



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 517 OF 2017

SURINDERPAL SINGH SYAN.....1 ST PLAINTIFF

JASMEER SINGH SYAN.....2 ND PLAINTIFF

SANATKUMAR SHANTILAL TRIVEDI.....3 RD PLAINTIFF

= VERSUS=

WANYIRI KIHORO.....DEFENDANT

RULING

Background

1. The 1st and 2nd plaintiffs contend that they are executors of the will of Ranjeet Singh Syan who died on 13/12/2004 (**the deceased**). Together with the 3rd plaintiff, they brought this suit as **Nairobi CMCC No 1468 of 2008**. Pursuant to an order of this court made on 10/5/2017, the suit was transferred to this Court and designated as **Nairobi ELC Case No 517 of 2017**.

2. The deceased and the 3rd plaintiff are the registered proprietors of **Land Reference Number 1/205**, situated along Kayahwe Road, Nairobi (**the suit property**). The defendant was at all material times husband to one Dr Wanjiru Kihoro who is now deceased.

3. The plaintiffs' case in the main suit is that in April 2001, the deceased together with the 3rd plaintiff, entered into a tenancy agreement with the late Dr Wanjiru Kihoro, pursuant to which they leased the suit property to Dr Wanjiru Kihoro for a period of 2 years, effective from 1/4/2001. The said tenancy lapsed by the effluxion of time on 1/4/2003 and was never formally renewed. Following the demise of Dr Wanjiru Kihoro, the defendant who was a spouse to Dr Wanjiru Kihoro continued to reside in the suit property without entering into a formal arrangement with the proprietors of the suit property. They contend that the defendant lived in the suit property as a trespasser following the demise of his late wife. They add that they served the defendant with a notice to vacate the suit property by 31/12/2007 but the defendant failed to vacate. They further aver that at the time of bringing this suit, the defendant had stayed in the suit property without paying the then monthly rent of Kshs 40,000 for 19 months, making a total of Kshs 760,000 in equivalent of rent arrears.

4. Consequently, the plaintiffs seek the following verbatim orders against the defendant:

- a) **An order for eviction of the defendant from the suit premises, namely, LR No 1/205.**
- b) **Kshs 760,000 as at 01.03.2008 with a monthly increment of Kshs 40,000 up to the date of eviction.**
- c) **Interest on (b) above from the date of filing suit until payment in full.**
- d) **Costs of the suit**

5. The defendant filed a defence dated 18/4/2008. He subsequently filed an amended defence and brought a counterclaim dated 5/1/2009. From the pleadings, the defendant admits existence of a tenancy agreement between the proprietors of the suit property and his late wife. He adds that the tenancy agreement gave his late wife the option to purchase the suit property at the expiry of the two year tenancy term. He denies being a trespasser on the suit property. He contends that his late wife exercised the option to purchase the suit property and entered into a purchase agreement with the late Mr Ranjeet Singh Syan on his own behalf and on behalf of the 3rd defendant on 15/1/2003 and paid the purchase price of UK\$ 60,000 to the late R S Syan who signed a conveyance in favour of his late wife whereupon the interests of the deceased and the 3rd defendant in the suit property were extinguished. He adds that, unaware of the sale transaction, he paid rent of Kshs 667,000 to Mr R S Syan between 2003 and 2004 and Kshs 967,170 to the 1st plaintiff between 2005 and 2007. He seeks a refund of the said

amount.

6. Consequently, the defendant seeks the following verbatim orders in the counterclaim against the plaintiffs:

- a) ***Declaration that LR No 1/205 was purchased as per the sale agreement and now belongs to the Estate of the late Dr Wanjiru Kihoro.***
- b) ***An order for the transfer of LR No 1/205 by the plaintiffs from the Estate of the Late Mr R S Syan and the third plaintiff to the Estate of the Late Dr Wanjiru Kihoro, and in the event of failure to do so, requisite papers to be expedited by the Court Executive Officer. (sic)***
- c) ***An order against the Estate of the Late Mr R S Syan for the refund of rental sum erroneously paid to him by the defendant, between the purchase by the Late Dr Kihoro and his subsequent demise in December 2004.***
- d) ***An order for the refund to the defendant of the rental sum paid by mistake to the first plaintiff following the demise of the late Mr R S Syan and before the subsequent discovery of the sale of the property to the Late Dr Kihoro***
- e) ***An order for costs and other relief as appropriate.***

7. The suit came up for hearing before this court on 23/7/2019. The court was not satisfied with the mode of service employed in respect of hearing notice. The court adjourned the hearing and directed the plaintiffs to serve a fresh hearing notice on the defendant through an advertisement in either the Daily Nation or the Standard Newspapers. The court set down the case for hearing on 5/11/2019. On 17/10/2019, the plaintiffs published a notice in the Daily Nation, addressed to the defendant, indicating that the suit was scheduled for hearing on 5/11/2019. The defendant did not, however, attend the hearing on 5/11/2019. Consequently, hearing proceeded in the absence of the defendant.

8. On 5/3/2020, this court rendered a judgment in favour of the plaintiffs and made the following disposal orders:

- a) ***It is hereby ordered that the defendant is to be evicted from the suit premises, namely, Land Reference Number 1/205 forthwith.***
- b) ***The defendant shall pay to the 3rd plaintiff and the estate of the late Ranjeet Singh Syan damages of Kshs 760,000 with interest thereon at court rate from the date of filing this suit.***
- c) ***The defendant will further pay the 3rd plaintiff and the estate of the late Ranjeet Singh Syan damages in the sum of Kshs 40,000 per month from 1/3/2008 till the defendant vacates or is evicted from the suit property. The said sum shall attract interest at court rate from the date of judgment.***
- d) ***The defendant shall bear costs of this suit.***

9. A formal decree was extracted on 9/3/2020 and the decree was subsequently executed.

Present Application

10. Following execution of the decree, the defendant brought a notice of motion dated 27/11/2020, seeking the following verbatim orders:

1. ***Spent***
2. ***That the judgment made and delivered by the Honourable Court (Judge B M Eboso) on the 5/3/2020 be set aside and the suit be heard interpartes.***
3. ***That the court make an order that pending the hearing of this suit interpartes, the applicant be given immediate access to the suit property, where he resides with his family and returns with his personal property which is currently left on the roadside at Kayahwe Road, Milimani***
4. ***That the costs of this application be costs in the cause.***

11. The said application is the subject of this ruling. It was supported by the defendant's affidavit sworn on 27/11/2020. The application was orally canvassed in virtual court on 7/12/2020.

Applicant's Case

12. The case of the defendant/applicant is that he was evicted from the suit property on 27/11/2020 in execution of the decree herein. He had never been served with court papers from this court. He did not know Milimani CMCC 1468/2088 had been transferred to this Court and registered as **Nairobi ELC 517/2017**. He was not aware of the proceedings of 5/11/2019 and all subsequent proceedings preceding the eviction. He did not see the hearing notice published in the Daily Newspaper.

Respondent's Case

13. The plaintiffs opposed the application through a replying affidavit sworn on 4/12/2020 by Surinderpal Singh Syan (**1st plaintiff**). He deposes that the defendant was duly served with the application seeking transfer of Milimani CMCC 1468/2008 but chose not to attend court. He adds that on all occasions when this matter came up, the defendant was served with appropriate notices but he failed to attend court. The 1st plaintiff adds that following the defendant's failure to attend court, the court ordered service of hearing notice on the defendant through a notice in the newspaper and the plaintiffs duly effected service as directed but the defendant failed to attend court on 5/11/2019.

14. Further, the 1st plaintiff deposes that the suit property was never sold to the defendant or to his deceased wife and that the sale agreement and the purported conveyance which the defendant is relying on are forgeries and are the subject of criminal proceedings against the defendant in Kibera Chief Magistrate Court Criminal Case No 5220/15.

Oral Submissions

15. At the hearing of the application, the applicant who acts in person submitted that the suit property belongs to him, having bought it from Mr Trevedi in 2003. He added that he was never served with court summons relating to this suit. Without explaining further, he contended that the matter herein was orchestrated. He added that the plaintiffs should have sued him personally because they knew where he lived. He urged the court to grant the prayers sought in the application.

16. In response, Mrs Thongori, counsel for the plaintiffs, made reference to the exhibits attached to the replying affidavit and submitted that the application for transfer of the suit from the Chief Magistrate Court to this Court was duly filed, served, heard and determined. She added that hearing notice relating to the main suit was duly served but the defendant elected to ignore the notice. She further submitted that the defendant's widow never purchased the suit property. She added that the purported witness to the alleged memorandum of sale had disowned the memorandum of sale and there was a pending criminal case against the defendant arising from the said memorandum of sale. Ms Thongori further submitted that the plaintiff had been denied use of their property for a long time. She urged the court to dismiss the application.

Analysis & Determination

17. I have considered the application, the response thereto, and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key questions in this application.

18. This suit was transferred from the Chief Magistrate Court pursuant to a formal application and subsequent order of this court. Prior to the transfer, the defendant had filed a defence and a counter-claim. His only default relates to non-attendance at the substantive hearing of the suit.

19. From the record, the defendant was served with a hearing notice through an advertisement in the Daily Nation newspaper. Taking into account the above background; the evidence on record; and the submissions presented in the application, two questions fall for determination in this application. The first question is whether the applicant has satisfied the criteria upon which our courts exercise discretionary jurisdiction to set aside regular *ex parte* proceedings and judgment. The second question relates to the appropriate orders available in the event the answer to the first question is in the affirmative.

20. The criteria upon which our courts exercise this discretionary jurisdiction was summarized by the Court of Appeal in **James Kanyिता Nderitu & another v Marios Phillotas Chikas & another [2016] eKLR** in the following words:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole, it is in the interest of justice to set aside the default judgment, among others”.

21. The defendant contends that he did not see the hearing notice which was published in the Daily Nation Newspaper. He also contends that he was not aware of the transfer of this suit from the Magistrate Court to this Court. The plaintiffs disputes these contentions.

22. The dispute in this suit relates to title to (ownership of) the suit property. The title is currently registered in the names of Ranjeet Singh Syan (now deceased) and the 3rd plaintiff. In his defence and counter-claim, the defendant contends that the 3rd plaintiff sold the suit property to his deceased wife but he (the defendant) was not aware of the sale until much later. On their part, the plaintiffs contend that the alleged sale never took place and that the memorandum of sale which the defendant is waving is a fraudulent document and is the subject of a criminal case at Kibera Law Court where the defendant faces criminal charges relating to the alleged memorandum of sale.

23. Given the nature of service of the hearing notice relating to the proceedings of 5/11/2019, the court is satisfied that it is probable that the defendant may not have seen the hearing notice published in the Daily Nation Newspaper. There is therefore a proper basis for exercising discretionary jurisdiction to set aside the regular *ex parte* judgment herein so that the defendant is given the opportunity to lead evidence in support of his defence and counter-claim. I now turn to the second question.

24. The defendant sought an order reinstating him into the suit premises. Without making any definitive or conclusive pronouncement at this stage, it is noted from the materials placed before court at this point that the memorandum of agreement for sale and the conveyance which

the defendant is relying on are the subject of criminal charges against the defendant. Secondly, it is not clear at this point if the 3rd plaintiff, acting alone, had the capacity to sell and convey the suit property to the defendant's deceased wife. Thirdly, the execution which ensued from the decree herein was a regular one because a hearing notice had been served as directed by the court. Lastly at the moment the late Ranjeet Singh Syan and the 3rd plaintiff are said to be the registered proprietors of the suit property. Taking the above factors into account, it is the view of the court that the circumstances of this application are not appropriate for a reinstatement order which, in essence, would constitute an eviction order against the plaintiffs who still hold title to the suit property. I will therefore not grant that order. I will instead preserve the suit property in terms of Order 40 rule 1 of the Civil Procedure Rules and let the suit property remain in possession of the plaintiffs. Further, the court's focus will be to hear and determine the main suit soonest.

Disposal Orders

25. In light of the foregoing, the court makes the following disposal orders relating to the defendant's notice of motion dated 27/11/2020:

a) The Judgment dated 5/3/2020 is set aside.

b) The suit property herein shall remain in possession of the plaintiffs but shall not be disposed or charged, pending the hearing and determination of this suit.

c) A hearing date for this suit shall be set at the time of reading this ruling

d) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JANUARY 2021.

B M EBOSO

JUDGE

In the presence of:-

Mrs Judy Thongori for the Plaintiff

Mr Wanyiri Kihoro - Defendant acting in Person

June Nafula - Court clerk