



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 974 OF 2003

**PETER GACHERU.....1ST
PLAINTIFF/RESPONDENT**

**ALICE NJERI KANYONYI.....2ND
PLAINTIFF/RESPONDENT**

VERSUS

**ELIZABETH MUTHONI NJENGA (sued on behalf of the estate of TEREZIAH JOHN
NJENGA.....1ST DEFENDANT**

**THE REGISTRAR OF LANDS KAJIADO
DISTRICT.....2ND DEFENDANT**

AND

**PAUL NJENGA
REMMY.....INTERESTED
PARTY**

RULING

1. Peter Gacheru the 1st plaintiff in this suit and Alice Njeri Kanyonyi the 2nd plaintiff sued the 1st and 2nd defendants Elizabeth Muthoni Njenga the 1st defendant is sued on behalf of the estate of Tereziah John Njenga and the Registrar of Lands, Kajiado District is the 2nd defendant.

2. On the 7/1/04 interlocutory judgment was entered against the 2nd defendants having failed to enter appearance or file defence after they were served with summons to enter appearance. This was done after the plaintiff’s advocate attached through her letter dated 8/12/03 for interlocutory judgment. Thereafter the matter was set down for hearing, formal proof. The plaintiffs were heard and Kubo J. gave a judgment in favour of the plaintiffs on the 15th January 2007. Thereafter a decree dated 26/2/07 was drawn giving effect to the orders given by Justice Kubo on the 15/7/07. On the 20/5/10 a Chamber summons application was filed by Paul Njenga Remy the interested party. In this application the interested party sought to be made a party to the suit, he also sought a stay of execution and also that the default judgement be set aside and he be allowed to defend the suit and file a defence to the plaintiff’s claim. The application dated 20/5/11 was withdrawn on the 30/5/11. I presume that it was the chamber summons application dated 20/5/10. Thereafter the interested party filed the Notice of Motion dated 25/11/11 which is the subject of this ruling. The application is brought under 10 Rule 11 and section 3A of the Civil Procedure Act and all enabling provisions of the law.

The interested party applicant seeks the following orders.

- i. That the default Judgment entered herein be set aside and all consequential orders entered hereof be vacated.
- ii. That the interested party herein be made a party to this suit.
- iii. That the interested party be granted leave to defend the suit and file a defence to the plaintiff's claim
- iv. That cost of the application be provided for.

3. The application is supported by the supporting affidavit of the applicant Paul Njenga Remy and the grounds are stated on the face of the application together with a supplementary affidavit dated 20/2/12. The application was opposed. The 2nd plaintiff/respondent filed a replying affidavit dated 31st July 2012

4. This is the applicant's case is brief from the facts deponed in his affidavits. The plaintiffs obtained a default judgment and had a decree issued on the 26/2/07 seeking to be registered as the proprietors of L.R. Ngong/Ngong/646. That the said suit property belongs to his late mother Teresiah John Njenga and he is one of the administrators of his late mothers estate together with the 1st defendant. That when they filed their Succession Cause no. 77/00 at Githunguri Court and after publication of the same in the Kenya Gazette the plaintiffs ignored, neglected it and refused to object to it. That he was not aware of the Succession Cause No. 3144/02 filed in the High Court by the plaintiffs. That his lawyer has perused this Court filed and found that there was an affidavit of service filed by Stephen Waititu Kimani dated the 8/12/03 where he alleges he served the 1st defendant on behalf of his late mother's estate. That though he is a legal administrator of the said estate he was not served with summons to enter appearance neither was to the 1st defend his agent for purposes of receiving the summons on his behalf nor has been created any agency in her favour as result of the affidavit of service interlocutory judgment was entered against him. That he has never been served with the summons to enter appearance and he got to hear of the case when he came to learn that someone was seeking to be registered as proprietor for the suit property. That his late mother was registered as proprietor of land No. Ngong/Ngong/648 in 1981 and the plaintiffs claim of entitlement of the said land was time barred since 22 years had lapsed when they made their claim in 2003. That it is against the cardinal principle of law to condemn a party unheard. That he has perused the plaint filed by the plaintiffs and the allegations made are falsehoods and he should be given a chance to counter the same. That he was not included and his sibling in the **succession cause No. HCC 3144/02** as beneficiary of his late father, this is contrary to the evidence in chief during the trial of this suit and that in the interest of justice the judgment should be set aside.

5. In the grounds the applicant states that after the death of his late mother the suit land which was registered in his late mother's name was later transferred to him by way of transmission and that he has proprietary interest in the property and was therefore required to be served with the summons to enter appearance by the plaintiff and that it is against the rules of natural justice for a party to be condemned unheard. That he is aggrieved by the interlocutory judgment and he has a good genuine defence to the suit.

6. In the supplementary affidavit the applicant denies that confirmation of grant in **Githunguri Succession Case No. 77 of 2000** was not obtained by fraud as his late mother was then registered proprietor of the suit property and that the monetary value was within the jurisdiction of the said Court. That **Succession Cause No. 3114/02** was done in secrecy. That the respondent did not consult them through elders to join in the petition of the administrator of succession cause No. 3114/00. That he did not receive notice of the judgment on the 8/1/07 and that his sister was sick and she died on the 14/9/08. That once he became aware of the exparte judgment he made this application. That they have been in occupation of the suit property and the respondent have not laid any claim to the suit property and that his late mother registration was not through fraud or concealment as alleged. That he has put a permanent house in the suit property and the house has been there since 1998 and they will suffer prejudice if the judgment is not set aside.

7. The 2nd plaintiff respondent filed a detailed affidavit and averred as follows: the interested parties application is frivolous and an abuse of the Court process, that the 1st plaintiff and 1st defendant are deceased and none has taken letters of administrations of their estates and that the orders sought are null and void as the decree that was issued has been executed and a new title issued in the 1st plaintiff's name and the 2nd plaintiff on the 14/1/09. That the letters of administration and confirmation of grant in the Succession Cause No. 77/000 were obtained fraudulently (paragraph 5) as the property is in Ngong yet the succession cause was filed in Githunguri and the land is worth over 4 Million, that no Kenya Gazette has been annexed for Succession cause 77/00 unlike others that was published on the 31/1/03 for succession cause no. 3114/02. That the 1st defendant was the interested party objected to the said petition and the letters of administration was issued. That the 1st defendant who is now deceased was aware of their Succession Cause no. 3114/00 and that they prior to filing the petitioner tried to consult with them through the village elders to join them so that they could petition for the letters of administration together with the members of the 2 houses but the 1st defendant and interested party refused and secretly filed the Cause at on the Githunguri Courts. That the orders in this matter were issued on the 15/1/07, five (5) years and they were served. The 1st defendant was served and there has been inordinate delay. That their process sever are clearly stated he served the 1st defendant. They did so after the search of the land registry at Kajiado showed that the 1st defendant and others had lodged a caution on the property. That the interested party did not acquire a valid title deed to the suit property and the Courts should not assume he is the registered proprietor on the portion he claims to own, that the title issued to the late Teresia John Njenga was issued through fraud and with concealment of the material facts that there were other dependants of John Njenga and the transfer was fraudulently done 13 years after the death of his father. That the issue of limitation did not apply as this is a succession matter. That as per the Judge's order in the succession cause the Judge granted a preservative order and referred the matter on the mode of distribution of the estate to the family division and that the matter can be determined on merit and the only option left to the interested party is to apply for revocation of the grant in succession cause No. 3114/03 other than applying to set aside a Court order. That she did inform Justice Kubo of the existence of the 2 houses of the deceased's estate and they do not wish to deny the other house their share but the other house has refused to cooperate. That the interested party is not being faithful as the 1st defendant was severally requested by the Registrar of Land Kajiado to return the title deed for cancellation in compliance with the Court order but she refused, this forced them to pay for the same to be published in the Kenya Gazette of 17th October 2008 a Registration of instrument to cancel the said title deed. The 1st respondent urged this Court to dismiss the application on in the alternative to refer the matter to the **Nairobi HCC succession Cause No. 3114/03** where the issue of distribution of the deceased's estate can be properly determined.

8. I have considered the oral submissions made by counsels in Court Miss. Munene raised an issue that the interested party is not the legal representative of the 1st defendant and therefore has no locus to bring this current application. From what is deponed, the interested party was a co-administrator with the 1st defendant who has since died, from what is annexed it show that he has a beneficial interest. This in my view gives him the locus to come to Court as an interested party. On the manner in which the Notice of motion has been brought, the Respondent counsel said that the applicant should have come under order 45 Rule 1 which deals with Review. The applicant is not seeking review but setting aside judgment. He has cited in his application Order 10 Rule 11. Oder 10 deals with consequences of non-appearance in Court, default of defence and failure to serve. Rule 11 provides that judgment under this order may be set aside on such terms that are just. Though not a defendant, I shall not penalise the applicant bearing in mind Articles, **159 (2) 2(b) of the Constitution** which states that "**justice shall be administered without undue regard to procedural technicalities**".

9. Being a party with beneficial interest, the judgment that was entered exparte which relates to proprietorship of the suit premises does affect the applicant. The respondent argues that judgment should not be set aside as the issue of succession is still pending and the interested party shall benefit of doubt. That is so but to leave the judgment as it is gives the respondent an upper hand over the interest party. I recognise that the interested party has chosen to come to Court four (4) years after the judgment was read and he states that he was not aware of the suit and I will give him the benefit. There is a lot of case law on

setting aside judgment where it was held that Courts will exercise its discretion after considering the case of each party. The interested party has not annexed a defence to show whether he has a good defence in the matter. It would have been in order for him to do so. However considering that the parties in this case are related and one is holding the title and the other is not, to do justice to both sides so that the matter can be heard and determined and judgement given after full hearing, I will exercise my discretion and set aside the judgement. In the case of **Patel. Vs. E.A. Cargo Handling Services Ltd**, The Court stated that **“the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice”**

In my view the discretion I have exercised is intended to avoid injustice.

I note that in the case of Shah Vs. Mbogo (1967) EA 116 states that **“In exercising the discretion the Court should consider among other fact and circumstances both prior and subsequent and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the judgment should be considered and it should be always remembered that to deny a person a hearing should be the last resort of the Court”**

To have the exparte judgment in force will not help any of the parties as one would feel the other has more advantage over the other. I therefore find merit in the Notice of Motion dates 25/11/11 and make the following orders:-

- i. The interested party is enjoined in this suit.
- ii. The default judgment is set aside and all consequential orders entered thereof vacated.
- iii. The plaintiff shall serve the interested party with a plaint within 21 days of this ruling.
- iv. The interested party should file a defence within 15 days of being served the plaint.
- v. Costs shall be in the cause.

Dated, signed and delivered this 27th day of July, 2012.

R. OUGO
JUDGE

In the presence of:-

Mr. Okindo holding brief Miss Jane Munene for the plaintiff/respondent.

Mr. Wabilianga holding brief for the interested party

Mr. Kabiru Court Clerk