REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 56 OF 2017 (OS)

CHRISTOPHER MWANGI MUNUHE (Suing as the personal representative

of the Estate of the late **LUCY WANJIRU MUNUHE).....PLAINTIFF**

VERSUS

GEOFFREY NASUBO.....DEFENDANT

RULING

1. In the Application dated 6th June, 2020, the Defendant has sought for the following reliefs:

> **a. That the Honourable Court be pleased to review and/or vacate the Judgment entered against the Defendant/Applicant by this Honourable Court on the 8th day of May, 2020.**
>
> **b. That this Application be heard inter parties on such date and time as this Honourable Court may direct.**
>
> **c. That the costs of this Application be provided for.**

2. The Application is supported by the Affidavit of the Defendant who has deponed that after this suit was filed, the Plaintiff served him with the Originating Summons by way of advertisement in a local newspaper and that the said advertisement was never brought to his attention as he resides with his family in San Diego, United States of America.

3. The Defendant deponed that he is the legal owner of land known as L.R. No. 20604/52 and 20604/57 *(the suit property)* having purchased the same; that his friend, Richard Makau, who is also based in San Diego, California brought to his attention about the Judgment of this court and that he instructed his current advocate to take over these proceedings.

4. The Defendant deponed that legally, no party can claim for adverse possession and allocation of property at the same time; that an allegation that the Plaintiff was paying for Rates in respect to the suit property is false and that the land which the Plaintiff has allegedly developed is L.R. No. 20604/134 and not his land.

5. In response, the Plaintiff deponed that he filed this suit seeking for adverse possession in respect of L.R. No. 20604/52; that his mother entered the suit land on 12th November, 2000; that the Defendant has confirmed that he has been away from the suit property since the year 2001 and that the documents showing that the firm of Muthaura Mugambi and Ayugi Advocates was served was a typing error.

6. According to the Plaintiff, the Defendant has not denied that his mother has been in possession and occupation of the suit property for over fourteen (14) years; that the Defendant was aware that he had erected a temporary building on the suit property in the year 2010 and that the Defendant only paid land rent in the year 2011.

7. In the Supplementary Affidavit, the Defendant deponed that the Plaintiff has not proved through approvals that the suit property is developed; that his departure from Kenya did not in any way warrant the deceased to illegally trespass on the suit property and that the Plaintiff entered his land as a legal proprietor of L.R. No. 20604/134, which land is adjacent to his.

8. In his submissions, the Defendant's/Applicant's advocate submitted that the law with respect to what constitutes a fair hearing is captured in Article 50 of the Constitution and that the said provision stipulates that no litigant should be driven from the seat of justice without being heard.

9. The Defendant's counsel submitted that the Plaintiff's mother was of unsound mind; that the institution of the suit by the Plaintiff's late mother is therefore a nullity and that there exists a mistake or error apparent on the face of the record.

10. Counsel submitted that the Defendant was served with the Originating Summons by way of advertisement in the local newspaper; that the Defendant resides in the United States of America and that the Defendant was not aware of the suit. Counsel relied on numerous authorities which I have considered.

11. On his part, the Plaintiff's/Respondent's advocate submitted that the Defendant seems not to be clear on the ground upon which he brings his Application for review; that an Applicant ought to be very precise on the grounds upon which the Application for review is filed and that the issue of the health of the Plaintiff cannot be an error apparent on the face of the record.

12. Counsel submitted that there is no evidence to show that the Defendant was in the United States of America as at the time the Summons were served upon him by way of advertisement and that the Application should be dismissed with costs.

13. This suit was commenced by way of an Originating Summons dated 31st December, 2014 and filed on 3rd February, 2015 in which the Plaintiff sought for the following orders:

> a. An order of declaration that the Plaintiff/Applicant has acquired by adverse possession the whole of the L.R No. 20604/52 at Mavoko Municipality measuring about 80ft by 40ft.
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> b. An order directing the Chief Land Registrar or the Registrar of Titles to transfer to the Plaintiff the ownership of the said parcel of land known as L.R. No. 20604/52 which the Defendant/Respondent has been holding on trust for the Plaintiff.
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> c. An order of permanent injunction order be issued to restrain the Defendant/Respondent by himself or his servants or agents from entering, working or trespassing into, alienating, charging, or selling or sub-dividing the said parcel of land and in any other manner from interfering with the Plaintiff's use and enjoyment of the said land.
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> d. An order of temporary injunction be issued to restrain the Defendant by himself, or his agents or servants from entering, trespassing into or working or selling or alienating or charging or sub-dividing the said parcel of land and or in any other way or manner from interfering with Plaintiff's use and enjoyment of the said land until this suit is heard and determined.

14. The said Originating Summons is supported by the Affidavit of the initial Plaintiff, who was substituted by the current Plaintiff upon her death.

15. In the said Affidavit, the deceased Plaintiff deponed that she was allocated plot number 20604/52 on 12th November, 2000 and began using the said plot; that she developed the said land and that she came to realize later on that the Defendant/Applicant had been allocated the same land by the officials of Akwana House Co-operative Society Limited.

16. The Originating Summons was served on the Defendant by way of advertisement in the Daily Nation Newspaper of 25th November, 2016. The Defendant neither entered appearance nor filed a Replying Affidavit. After hearing the Plaintiff's case, this court allowed the Plaintiff's claim vide a Judgment dated 18th May, 2020.

17. The Defendant is now seeking for an order to set aside the said Judgment on the ground that he was not aware of the existence of the suit because he is a resident of the United States of America; that he moved to America in the year 2001 and that he has a right to be heard.

18. The Defendant's Application is filed pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules which provides as follows:

> "1. (1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

19. Indeed, from the Defendant's Affidavit, he is not seeking to review the Judgment of the court on the basis of discovery of new and important matter or evidence, or an apparent error on the face of the record. The Defendant can therefore only review the Judgment by showing that he has sufficient reasons that prevented him from filing a response to the Originating Summons.

20. In my view, the most apt provision of the law that the Application should have been filed under is Order 10 Rule 11 of the Civil Procedure Rules which provides as follows:

> "11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

21. The Court's power in considering an Application to set aside an interlocutory Judgment which has been entered regularly is discretionary. In the case of ***Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75***, the court held as follows:

> "There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

22. In the case of ***James Kanyiita Nderitu & Another [2016] eKLR,*** the Court of Appeal stated as follows:

> "From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one which is irregularly entered. 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 default Judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default Judgment, among others."

23. In **Richard Murigu Wamai vs. Attorney General & another [2018] eKLR,** while quoting the case of ***Patel*** (*supra)* the court observed that:

> "That where there is a regular Judgment as is the case here, the court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is an issue which raises a prima facie defence which should go to trial for adjudication."

24. Further, in the case of ***Job Kiloch vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR***, the court stated as follows:

> "What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

25. For the court to set aside the Judgment, the Defendant must state the reasons for his failure to file his Memorandum of Appearance and Defence. The Court is also obliged to consider the length of time that has elapsed since the default Judgment was entered; whether the intended Defence raises a triable issue; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment.

36. The main reason that the Defendant has procured for his failure to file a response to the Originating Summons is that he is based in the United States of America and did not see the advertisement of the service of the Summons in the Daily Nation Newspaper of 25th November, 2016.

27. That may be so. However, the Defendant has not annexed on his Affidavit a copy of his Passport to show that indeed he has been in the United States of America since the year 2001, and that he was still in the United States of America on 25th November, 2016 when he was served with the Summons by way of advertisement in the Newspaper, which, in any event must have been posted on the internet and available to the Kenyans in the diaspora.

28. In any event, the Defendant has admitted that he relocated to the United States of America with his nuclear family in the year 2001, and that it was only in the year 2020 that his friend, Richard Makau, brought to his attention the existence of the Judgment of the court.

29. The Defendant in a nutshell admitted that he has not been in possession of the suit property since the year 2001. Considering that the Plaintiff has been using the suit property immediately he was allocated the same on 12th November, 2000, it follows that the Defendant's Defence does not raise any triable issue, having been dispossessed the suit property by the Plaintiff for more than twelve (12) years since he went to the United States of America.

30. The Defendant having been served with the Originating Summons regularly, and the Defendant's Defence having not raised any triable issue, it is my finding that the Application dated 6th June, 2020 is unmeritorious.

31. For those reasons, I dismiss the Notice of Motion dated 6th June, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF FEBRUARY, 2021

O.A. ANGOTE

JUDGE