



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT & LAND DIVISION

CIVIL SUIT NO. 391 OF 2013

THOMAS OMBUYA AROGO.....PLAINTIFF/RESPONDENT

VERSUS

EVANS NYAKAMBI NYANGERI.....1ST DEFENDANT/RESPONDENT

SOLOMON ABISI AROGO.....2ND DEFENDANT/APPLICANT

KISII COUNTY LAND REGISTRAR.....3RD DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. On 26th July 2020, the Applicant/2nd Respondent filed a Notice of Motion dated 21st July, 2020 seeking the following orders;

- a) The ex-parte proceedings of the 5th March 2020, and the consequent order dismissing the 2nd Defendant's Defence be set aside;
- b) The 2nd Defendant Defence be reinstated and the 2nd Defendant be allowed to unconditionally prosecute his claim; and
- c) costs of this Application be costs in the cause.

2. The application is grounded on Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 2 and 4, order 51 rule 1 and 15 of the Civil Procedure Rules, Article 159 and 50 of the Constitution of Kenya 2020 and enabling provisions of the law. The Applicant also swore an affidavit in support of his application on 7th October 2020.

3. In support of this Application the Applicants averred that, the Plaintiff's Advocates representative served a Hearing Notice on a wrong address. The Plaintiffs' Advocates' Process Server thereafter filed an Affidavit of Service indicating the wrong address on which basis the Court proceeded to hear the Plaintiffs case and closed the Applicant's Defence.

4. The Application is opposed by the Plaintiff/Respondent vide a Replying Affidavit dated 12th August, 2020 and filed in this court on 11th September, 2020. In the said affidavit the Respondent avers that the application is baseless, full of dishonesty, lacks merit and should be dismissed with costs. He further avers that the 2nd Respondent has never responded by filling his Defence despite being served with the Summons and an Amended Plaintiff. Instead he filed a Preliminary Objection which was dismissed and he has refused to pay the costs up to date. He contends that the 2nd Defendant's applications is an abuse of the court process since the former 2nd Defendant's Advocates have on many occasions been served with Hearing Notices to attend court but have never attended. It is his contention that the firm of Okatch and Partners Advocates were accordingly served as per the Hearing Notice served upon their agent who in turn instructed their Process Server to serve the same on behalf of the said Advocates. He avers that the firm of Osiemo Wanyonyi & Company Advocates were neighbors with the firm of Okatch & Partners Advocates before they moved to their current offices. He therefore contends that the 2nd Respondent knows that the former law firm would not have any excuse before this Court and he thus opted to come on record in order to get the court's favor. He averred that the current law firm is not properly on record because the proceedings have already been closed and the matter is only pending for judgment.

5. The parties agreed to dispose of the application by way of written submissions and the Applicant filed his submissions on 19th November,

2020 while the Respondent filed his on 26th January, 2021.

FACTUAL BACKGROUND

6. I find it necessary for me to give a background of this suit more particularly the proceedings this far before delving into the issues raised in the 2nd Defendant's Application.

7. The Plaintiff commenced this suit vide an Amended Plaintiff filed in this Court on 31st March, 2016, wherein he sought the following orders:

a) *A declaration that the transfer of parcel no. 2046 was unlawful, null and void and it is the property of the Estate of Haron Arogo Hachira;*

b) *An Order that the Defendant's Title No. West **KITUTU/MWAKIBAGENDI/2046** together with 2045 be cancelled and be reverted to the original Title No. West **KITUTU/MWAKIBAGENDI/1000** to be succeeded by the Plaintiff;*

c) *In the alternative to the above prayers, the 1st Defendant be ordered to pay to the Plaintiff the value of the said land parcel No. West **KITUTU/MWAKIBAGENDI/2046** calculated at the current market value;*

d) *Costs of the suit and interest;*

e) *Interest at court rate; an*

f) *Any other or better relief the Honourable Court may deem fit to grant.*

8. The 2nd Defendant/Applicant through his former advocates, Okatch & Partners Advocates filed a Memorandum of Appearance on 28th April, 2016, and immediately raised a Preliminary Objection filed on the same day.

9. The Preliminary Objection was heard and dismissed. On 3rd December 2018, the 2nd Defendant filed his Statement of Defence, Witness Statements and bundle of document in readiness for hearing.

10. The matter had been fixed for hearing on 3rd of December, 2018 on which day the 2nd defendant filed their Defence. However, because it was a fresh hearing and the Judge was on transfer, he directed that the same be taken out of the hearing list and fixed it for mention on 24th August 2019, for purposes of taking a hearing date.

11. On 24th August, 2019 the matter was fixed for hearing on 5th March, 2020. Since on that day all the Defendants were absent, the court directed counsel for the Plaintiff who was present to serve all of them. On 5th March, 2020 after the Judge had ascertained that the Defendants had been served, she proceeded to hear Plaintiff and his witnesses' *ex parte* upto the closure of his case.

12. The Plaintiff was given 21 days to file his written submissions and the matter was fixed for mention to confirm compliance on 16th April, 2020.

13. The matter was however mentioned on 5th May, 2020 when the court on its own motion, noting that the parties had not had not filed their written submissions owing to the scaling down of the court operations resulting from the Covid-19 pandemic, gave directions that the matter be mentioned on 5th June, 2020.

14. On 3rd June, 2020, the 2nd Defendant changed his advocates to the current firm of advocates who took over from the firm of Okatch & Partners Advocates. On 6th June, 2020 the current advocate appeared in court and requested for more time to peruse the file because he had just come on record. The court indulged him and fixed the matter for mention on 27th July, 2020.

15. The instant application was thereafter filed on 26th July 2020 seeking to set aside the *ex parte* proceedings that took place 5th March, 2020. The said application has been opposed by the Respondent in the manner highlighted hereinabove.

2ND DEFENDANT/APPLICANT'S SUBMISSIONS

16. Learned counsel for the Applicant submitted that he was on 27th May, 2020 instructed by the 2nd Defendant to act for him in the matter in place of the firm of Okatch & Partners Advocates. He contended that the change was necessitated by the fact that the former advocates had been served with a Mention Notice dated 12th May, 2020, for 5th June, 2020. He urged this court to note that the Mention Notice was correctly addressed to the location where Okatch & Partners Advocates, the former advocate had moved to. It was his contention that the Court by serving the Mention Notice at Lower Hill Duplex Apartments recognized that the firm had changed its location and this had clearly been captured in the previous pleadings filed by the former advocates.

17. Counsel for the Applicant further submitted that he filed his Notice of Appointment of Advocates on 5th June, 2020 and appeared for the first time in this matter in place of the former advocates for the 2nd Defendant. He was informed by the court that the matter was coming up for mention to confirm filing of submissions. He then sought time to peruse the file which leave was indeed granted. He argued that he did so because in his recollection the matter had never been fixed for hearing. However, on perusal of the Court file, he found out that a Hearing

Notice dated 23rd January 2020, was served on the Legal Claims Department of UAP Old Mutual Offices; and an Affidavit of Service filed by one Charles Nyakundi Mogeni had been filed in Court on 4th March, 2020, confirming service of the Hearing Notice.

18. Counsel submitted that service on UAP Towers, 5th Floor, as was confirmed by the Plaintiff's own Process Server in the Return of Service could not be service on the 2nd Defendant's Advocates and as such he concluded that there was no proper service of the Hearing Notice for the hearing conducted on 5th March, 2020. He contended that service of the Hearing Notice at UAP Old Mutual Offices was not proper service.

19. Counsel referred the court to **Order 5 Rule 8 (1)** of the Civil Procedure Rules. He argued that the Hearing Notice was not properly served on the agent empowered to accept service. This is what made the 2nd Defendant and his advocates miss the hearing of 5th March, 2020. To buttress his submissions, he referred this court to the cases of **Esther Wamaita Njihia & 2 Other-Vs- Safaricom Limited [2014] eKLR, Shah-Vs- Mbogo [1968] E.A 93, Ncharpi Leiyangu-Vs- IEBC & 2 Others [2014] eKLR** and the findings of Justice Mativo in **Wachira Karani-Vs- Bildad Wachira [2016] eKLR**.

20. He concluded his submissions by urging this court to allow the application, set aside the proceedings of 5th March, 2020, and order that this suit proceeds for hearing afresh.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

21. Counsel for the Plaintiff/1st Respondent in his submissions presented the following issues which he urged the court to consider in determining the application.

(i) Whether service was effected upon the 2nd Defendant's advocates and how many times the 2nd Defendant's advocate had been served without appearing in Court.

(ii) Whether the 2nd Defendant had file the Amended Defence upon service of the Amended Plaintiff.

(iii) Whether the 2nd Defendant is keen on prosecuting this case.

(iv) Whether the firm of Okatch and Partners Advocates and Osiemo Wanyonyi & Company Advocates were practising from the same building and floor.

22. With regard to the first issue, learned counsel for the Plaintiff submitted that service upon 2nd Defendant's Advocates was proper. He contended that as it was clearly demonstrated in the Affidavit of Service, the Process Server was able to serve the advocates according to the instructions that were given to him by the security officer at the reception desk.

23. On the issue of whether the 2nd Defendant/Applicant has filed the Amended Defence upon service of the Amended Plaintiff, counsel submitted that the Plaintiff Amended the Plaintiff and served the 2nd Defendant's advocates on 11th April, 2016. Since then the 2nd Defendant had never filed his Amended Defence. He contended that the acts of the 2nd Defendant in not responding or filing any Amended Defence was a clear indication that they were not interested in the suit. He added that whenever they were served with Court documents requiring them to attend Court or the registry, they never attended and hence they could not claim that they were ready and willing to defend the suit when the Plaintiff had already testified and closed his case. He argued that the behavior of the 2nd Defendant was clearly an abuse of the court process. It was his contention that, when parties are required to file their documents in court, they are supposed to do so within the required time frame and the court cannot pester litigants to file their documents or attend court for the hearing of their cases.

24. On the whether the 2nd Defendant is keen of prosecuting this case, counsel submitted that the 2nd Defendant has never been keen to prosecute this case since he has always been invited to attend Court but neither the 2nd Defendant himself nor advocate has ever attended court despite numerous Hearing Notices being served upon them. He argued that from the court record it was evident that the 2nd Defendant and his advocate had never attended court. He therefore urged the court to dismiss the application.

25. On the issue of whether the firm of Okatch and Partners Advocates and Osiemo Wanyonyi & Company Advocates were practising from the same building and floor, counsel submitted that the two firms were in the same building and floor before the firm of Okatch & Partners relocated. He submitted therefore that the firm of Okatch and Partners Advocates had to be tactical and surrender the matter to another firm who came up with grounds to convince the court to set aside the proceedings and reinstate the suit. It was his contention that if the firm of Okatch and Partners had presented the application it would have been difficult for them to convince the court because they had deliberately failed to attend court for hearing. He thus concluded that it was a waste of the court's time for the 2nd Defendant to take the court round in circles.

26. He urged the court to disallow the application by the 2nd Defendant and proceed to give a date for judgment in this matter.

ISSUES FOR DETERMINATION

27. Having considered the application, the response by the Respondent and the rival submissions, I deduce that there is only one issue for determination which is whether this court should set aside the exparte proceedings of 5th March, 2020.

ANALYSIS AND DETERMINATION

Whether this court should set aside the *ex parte* proceedings of 5th March, 2020

28. Essentially, setting aside an *ex parte* order is a matter of the discretion of the court. It is a sound principle of law that as far as possible all parties should be heard and it should be the court's last resort to deny a party a chance to be heard. The overriding objective of the Civil Procedure Act commonly referred to as the '**the Oxygen Principles**' is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The Judicial authority to do justice to all is enshrined in Article 159 of the Constitution. This authority cannot be said to be exercised if the court were to deny a party a chance to be heard on merit especially where the failure to attend court has been explained.

29. Section 3A of the Civil Procedure Act provides for the exercise of inherent powers of the court as follows;

"Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

30. In the case of **Esther Wamaitha Njihia & 2 Other-Vs- Safaricom Limited [2014] eKLR** that learned counsel for the Applicant has referred this court to, the learned Judge citing relevant cases on the issue held *inter alia* that:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defense if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

31. I am further guided by the case of **Captain Philip Ongom v Catherine Nyero Owota SCCA 14/2/2001 [2003] eKLR** where the court held *inter alia* that the court must be satisfied about one of the two things namely: -

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to **sufficient cause**.

32. The court in the above matter went ahead to define what constitutes *sufficient cause* and in this respect the following paragraph is highly relevant to the issues before me: -

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

33. The Applicant herein is required to satisfy to the court that he has a good and sufficient cause.

The Court of Appeal of Tanzania in the case of **he Registered Trustees of the Archdiocese of Dar es Salaam Vs Chairman of Bunju Village Government & Others Civil Appeal 147 of 2006 C.A** while discussing what constitutes *sufficient cause* had this to say:

*"It is difficult to attempt to define the meaning of the words '**sufficient cause**'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)*

34. From the foregoing therefore, can it be said that the Applicant herein has demonstrated that there was sufficient cause why he or his former advocates failed to attend the hearing that was scheduled on 5th March 2020?

35. The Applicant avers that the Hearing Notice was not properly served on their former advocates. Instead it was served on the Legal Claims Department of UAP Old Mutual Offices, UAP Towers 5th Floor, as was confirmed by the Plaintiff's own Process Server in the Return of Service. He contended that service of the Hearing Notice at UAP Old Mutual Legal Claims who were not parties to this suit was not proper service.

36. In opposition to the reasons advanced by the Applicant, learned counsel for the Plaintiff submitted that according to the Affidavit of Service, the process server served the former advocates for the Applicant according to instructions given to him by the security personnel at the reception desk at UAP Towers.

37. In order render an accurate determination there is need to first and foremost examine the Affidavit referred to the learned counsel of the plaintiff.

In the said Affidavit of Service the process server averred partly that

".....on 24th February, 2020, I proceeded to UAP Tower, 5th Floor situated at Lower Hill where the offices of the 2nd Defendant are located and on arrival, I met a man by the name Erick to whom I introduced myself and the purpose of my visit and after

introduction, I tendered to him copies of Hearing Notice dated 23rd January, 2020 and requested for service where he accepted my service **by stamping and signing my principal copies** which I now return to this Honourable Court duly served....”

38. Since the Process Server stated that service was accepted by the receiver stamping and signing his principle copies which he attached to his Affidavit of Service, it would be important scrutinize the copies attached to the said Affidavit. Unfortunately, and as rightly pointed out by Counsel for the Applicant in his submissions, the stamp placed on the Hearing Notice belongs to the UAP Old Mutual Legal Claims and not the Applicant’s former firm of Advocates.

39. The Plaintiff in his attempt prove that the physical address used was correct, attached two Hearing Notices that were addressed to the Applicant’s former advocate’s presumably new offices at UAP Towers which were undoubtedly received since they all bear the receipt stamps bearing the name of the former Advocates. However, the contested Hearing Notice which is the subject of this application bears the stamp of a different entity (UAP Old Mutual Legal Claims) which leaves no doubt that the same was not received by the former Advocates and thus they were not properly served.

40. From the foregoing therefore, having established that the 2nd Defendant’s/Applicant former advocates were not properly served with the Hearing Notice for 5th March 2020, I find merit in the application and I allow it. I hereby set aside the *ex parte* proceedings that took place on 5th March, 2020 and direct that hearing commences afresh.

41. The costs of this application shall be in the cause.

Dated, signed and delivered at Kisii this 12th day of April 2021.

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J.M ONYANGO

JUDGE