



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**CIVIL SUIT 136 OF 2004**

**KYENGO MBAI..... PLAINTIFF/RESPONDENT**

**VERSUS**

**1. KIMANTHI MUSEMBI**

**2. NDUVA KIMANTHI... DEFENDANT/APPLICANTS**

**RULING**

1.The Plaintiff in this matter, **Kyengo Mbai** (“Plaintiff”) filed a plaint on **16/11/2004** seeking a declaration that **Kimanthi Musembi** (“1<sup>st</sup> Defendant”) and **Nduva Kimanthi** (“2<sup>nd</sup> Defendant”) are trespassers on his land to wit Land Parcel No. 393 Kaumoni Adjudication Section (“Suit Property”) and praying for orders of eviction and injunction.

2.On **11/01/2005**, the Plaintiff caused to be filed an Affidavit of Service sworn by **Philip Muoki**, a licenced Process Server who deponed that he travelled to **Kaumoni Village** in **Makueni District** on **02/12/2004** and served the Defendants with the Summons to enter Appearance in the suit.

3.On **24/01/2005**, the Plaintiff requested for interlocutory judgment in the absence of entry of appearance or filing of defence by the Defendants.

4.On **02/02/2005**, the Deputy Registrar, duly satisfied that the Defendants had been served, entered interlocutory judgment in the suit. Subsequently, the suit was set for formal proof on various days and proceeded *ex parte* before **Justice Onyancha** and **Sitati**. Ultimately, *Lady Justice Sitati* gave a judgment on **27/07/2007**. She held that the Plaintiff had proved his case against the two Defendants jointly and severally; declared that both were trespassers on the Suit Property; and further held that both should be evicted and restrained from further trespassing on the Suit Property.

5.The Plaintiff extracted the decree on **03/08/2007**.

6.On **07/08/2007**, the Plaintiff’s lawyers, **Onesmus N. Makau & Associates** filed a Bill of Costs dated **07/08/2007** against the Defendants. They filed an affidavit of service sworn on **26/09/2007** by **Alphonse Kyalo** and filed in Court on **27/09/2007**. In it, he depones that he travelled to the Defendants’ home in the company of the Plaintiff and served the Bill of Costs on the wives of the Defendants.

7.There is yet another affidavit of service by **Alphonse Kyalo** filed on **03/12/2007** deponing that he travelled to the Defendants’ home and place of work and served a copy of the Penal Notice.

8.Yet again on **24/06/2008**, **Alphonse Kyalo** swore another affidavit averring to serving the Defendants’

wives with copies of Notice to Show Cause.

9. Through all these legal proceedings, the Defendants did not file any appearance or document in Court. Their first filing comes in the form of a “Memorandum of Appearance” filed by their advocates, **J.M. Mutua** on **26/09/2011** when they are finally faced with eviction. That “Memorandum of Appearance” is filed simultaneously with a Notice of Motion dated **20/09/2011** (“Application”) filed under Certificate of Urgency seeking three substantive prayers:

- a. That a stay of execution of decree herein do issue pending hearing and determination of this application **inter partes**;
- b. That the *ex parte* proceedings, judgment and decree and all consequential orders be set aside and the [2<sup>nd</sup>] Defendant be granted an opportunity to be heard;
- c. That the Memorandum of Appearance and the Defence hereto be deemed as duly filed.

10. The Application is supported by the affidavit of the 2<sup>nd</sup> Defendant. In it, and in the submissions of his Learned Counsel, **Mr. Mutua**, the 2<sup>nd</sup> Defendant maintains that he was never served with any suit papers and did not at all know about the suit until he received a letter dated **25/07/2011** from the Plaintiff’s lawyers. Although he annexes a copy of the decree and eviction order to his Affidavit, the 2<sup>nd</sup> Defendant does not state how he came to get them.

11. Both in the submissions made on his behalf and in his affidavit, the 2<sup>ND</sup> Defendant also says the *ex parte* judgment was not regular because the 1<sup>st</sup> Defendant was deceased at the time of the proceedings. Challenged by **Mr. Mulei**, counsel for the Plaintiff, **Mr. Mutua** modified that assertion to one that the 1<sup>st</sup> Defendant was deceased during part of the proceedings he having died on **05/06/2006**. Yet, the 2<sup>nd</sup> Defendant points out; the matter proceeded on **20/07/07**. The 2<sup>nd</sup> Defendant argues that the proceedings in this case were a nullity because the 1<sup>st</sup> Defendant had died and no efforts to regularize the situation were undertaken.

12. Finally, the 2<sup>nd</sup> Defendant says his proposed defence which is attached to his affidavit raises triable issues. The main defence, **Mr. Mutua** argued, was that the 2<sup>nd</sup> Defendant is settled on **Plot No. 228** and the subject property here is **Plot No. 293**.

13. On his part, **Mr. Mulei** for the Plaintiff vigorously opposed the Application. First, he argued that the Application is fatally defective because it does not state on its face the provisions upon which **prayer No. 2** are predicated. I can easily dispose off this technical objection with a reference to *Gitau v Muriuki* [1986] KLR 211. As many cases have now held, and notwithstanding Sir Udoma’s remarks in *Salume Namukasa v Yozefu Bukya* (1966) EA 433, invoking the wrong provision of law (or, failing to invoke one) does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded.

14. Next, **Mr. Mulei** forcefully argued that there is ample evidence to show that the 2<sup>nd</sup> Defendant was served with the Summons and other court papers. Hence, he argued, the interlocutory judgment was regular, and it was procedural to proceed with the matter *ex parte*. Further, **Mr. Mulei** argued, there is no point of setting aside the judgment: the 2<sup>nd</sup> Defendant has no viable defence which raises triable issues. All the 2<sup>nd</sup> Defendant does, argues **Mr. Mulei**, is raise mere denials.

15. On the issue of abatement, **Mr. Mulei** says the death of the 1<sup>st</sup> Defendant only became known after entry of interlocutory judgment. His position is that the suit proceeded regularly and that, owing to the length of time it has taken to bring this Application, the same should be dismissed. The Defendant,

complained **Mr. Mulei**, is only trying to delay the process of the Court and has consistently ignored the Court process until faced with execution.

16. The main application here is to set aside the judgment in the suit. The relevant legal provision is, therefore, **Order 10, Rule 11**. It reads:

Where judgment has been entered under this Order [i.e. due to non-appearance], the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

17. A few of our Courts have dealt with applications under this rule and its previous renditions. The substance of the rule itself has remained remarkably constant. The principles which have emerged to consider an application to set aside a judgment such as the one entered into here are the following:

a. First, the Court must consider whether the judgment was entered regularly or irregularly. If the latter, there is really no discretion, the Court must give the defendant a chance to defend *ex debito justitiae* – see *Mwala v Kenya Bureau of Standards* [2001] 1 EA 148.

b. Second, where the judgment was entered into regularly, it is imperative that the Court determines if the proposed defence raises any triable issues – see *Kingsway Tyres & Automart v Rafiki Enterprises Ltd* (CA. No. 220 of 1995 as cited with approval in *Tree Shade Motors Ltd v D.T. Dobie & Co. Ltd* (C.A. (NAI) 38 OF 1998). In the former case, the Court of Appeal held:

Where a draft defence is tendered with the application to set aside a default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff's claim. If it does, the defendant should be given leave to enter and defend.

c. Third, in exercising its discretion, the Court must act judiciously. While refusing a defendant an opportunity to put up a defence is a draconian measure, the discretion to set aside must not be used to aid a party to delay the course of justice for one of the litigants – see, for example, *National Cereals and Produce Board v Wareng Nekol Multipurpose Coop. Society* (Eldoret HCCC No. 95 of 2000).

18. I will now apply these principles to the instant case. First, it is the opinion of the Court that the judgment in this case was regularly entered. I say so for two distinct reasons. First, while the 2<sup>nd</sup> Defendant denies being served, the circumstances belie this denial. I find that the affidavit of service on file is believable that the Defendants were served. The details included in the affidavit point to its credibility. In addition, the 2<sup>nd</sup> Defendant had the option of cross examining the Process Server but his attorney chose not to. The Court is therefore behooved to believe the evidence in affidavit of service.

19. Something else points to the incredulity of the 2<sup>nd</sup> Defendant's story that he was not served. The Plaintiff has served the 2<sup>nd</sup> Defendant with at least three other documents respecting the suit – with a detailed affidavit of service being filed. I have detailed above in this ruling all those instances. It seems rather unlikely that the process servers contrived all those instances of service. I therefore make the finding that the Defendants were served and failed to enter appearance.

20. The 2<sup>nd</sup> Defendant also complains that the suit was a nullity on account of the death of the 1<sup>st</sup> Defendant. It is true that the suit abated as against the 1<sup>st</sup> Defendant. However, by dint of Order 23, Rule 4(3), the suit as against the 2<sup>nd</sup> Defendant is still valid.

21. The judgment entered was, therefore, regular. The Court, therefore, has discretion in determining whether to set it aside or not. As stated above, the two factors to consider are, first, whether the proposed defence raises triable issues, and, second, whether the Defendant is deserving of the Court's discretion in the specific circumstances of the case.

22. I am unsure the 2<sup>nd</sup> Defendant's proposed defence raises any triable issues. His proposed defence is replete with references to **Plot No. 228** and, basically, argues that he is in possession of **Plot No. 228** not

the Suit Property. So be it. If that were true, then there is no dispute and no need for him to resist the default judgment. It is difficult to read the 2<sup>nd</sup> Defendant's proposed defence as anything other than bald denials which will only serve the purpose of delaying the obvious eventuality. My conclusion is that the 2<sup>nd</sup> Defendant's proposed defence raises no triable issues.

23. But, even if I were wrong on that score, I would dismiss the Application on the ground that it is highly prejudicial and unfair on the Plaintiff to allow the present Application to succeed. The Defendants in this suit have been singularly iniquitous in their conduct with the effect of delaying the suit for almost **eight (8) years**. It is only when the 2<sup>nd</sup> Defendant was faced with eventual execution that he chose to come to Court. Eight years is a long time for a Plaintiff who has done everything according to the law, and who has patiently been waiting in turn for a judgment, then decree, then execution. The wheels of justice have surely been turning too slowly for this litigant. I see no good reason to exercise the Court's discretion in favor of the 2<sup>nd</sup> Defendant in this case. I disbelieve his story that he never knew about the suit until he received the Plaintiff's lawyer's letter dated **25/07/2011**. Even if that were true, that does not explain his more than two months' delay to file the present Application. It seems clear to the Court that the Defendants chose to ignore the suit and did so as long as they could. It is not fair to have the Plaintiff begin the suit afresh, close to eight years later, on account of the Defendants' nonchalant attitude towards the suit.

24. Since I have declined to set aside the judgment, it follows that the prayer to stay execution must equally fail as well. In the result, I dismiss the Application dated **20/09/2011** in its entirety with costs to the Plaintiff.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of JANUARY 2012.**

**J.M. NGUGI**

**JUDGE**