



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Case 100 of 2007

DANIEL WAITE MATU.....APPLICANT

Versus

BIASHARA SACCO LTD.....1ST RESPONDENT

BERNARD MURIUKI GATURUKU T/A

Bensure Auctioneers.....2ND RESPONDENT

MUTAHI MUTITU.....3RD RESPONDENT

R U L I N G

Through Messrs Muchiri wa Gathoni & Company Advocates, Mutahi Mutitu, hereinafter referred to as “*the applicant*” lodged the instant chamber summons application seeking in the main that:-

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3. The exparte interlocutory judgment entered against the 3rd defendant on 17th January, 2007 and all consequential orders and decree be set aside.

4. The defendant be granted leave to file his defence in the matter herein.

5. The costs of this application be provided for.”

The application was expressed to be brought under orders 1XA rules 10 and 11, XXI rules 22 (1) and 25 of the Civil Procedure rules and all other enabling provisions of the law. The grounds in support of the application were that the applicant came into this matter vide an amended plaint filed in the Chief Magistrate's Court, Nyeri on 20th November, 2006. The interlocutory judgment entered was irregular as it was entered by a court lacking in jurisdiction. Though there was no order of eviction of the applicant, **Daniel Waite Matu**, hereinafter referred to as "*the respondent*" had stationed guards barring the applicant from accessing his property. In fact the respondent had started picking tea from the said property. That the applicant was never served with notice of entry of judgment as required and therefore execution proceedings were irregular. Finally that the respondent would not suffer any prejudice if the orders are granted and that it was meet and just that the applicant be granted opportunity to defend himself.

In support of the application, the applicant deposed that he bought land parcel **Chinga/Kagongo/1055** hereinafter referred to as "*the suit premises*" in a public auction held on 26th August, 2003 and had the same transferred and registered in his name. He thereafter took possession and developed it by planting over 4,000 tea bushes. Since then he had quietly and peacefully enjoyed the suit premises. On 3rd July, 2009 his workers went to the suit premises but found security guards stationed thereat who barred them from entering the suit premises on the instructions of the respondent. The guards subsequently told the applicant when he entered the fray that the suit premises no longer belonged to him but to the respondent pursuant to a court order. It was then that he learned that a judgment had been entered against him on 19th March, 2009 pursuant to which his title to the suit premises had been cancelled. He confirmed his fears when on searching the suit premises at the Nyeri Land Registry he discovered that the respondent had been registered as the proprietor on 27th April, 2009. When his advocates perused the court file they noted that he had been joined as a party in the suit in the then Nyeri Chief Magistrate's Court Civil Suit number 793 of 2004 vide an amended plaint dated 17th November, 2006, whereupon interlocutory judgment was entered against him on 17th January, 2007 for failing to enter appearance and file a defence. He was never served with summons to enter appearance however and had he been served he would have defended himself as he was not involved in any fraud or at all as alleged in the plaint and bought the suit premises above board. Thus his failure to file defence was not deliberate having heavily invested in the suit premises it would have been foolhardy on his part not to defend the suit. There was no order for his eviction issued in the judgment of this court. Accordingly the respondents' acts of stationing guards on the suit premises were driven by malice and intended to occasion loss and are therefore unlawful and illegal. He would suffer irreparable loss unless the orders prayed in the application are granted as the suit premises are going to waste and the respondent is taking advantage by picking his tea leaves. The respondent will on the other hand not suffer any prejudice or loss that is incapable of being addressed by way of damages.

The application was opposed. Through a replying affidavit filed through **Waweru Macharia & Co. Advocates**, the respondent deposed that execution had already taken place and the suit premises reverted to him. Accordingly the order of stay had been overtaken by events. Nor can it be set aside. Interlocutory judgment was validly and regularly obtained. The applicant cannot challenge the validity of the judgment entered against him at his juncture and this court cannot set aside the judgment entered by the chief Magistrate's Court as this court is not sitting on appeal or review of the said judgment. The respondent did not require eviction orders as the applicant had never taken possession of the suit premises and all that he did was to re-enter the suit premises after the title was rectified by the Land Registrar. That it was incorrect for the applicant to claim that he was unaware of this suit when he had placed a caution on the suit premises and referred to this suit. The applicant had not undertaken any developments on the suit premises and the tea bushes referred to were actually the respondent's. The applicant had been served with a notice to vacate the suit premises on the basis of the judgment. The suit premises having reverted to the respondent, he would suffer irreparable harm and prejudice if the judgment is set aside. Litigation has to come to an end and judgment having been executed, this court was *funtus officio*.

On 20th July, 2009 when the application came up for interpartes hearing before me **Mr. Muchri** and **Mr. Macharia** learned counsel for the applicant and respondent respectively agreed to canvass the same by way of written submissions. Subsequently they filed and exchanged written submissions which I have

carefully read and considered.

Briefly stated the history of this matter from the pleadings and the written submissions appear to be this; The suit was filed on 22nd October, 2004 by **Gerald Gichanga Wanbaki & Daniel waite Matu** the 1st and 2nd plaintiffs against Biashara Sacco Limited & **Bernard Muriuki Gatukuru** the 1st and 2nd defendants respectively. The matter was filed in the Chief Magistrate's Court as Nyeri CMCC No.793 of 2004. The plaintiff sought to set aside sale of the suit premises by public auction on 26th August, 2003 and restrain the defendants by a permanent injunction from transferring the same. The particulars of the plaint were that the 1st plaintiff had been advanced a loan of Ksh.70,000/= in or about September, 2000 by the 1st defendant and the plaintiff had guaranteed the said loan with his title deed in respect of the suit premises. The plaintiff alleged to have repaid the loan leaving a balance of Ksh.43,031/= and further reduced this balance by paying a sum of Ksh.15,000/= on or about 31st July, 2007.

On 26th March, 2003 however, the 1st and 2nd defendants proceeded to sell the suit premises by public auction to one, **Mutahi Mutitu** the applicant herein. The suit premises were fraudulently transferred to the applicant. Thereafter on 27th February, 2006 the respondent filed an application for leave to amend plaint to have the applicant joined as 3rd defendant. The application was allowed and the amended plaint was duly filed in court on 20th November, 2006. On or about 11th January, 2009 a request for judgment was filed and judgment was duly entered on 17th January, 2007. Later the matter was transferred to this honourable court as the subordinate court did not have jurisdiction to order for rectification of the register with regard to the suit premises. The matter was then heard an order of rectification given. The applicant only came to learn of the judgment when his workmen were denied access to the suit premises and when he reported the issue to the police he was shown a letter dated 2nd July, 2003 asking him not to interfere with the suit premises. This was long after the respondent had had the title issued in his name.

Order 1XA rule 10 of the Civil Procedure Rules gives this court wide and unfettered discretion to set aside or vary a judgment entered and any consequential decree or order upon such terms as are just. Order XX rules 22 (1) and 25 also give this court jurisdiction to stay execution of the decree. However, I do not think that the decree issued herein is now capable of being stayed as it has already been executed. Indeed the applicant it would appear had abandoned that prayer since he conceded that pursuant to the judgment and decree issued herein, the title to the suit premises had changed hands. The suit premises have been transferred from the applicant and registered in the name of the respondent. Similarly the respondent has taken possession of the suit premises pursuant to the same judgment and decree. That being the case nothing is left that can be stayed by an order of this court. It is a cardinal principal of law that a court of law should never act in vain. If I was to make such an order I will certainly be acting in vain.

This application then should be limited to the prayer seeking to set aside the interlocutory judgment entered against the applicant on 17th January, 2007. However it should be noted that the said judgment was not entered by this court. Rather it was entered when this suit was still in the subordinate court and before it was transferred to this court. I doubt whether in the circumstances I would have jurisdiction to determine the issue. Even if I had jurisdiction, on the material before me I would still have declined to grant the prayer on the grounds that the applicant has been less than candid in this application.

The gist of the applicant's argument is that he was not served with the summons to enter appearance. Further that the subordinate court had no jurisdiction to entertain the suit. However there is on record an affidavit of service by the process server known as **Lawrence Kiarie Thuku** dated 1st December, 2006. That affidavit of service clearly sets out in detail the circumstances under which the applicant was served. He was served at his place of business in Othaya town. The applicant has not disputed the fact that he runs a business in Othaya. His only response is that the process server did not give a description as to where the business is situated. I do not think that failure by the process server to give such a description would necessarily mean that the process server was not being truthful. Afterall this was not the first time the process server had served him with court papers in respect of this suit. Indeed he first served the applicant on 8th March, 2006 with the application to have him enjoined in the proceedings.

The process server was introduced to the applicant by the respondent. Secondly on 23rd March, 2006, he was again served by the same process server with the hearing notice for the hearing of the application to join him as a party to the suit again. It is instructive that when the said application came up for hearing on 23rd March, 2006, the applicant was represented by counsel meaning therefore that he had been served with the application which he in turn passed it over to his counsel. That being the case, the applicant was a person well known to the process server. If the process server says that he served him at his place of business at Othaya then it must be true. There would have been no reason for the process server to swear a false affidavit of service. In any case, the applicant has not even sought that the process server be availed in court so as to be cross-examined on the veracity of his affidavit of service aforesaid.

It is also instructive that the respondent registered a caution on the suit premises on or about 15th April, 2005. In the affidavit in support of the caution, the respondent mentioned that he had filed a suit in the chief Magistrate's Court challenging the transaction that led to the suit premises being transferred and registered in the name of the applicant. He even gave to the Land Registrar, copies of the plaint and defence. How can the applicant then claim not to have been aware of this case. Secondly, and as correctly submitted by **Mr. Macharia**, the Land Registrar, before rectifying the land register with respect to the suit premises, gave notice in the Kenya Gazette of his intention to **“dispense with the production of the title deed and proceed with the registration of the said instrument of subdivision and transfer and issue a land title deed to the said Daniel Waite Matu and upon such registration the land title deed issued earlier to the said Mutahi Mutitu, shall be deemed to be cancelled and of no effect....”** That Notice appeared in the Kenya Gazette of 22nd May, 2009. It contained the details of the case and even the applicant's name. The underlying presumption is that everybody in Kenya reads the Kenya Gazette. Accordingly, the applicant must be deemed to have read the same. He cannot therefore be heard to say that he was unaware of the suit all along and even following the aforesaid Kenya Gazette Notice.

The applicant too has raised the issue that he was not served with notice of entry of judgment. Surprisingly however, he has annexed in his affidavit in support of the application a letter dated 2nd July, 2009 addressed to him by counsel for the respondent notifying him of entry of judgment. How then can he claim that he was not so notified. Of course he has claimed that he obtained the same from Othaya police station. I do not accept that explanation for the simple reason that there is nothing from Othaya Police Station confirming that indeed they were the ones who passed on to him the said notice.

The applicant too has raised the issue that the interlocutory judgment entered in the matter was irregular as it was entered by a court lacking in jurisdiction. However the applicant has neither in the supporting affidavit nor his written submissions expounded on the issue. Looking at the plaint as filed in the magistrate's court, it is apparent that the respondent had been advanced a loan of Kshs.70,000/= by the 1st defendant and he had guaranteed the same with the suit premises. He claimed to have repaid the loan leaving a balance of Kshs.43,031/= and reduced this balance by paying a further sum of Kshs.15,000/- on 31st July, 2003. It was on this basis that he filed suit in the magistrate's court praying for the setting aside of the auction and injunction. From the foregoing I cannot see the basis of the applicant's complaint that the magistrate's court then did not have jurisdiction. The applicant has not stated as at that time what was the pecuniary jurisdiction of the Chief Magistrate's court in Nyeri. Of course I am aware that the jurisdiction then was Ksh.3,000,000/=. In the circumstances, the applicant cannot be right in claiming that as at the time the exparte judgment was entered the court had no pecuniary jurisdiction. It had since the pecuniary value of the suit premises did not exceed Kshs.3,000,000/=. Infact by his own admission contained in the documents annexed in his supporting affidavit, he bought the suit premises for Kshs.300,000/=. The suit was only transferred to this court following the amendment of the plaint to include a claim for the rectification of the register that was beyond the jurisdiction of the chief Magistrate's Court.

I have considered the authorities cited by the applicant in support of his case. However, in the circumstances of this case they are of no assistance to the applicant. If anything they support the respondent's case.

All in all I am satisfied that the applicant was properly served. The ex-parte judgment was entered

regularly and properly. The applicant has deliberately not been candid with the court. For those reasons, I cannot therefore exercise my unfettered discretion in his favour. The application is unmerited and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of November, 2009

M.S.A MAKHANDIA

JUDGE