



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 336 OF 2014

(Formerly Nyeri HCC 123 of 2012)

ANDREW GACHINI GITONGAPLAINTIFF

-VERSUS-

STEPHEN NDIRANGU MURIITHI.....DEFENDANT

RULING

A. INTRODUCTION AND BACKGROUND

1. By a plaint dated 24th May, 2012 the Plaintiff sought an eviction order against the Defendant from all that parcel of land known as L.R. **No. Aguthi/Muruguru/400** (*the suit property*). The Plaintiff also sought general damages for trespass, costs of the suit and interest thereon at court rates.
2. The Plaintiff pleaded that he was the absolute registered proprietor of the suit property and that the Defendant had wrongfully entered and settled thereon together with his family members. It was further pleaded that despite issuance of a demand and notice of intention to sue the Defendant had failed to vacate the suit property hence the suit.
3. It would appear that there is a dispute between the parties as to whether or not the Defendant actually entered appearance and filed a defence to the action. There is an appearance on record dated 6th August, 2012 and a defence dated 4th August, 2012 indicating that they were filed by the Defendant in person. However, the Defendant has denied having filed the said documents.
4. The material on record shows that the suit proceed to full hearing on 6th December, 2016 in the absence of the Defendant. The record further shows that judgment was delivered in favour of the Plaintiff on 30th May, 2018 and the same executed in 2019 whereby the Defendant was evicted from the suit property.

B. DEFENDANT'S APPLICATION

5. By a notice of motion dated 10th February, 2021 brought under the provisions of **Order 10 Rule 11, Order 12 Rule 7** and **Order 22 Rule 22** of the **Civil Procedure Rules, 2010** (*the Rules*), **Sections 1 and 1A** of the **Civil Procedure Act (Cap. 21)**, **Section 19** of the **Environment and Land Court Act** and **Article 159** of the **Constitution of Kenya**, the Defendant sought the following orders:

(a) Spent

(b) *That pending the hearing and determination of this application and suit, this honourable court be pleased to issue a temporary injunction against the Plaintiff/Respondent whether by himself, his agents, his principal and his servants from selling, dealing, interfering, alienating or disposing of all that parcel of land known as Aguthi/Muruguru/400.*

(c) *That pending hearing and determination of this application and the suit, this honourable court be pleased to grant a stay of execution of the judgment and decree entered on 30th may, 2018 and further order that the Defendant/Applicant be allowed to resume occupation, user and possession of Title Number Aguthi/Muruguru/400.*

(d) *That pending hearing and determination of this application and the suit, this honourable court be pleased to grant a stay of execution of the judgment and decree entered on 30th May, 2018 and further order that the Defendant/Applicant be allowed to resume occupation, user and possession of Title number Aguthi/Muruguru/400.*

(e) That pending hearing and determination of the suit, this honourable court be pleased to issue an order of inhibition to prevent any dealings over Title number Aguthi/Muruguru/400.

(f) That this honourable court be pleased to set aside the ex parte judgment entered on the 30th May, 2018 in favour of

the plaintiff against the Defendant together with any consequential decree and orders of the court as the court may deem fit and just.

(g) That costs for this application be provided for.

6. The said application was based upon the grounds set out on the face of motion and the contents of the supporting affidavit sworn by the Defendant on 10th February, 2021 and the annexures thereto. In a nutshell, the Defendant contended that he was never served with summons to enter appearance and a hearing notice hence he was unaware of the suit until his family was evicted from the suit property on 9th December, 2019.

7. The Defendant further denied having filed the memorandum of appearance and statement of defence on record. He contended that the signatures appearing thereon were forgeries in consequence whereof he had reported the matter to the Directorate of Criminal Investigation for investigation.

8. The Defendant further contended that he had a legitimate claim upon a portion of the suit property which he claimed belonged to his late grandfather one Gitonga Kabogo (*the deceased*). He stated that he settled on a portion of the suit property in 1975 and occupied the share belonging to his late father and that he had planted coffee stems and constructed a dwelling house thereon. It was his contention that the Plaintiff was registered as proprietor of the suit property to hold it in trust for the family members of the deceased and not as absolute proprietor thereof.

C. THE PLAINTIFF'S RESPONSE

9. The Plaintiff filed grounds of opposition dated 19th February, 2021 in opposition to the said application. The Plaintiff contended that the application was incompetent, bad in law, frivolous, vexatious and otherwise an abuse of the court process. The Plaintiff further contended that the application was fatally and incurably defective hence it should be dismissed with costs.

10. The Plaintiff also filed a replying affidavit sworn on 3rd March, 2021 in opposition to the application. It was contended that the Defendant was duly served with court process and that he entered appearance and filed a defence to the action. The Plaintiff further stated that the Defendant was duly served with a hearing notice on 29th September, 2016 but he failed to attend court for hearing on 6th December, 2016. It was also contended that the Defendant was duly served with an application dated 18th July, 2019 for eviction. The Plaintiff annexed copies of several affidavits of service relating to service of summons, hearing notices and application for eviction to his replying affidavit.

D. THE DEFENDANT'S REJOINDER

11. With leave of court, the Defendant filed a supplementary affidavit sworn on 18th March, 2021 in response to the Plaintiff's replying affidavit. The Defendant contended that all the affidavits of service annexed to the replying affidavit indeed confirmed that he was never served with any court process. He contended that the name of his wife was Lydia Wangui Ndirangu and that the process server must have served a different person with summons to enter appearance.

12. He further contended that Grace Wanjiku Ndirangu who was alleged to have been served on his behalf was his daughter who was a college student at the time service was allegedly effected. He further stated that the Plaintiff was his uncle who knew all members of his family and he wondered why he could not be personally served.

E. DIRECTIONS ON SUBMISSIONS

13. When the application was listed for hearing on 24th February, 2021 it was directed that it shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Defendant filed his submissions on 13th February, 2021 whereas the Plaintiff filed his on 23rd March, 2021.

F. THE ISSUES FOR DETERMINATION

14. The court has perused the Defendant's notice of motion dated 10th February, 2021, the Plaintiff's replying affidavit in opposition thereto as well as the Defendant's supplementary affidavit. The court is of the opinion that the following issues arise for determination in this matter:

(a) Whether the Defendant has made out a case for setting aside the ex-parte judgment and decree dated 30th May, 2018 and all consequential orders.

(b) Whether the Defendant is entitled to be reinstated into the suit property.

(c) Whether the Defendant has made out a case for preservation of the suit property.

(d) Who shall bear costs of the application.

G. ANALYSIS AND DETERMINATION

(a) Whether the Defendant has made out a case for setting aside the ex parte judgment and decree dated 30th May, 2018 and all consequential orders:

15. The court has considered the material and submissions on record on this issue. The Defendant submitted that there was no proper service of summons to enter appearance hence he was entitled to setting aside of the *ex-parte* judgement. The Defendant relied upon the provisions of **Order 5 Rule 12** of the **Rules** which stipulate that:

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who resides with him”.

16. It was submitted that the process server who purported to serve the summons did not make any number of attempts in tracing the Defendant and that he simply left the summons at the first attempt with somebody described as Grace Wanjiku Ndirangu who was not the Defendant’s wife. The Defendant also submitted that he had a reasonable defence to the action and that he intended to raise a counterclaim against the Plaintiff in terms of the draft defence and counterclaim annexed to his supporting affidavit.

17. The Defendant cited at least 3 authorities in support of his application, that is, **William Ntomauta M’Ethanga** sued as **M’Mauta Nkari v Baikiamba Karimania [2017] eKLR**; **Zacharius Mweri Baya v Mohamed Sheikh Abubakar [2010] eKLR**; and **James Kanyiita Nkeritu and Another V Marios Philotas Ghikas and Another [2016] eKLR**.

18. In those cases it was held that the court has unfettered discretion to set aside a default judgment if satisfied that it would be in the interest of justice to do so. Some of the factors to be considered in such application would include whether or not the judgment was regular; the reasons for the failure to defend the suit or to attend the hearing; whether the proposed defence raised triable issues; the period of delay in making the application; and the possible prejudice the parties may suffer among other factors.

19. The Plaintiff, on the other hand, submitted that the Defendant had not made out a case for setting aside the *ex parte* judgment. It was submitted that the judgment was a regular one since the Defendant was duly served with court process at all material times. The Plaintiff submitted that the Defendant was out to deliberately delay or obstruct the course of justice within the meaning of the case of **Shah v Mbogo and Another [1967] EA 116** hence the application should be dismissed. The Plaintiff also relied upon the case of **Price and Another v Hilder [1980] KLR 95** in which the court declined to set aside an *ex parte* judgement after the lapse of 9 years after it was passed and after the demise of the plaintiff’s chief witness.

20. Having considered the material on record and the submissions of the parties, it is abundantly clear that there was no proper service of summons to enter appearance upon the Defendant as required by law. There was simply no compliance with **Order 5** of the **Rules**. The process server’s affidavit of service sworn by John M. Chere on 31st July, 2012 shows that upon failing to find the Defendant on his first attempt, he simply left the summons with Grace Wanjiku Ndirangu whom he claimed was the Defendant’s wife. It is thus evident that the process server did not take service of summons to enter appearance seriously. In **Waweru v Kiromo [1969] EA 172** it was held that since the process server had made no inquiry on the Defendant’s whereabouts it could not be said that he could not be found so as to justify service upon his wife. The same holding was followed in **Credit Corporation Ltd v Mathew Joseph Ogutu [1994] eKLR** where service in contravention of **Order 5** of the **Rules** was found to be improper and invalid.

21. There is also no evidence on record to demonstrate that the said Grace Wanjiku Ndirangu was residing with the Defendant at the material time. On the contrary, the various affidavits of service on record indicate that the Defendant was resident in Nairobi and that he would occasionally visit his family in Nyeri on certain weekends.

22. It was contended by the Plaintiff that since the Defendant entered appearance and filed a defence in person then service of summons would not be an issue any more. It is evident from the material on record that the Defendant has denied having filed the memorandum of appearance and defence on record. He swore that the signatures on those two documents were forgeries and that he had reported the matter to the Directorate of Criminal Investigation for investigation. The Defendant pointed out that the signatures on those two documents are markedly different from his signature as appears in his sworn affidavits. The mystery surrounding the disputed signatures can only be resolved upon conclusion of criminal investigations.

23. The court has also considered whether or not the Defendant’s proposed defence raises any triable issues. Although the Defendant has raised the issue of trust with respect to the suit property, the Plaintiff did not contend either in his replying affidavit or written submissions that the proposed defence was a sham. The court is satisfied that in the circumstances the proposed defence of trust raises a triable issue. The court does not agree with the Plaintiff’s submission that the Defendant requires letters of administration in order to plead that the Plaintiff is holding the suit property in trust for family members of the deceased.

24. The court is thus satisfied that the Defendant is entitled to setting aside of the *ex-parte* judgment. The material on record shows that there was no proper service of summons upon him. The material on record further shows that he has a defence which raises triable issues. There is no material on record to demonstrate that the Defendant has deliberately sought to obstruct or delay the course of justice. A party who was not properly served cannot be said to be obstructing or delaying the course of justice.

25. The material on record shows that the Defendant was never heard at the trial. Even if the *ex parte* judgment was a regular one, the court would still have been inclined to grant the Defendant a chance to defend the suit on the merits because he has demonstrated that his proposed defence is not frivolous. The cases of **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, **Chemwolo** and **Another v Kubende**

[1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173 all demonstrate that the court has judicial discretion to set aside an *ex parte* judgment. The right to be heard is so important in civil litigation and denying a litigant a hearing should be the last resort of the court. In the case of Patel v E.A. Cargo Handling Services Ltd (Supra) it was held that:

“There are no limits or restrictions on the judge’s discretion 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. I agree that where it 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, in my view, a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication”.

26. The Defendant raised the issue of delay in filing the instant application for setting aside the *ex parte* judgment. It was contended that whereas the *ex parte* judgment was delivered on 30th May, 2018 and the Defendant evicted in December, 2019 he did not file the instant application until 10th February, 2021. The court has noted that the Defendant had in fact filed a notice of motion dated 15th January, 2020 for setting aside the judgment through the firm of Ng’ang’a Munene and Company Advocates.

27. It would appear that subsequently, the Defendant appointed the firm of J. M. Mwangi and Company Advocates which filed an application dated 30th May, 2020 to come on record for the Defendant. The application for leave to change advocates was allowed on 22nd January, 2021. The Defendant thereupon withdrew the application dated 15th January, 2020 and filed the instant notice of motion dated 10th February, 2021. The Defendant’s contention all along was that he was unaware of the suit until his family was evicted in December, 2019. So, if he filed

the first application for setting aside on 15th January, 2020 it could not be said that there was unreasonable delay on his part in challenging the *ex-parte* judgment.

(b) Whether the Defendant is entitled to be reinstated into the suit property

28. The Defendant sought an order for him to be allowed to resume occupation, user and possession of the suit property he was occupying prior to his eviction. This is essentially an order for reinstatement into the suit property. The court has considered the material and submissions on record on this issue. There is no doubt that the Defendant was evicted pursuant to the *ex-parte* judgment and decree dated 30th May, 2018. It would, therefore, follow that upon setting aside of the *ex-parte* decree, there shall be no legal basis for keeping the Defendant out of the suit property of which he was in possession prior to issuance of the *ex-parte* decree. Accordingly, the court is inclined to grant the prayer for reinstatement so that the parties are restored to their respective positions as at the time of filing suit.

(c) Whether the Defendant has made out a case for preservation of the suit property

29. In his application and supporting affidavit, the Defendant contended that the Plaintiff had identified potential buyers for the suit property and that there was a real risk that the suit property might be alienated before conclusion of the suit and his intended counter-claim. The court has noted that the Plaintiff did not specifically respond to the risk of alienation. He did not deny that he had identified potential buyers and that he intended to sell the property.

30. In the case of Shivabhai Patel v Manibhai Patel [1959] EA 907 it was held that the court has a duty to preserve property which is the subject of a dispute pending the hearing and resolution thereof. The court is similarly empowered to grant an order of inhibition under Section 68 of the Land Registration Act, 2012 to prevent any further dealings with property for a limited period of time or until further orders of the court.

31. In the instant application, the Defendant sought both an order of inhibition and an interim injunction to restrain the Plaintiff from selling, alienating, or dealing with the suit property pending the hearing and determination of the suit. The court is of the opinion that an order of inhibition would be sufficient to preserve the suit property pending the hearing and determination of the main suit. Accordingly, the court is inclined to grant the order of inhibition only.

(d) Who shall bear costs of the application

32. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Jannomohamed & Sons v Twentsche Overseas

Trading Co. Ltd [1967] EA 287. However, the court is of the

opinion that costs of the application should be in the cause since the parties herein are close relatives and the main suit is yet to be heard.

H. CONCLUSION AND DISPOSAL

The upshot of the foregoing is that the court finds merit in the Defendant’s application dated 10th February, 2021. Accordingly,

the same is hereby allowed in the following terms:-

(a) The ex-parte judgment dated 30th May, 2018 be and is hereby set aside together with all consequential orders.

(b) The Defendant shall be reinstated into the suit property within 7 days from the date hereof and in that regard the Plaintiff shall allow him to resume occupation, user, and possession of the suit property which he occupied before his eviction.

(c) An order of inhibition be and is hereby granted preventing any dealings with L.R. Aguthi/Muruguru/400 pending the hearing and determination of the main suit.

(d) The Defendant is hereby granted unconditional leave to defend the suit and in that regard the Defendant shall file his defence and counterclaim, if any, within 14 days from the date hereof.

(e) Costs of the application shall be in the cause.

(f) The parties shall be at liberty to fix the matter for pre-trial directions within 30 days upon the close of pleadings.

33. It is so decided.

RULING DATED and SIGNED in Chambers at Nyeri and DELIVERED via Microsoft Teams platform this **21st** day of **April, 2021**.

In the presence of:

Mr. Wahome Gikonyo for the Plaintiff

Mr. Mwangi Muthoni for the Defendant

HON. Y. M. ANGIMA

JUDGE

21.04.2021