



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1418 OF 2001**

**JACINTA WAIRIMU NJOROGE ..... PLAINTIFF**

**VERSUS**

**JULIA WANJIRU ..... 1ST DEFENDANT**

**ALICE WAMBUI KARANJA ..... .2ND DEFENDANT**

**AGATHA WANGECHI MUIRURI ..... .3RD DEFENDANT**

**RAHAB MURINGE NDERI .....4TH DEFENDANT**

**JACINTA MUMBI CHEGE ..... .5TH DEFENDANT**

**RULING**

Julia Wanjiru, the first defendant herein moved the court for an order to set aside the ex parte judgment entered against her, but in favour of the plaintiff, vide a judgment of 8th July 2003.

The records show that counsel for the plaintiff took a date at the Registry, for the hearing of the suit, and the same was served on counsel for the 1st defendant, but he did not appear in court. His client the 1st defendant also did not appear in court. The hearing proceeded ex parte after which judgment was delivered the same day.

There are several affidavits sworn by Julia Wanjiru, the first defendant, either seeking an order to stay for execution of the eviction order or an order for setting aside the ex parte judgment. The contents of these affidavits are relevant to this application. These affidavits were sworn on 22nd August 2003, 14th November 2003.

There are also affidavits sworn by one Rahab Muringe Nderi, the 4th defendant, supporting Julia's averments in her affidavits for stay of eviction order and also seeking an order to set aside an ex parte judgment. Some of these affidavits are dated 24th November 2003, 26th June 2002, 17th September 2001.

The affidavits seek leave to defend the suit. They also contend that the mistake of Julia's lawyer in failing to appear in court and or indeed failing to inform her of the hearing of the suit on 8th July 2003 should not be visited upon her, as she had briefed him fully.

The affidavits also give the history of what according to them, i.e. Julia and Rahab, is the history of the suit – i.e. how they as defendants and members of a self help group known as Wema Self Help Group bought the suit premises for Kshs.90,000/= and paid the full amount to one Mumbua Maitha. That the defendants proceeded to subdivide the suit premises into 18 plots and sold most of them, but that in June 2001, they learnt that one of the sons of Mumbua Maitha fraudulently sold the suit premises to the plaintiff Jacinta Wairimu Njoroge.

The 1st defendant and Rahab prayed the court to allow them to defend the suit as they have a good defence. A copy of an amended defence was one of the annexures to the application as well as an agreement signed by Mrs Mumbua Maitha the original owner of the land, and Wema Self Help Group. Also annexed was a letter dated 6th June 2001 containing an agreement between Mumbua Maitha, the original owner of land, her son Daniel Maitha – who was alleged to have sold land to the plaintiff fraudulently, Rehab, Stephen Kamau, P.N Gitaka. In this agreement, it seems to have been resolved that

***“the original owner of the plot Wema Self Help Group should continue ownership and Jacinta Wairimu (the plaintiff) will be shown another piece of land or be refunded her money?”***

Jacinta Wairimu who had a judgment in her favour in this suit has also sworn several affidavits claiming that she bought the suit premises through Kenrest Home Agencies Ltd, for Kshs.350,000/= on 13th October 1999. The agreement was annexed. The vendors as per the agreement are shown as Mumbua Maitha and Daniel Musau Maitha. There’s a copy of letter dated 12th October 1999, said to have been written by a sub chief, ***“giving authority to Daniel Musau Matheka, to forward the number of the plot to the person who had bought it.....”***. The letter states further that Daniel’s mother, Mumbua Maitha was “too sick” to come to Nairobi.....

Also annexed is a form of transfer of the suit premises from Wambua Maitha to Jacinta Wairimu Njoroge, the plaintiff. This was on 22nd October 1999. It was signed for the Commissioner of Lands, and stamped. The lease document was executed, and a certificate of lease in the name of Jacinta Wairimu Njoroge issued.

It is the process or procedure leading to the transfer of this land to Jacinta’s name that is being challenged by the 1st defendant who alleges fraud on the part of one of the sons of Mumbua Maitha.

To prove her point that she is the rightful owner of the suit premises, Jacinta has sworn several affidavits to support various applications. She has also annexed a number of documents to these affidavits including land rent payment, cheque to Commissioner of Lands amongst many other documents. Some of her affidavits are dated 25th August 2001, supporting her application for a mandatory injunction to compel the 1st defendant to move from the suit premises and also to remove any structures she might have erected thereon.

There is also an amended affidavit dated 6th June 2002, supporting an amended chamber summons for mandatory injunction, and still another one dated 21st June 2002.

She has also sworn a lengthy affidavit dated 3rd September 2003, to challenge the application to set aside the ex parte judgment. She annexed the hearing notice to Messrs Kiiru Wainaina advocates and submitted that the advocate was properly served and should have been in court for the hearing of the case scheduled for 8th and 9th July 2003.

Julia filed application for eviction under a certificate of urgency on 13th November 2003. It was supported by her affidavit dated 12th November 2003.

In court during the hearing of the application to set aside the ex parte judgment, Jacinta’s counsel Mr. Mugo submitted,

***“I admit that ownership is in issue. She (Jacinta) became registered before the suit was filed. Purchase by Julia (1 st defendant) is in dispute. The agreement of sale was with Wema Self Help Group, and the 1 st defendant not being a director cannot sue on behalf of the group .....”***

Mr. Mugo challenged the annexed defence contending that the plaint cannot be dismissed as Jacinta, his client holds the title to the suit premises.

Mr. Kiiru on the other hand submitted that his client Julia bought property from the original owner,

and that the person who later sold it to the plaintiff had no authority to do so as he was not the owner. He contended that the first defendant has a good defence which the court should hear.

I considered the contents of the various affidavits filed by parties to this dispute. I also considered the submissions and the legal authorities quoted.

As was submitted by Mr. Mugo, I also find that the ownership of the suit premises is in issue. I have read the amended plaint as well and the prayers sought therein. I have also considered the amended defence, which was annexed to the affidavit of Rahab Muringe Nderi. It alleges fraud on the part of the plaintiff, and it gives particulars of such fraud in para 6.

I find that these are serious issues, which need to be decided upon by a court of law. Though the 1st defendant did not appear at the hearing, it was not her fault but that of her counsel Mr. Kiiru, and reading through the decided cases supplied, I find that a court of law would consider not punishing a litigant, in this case the 1st defendant for mistakes of her lawyer as seen in this case. For this reason, I proceed to set aside the ex parte judgment passed by Rimita, J on 8.7.2003, in favour of the plaintiff. I, however, direct the 1st defendant to pay the plaintiff thrown away costs.

I find that the amended defence raises triable issues which should be put to the test, and I direct that this suit be heard and determined on merit. The ex parte judgment is set aside plus all consequential orders.

The advocates representing the parties herein should file issues for the determination of this case. They should also conduct discovery and inspection of documents to facilitate a speedy hearing.

Dates for the hearing of the suit should be obtained from the Registry.

Dated at Nairobi this 4th day of March 2004.

**JOYCE ALUOCH**

**JUDGE**