



**Mbugua v Gachoki (Environment & Land Case 700 of 2012)
[2023] KEELC 21340 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 700 OF 2012
AA OMOLLO, J
NOVEMBER 2, 2023**

BETWEEN

BENARD KAMAU MBUGUA APPLICANT

AND

CHARLES MWANGI GACHOKI RESPONDENT

RULING

1. There are two applications coming up for determination. The first one by the plaintiff dated 26/1/2023 is seeking to execute the judgment issued on 3rd May, 2018 and decree dated 8th July, 2022 under the supervision of the OCS Theta Police Station. The Defendant's application which is dated 28th February, 2023 sought for the setting aside of the judgment entered on 3rd May, 2018. He also sought for leave to file defence to the claim. It is my considered view that determining the Defendant's application first will take care of the application for execution and so I chose it first.
2. The application was premised on the grounds *inter alia*:
 - a. That the Defendant was never served with summons to enter appearance and only became aware of these proceedings when he was served with the motion application for execution.
 - b. That the orders sought in the plaint which were granted are extremely severe and would render the defendant homeless.
 - c. That he purchased plots 1 & 2 on parcel number Ruiru/Ruiru East Block 2/985 in 2004 from Salome Nyoro and paid the full agreed purchase price.
3. The plaintiff filed a brief replying affidavit to contest the application seeking setting aside orders. He deposed that the application is an afterthought and that the land in question No. Ruiru East Block 2/958 was not sold to the Defendant. The plaintiff averred that the Defendant was served with S.T.E.A



and notice of decree which service the Defendant ignored. He contends that the Defendant has come to court with unclean hands knowing he is living on the land that does not belong to him.

4. In a supplementary affidavit sworn in response to the Defendant's replying affidavit to the motion dated 26th January, 2023, the plaintiff stated that he did accompany the process server while serving the S.T.E.A. on the Defendant. That he also accompanied the process server on 9th September, 2022 when he was served with the decree now being challenged.
5. The plaintiff filed written submissions dated 25th April, 2023 urging this court not to grant the orders sought by the Defendant. There are no submissions on record filed by the Defendant.
6. This court is guided by the principles for setting aside judgments and or orders as put forth in the case of *Patel Vs. E.A Cargo Handling Services Ltd*, which to do justice to parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules; the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.
7. I have perused the record and note that the plaint was lodged in court on 12th October, 2012 and summons to enter appearance issued on 15th October, 2012. The affidavit of service of Ann Micere dated 12th September, 2013 stated that the Defendant was served on 23rd May, 2013 with summons to enter appearance. At paragraph 2, the process server deposed thus;

“Not being able to find Charles Mwangi Gachoki the defendant on 2013 at 12:00 p.m. I served the summons on her wife (Mrs. Mwangi) an adult member of the family residing with him/her.”
8. The process server does not disclose the place of service, does not state whether she (process server) knew the Defendant's wife before and if not, who introduced her. There is no mention of the Plaintiff accompanying the process server to effect service to then confirm that the person served was the wife to the Defendant since her name is not given. The Plaintiff in his replying affidavit does not swear to knowing the Defendant or his wife before the filing of this case. This court takes note that Mwangi is a common name among the Kikuyu Community such that Mrs. Mwangi without any other description is insufficient form of identification of the person served on behalf of the Defendant.
9. The Defendant cannot be blamed for bringing this application after undue delay since the plaintiff does not disclose the execution process he undertook between 2018- 2022. The Plaintiff went into slumber until 8th July, 2022 when he extracted the decree and served upon the Defendant on 9th September, 2022. Consequently, the plaintiff's averment that the Respondent has come to this court with ill-motive is uncorroborated.
10. In conclusion, I find that service of the S.T.E.A upon the Defendant was inadequate and having demonstrated that from his bundle of documents annexed raises at least some triable issues, for instance, that he purchased the portion of the suit property. For the foregoing reasons, I do allow the Defendant's application. The effect of this order is that the Plaintiff's application cannot succeed.
11. However, for the inconveniences occasioned to the plaintiff, I award him thrown away coast of Kshs.30,000/=. The application is therefore granted on the following terms:
 - i. The judgment entered on 3rd May, 2018 is set aside.
 - ii. The Defendant to file and serve his defence within 14 days of this ruling/order.



- iii. The Defendant shall pay the plaintiff thrown away costs of Kshs.30,000/= within 30 days of this date. In default, the plaintiff is at liberty to execute.
- iv. The costs of this application in the cause.
- v. The Plaintiff's application dated 26th January, 2023 is marked as overtaken by events with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2023

A. OMOLLO

JUDGE

