the matter be mentioned on 30th September 2013 for purposes of fixing a hearing date.***
- 3. If the defendant/applicant does not comply with (1) above, the judgment herein shall revert.***

It is so ordered.

B.N. OLAO

JUDGE

16TH SEPTEMBER, 2013

16/9/2013

Coram

B.N. Olao

CC – Muriithi

Plaintiff – absent

Mr. Ithiga for Njeru for Defendant – present

COURT: Ruling delivered this 16th day of September 2013 in open Court.

B.N. OLAO

JUDGE

16TH SEPTMEBER, 2013