



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E083 OF 2021

LUCIA NYAMBURA NGUGI.....PLAINTIFF

VERSUS

JOSEPH KAMAU *alias* GITHAIGA.....1ST DEFENDANT

WILSON TANUI *alias* NGARE2ND DEFENDANT

RULING

1. The plaintiff initiated this suit on or about 9/8/2021 through a plaint dated 6/8/2021. Her case is that she is the widow and executrix of the will of the late **Elijah Ngugi Njuguna**. The deceased was the registered proprietor of **Land Reference Number 30568** comprised in **Title No. IR 228053** situated in the South West of Thika Municipality in Kiambu County (**the suit property**). Upon the demise of the deceased, the suit property was conveyed into her name in her capacity as the executrix of the will of the deceased.

2. She contends that the 1st and 2nd defendants have, without any colour of right or permission, cut off part of the fence of the suit property fronting the Thika Highway and have erected illegal temporary structures on the land where they are currently running small businesses, including hotels and garages. Consequently, she seeks the following reliefs against the defendants:-

a) An order of permanent injunction restraining the defendants, their agents and or servants from interfering and or occupying all that parcel of land known as LR No. 30568 IR 228053 situated in the Southwest of Thika Municipality in Kiambu District/County.

b) Eviction of the defendants from Land Parcel LR 30568 IR 228053 situated in the Southwest of Thika Municipality in Kiambu District/County, and demolition of the defendants erected structures thereon.

c) General damages for loss of lesser (mense profits) and the damages occasioned during their occupation.

d) Costs of the suit.

3. Contemporaneous with the plaint, the plaintiff brought a notice of motion dated 6/8/2021, seeking an interlocutory injunction in the following terms:-

“That temporary injunction do issue against the Defendants/ respondents and their servants, agents, and or their tenants or employees from trespassing, constructing, leasing, entering or occupying all that parcel of land known and or described as LR 30560 IR No. 228053 situated in the Southwest of Thika Municipality in Kiambu District/County pending the hearing and determination of this suit.”

4. The above application was heard ex-parte on 18/11/2021. On the same day, the court granted the interlocutory injunctive order sought in the application dated 6/8/2021. Subsequently, on or about 12/1/2022, the defendants brought a notice of motion dated 10/1/2022, seeking an order setting aside the exparte order. The said application is the subject of this ruling.

5. The application is supported by an affidavit sworn on 10/1/2022 by **Joseph Kamau alias Githaiga**. He deposed that they were never served with any pleadings in this suit and that they were, similarly, not served with a hearing notice relating to the hearing which culminated in the issuance of the ex-parte order. Canvassing the application in the virtual court, Mr. Kinyua, counsel for the defendant, submitted that the defendants were never served and that there was no indication in the plaintiff’s replying affidavit that the defendants were served. Counsel urged the court to set aside the ex-parte orders.

6. The plaintiff opposed the application through a replying affidavit sworn on 27/1/2022. She deposed that the defendants’ application was hollow and an abuse of the court process. She added that the defendants were duly served as indicated in the affidavit of service but elected

to ignore the court papers. She further deposed that the defendants had not demonstrated any interest or right in the suit property, contending that the defendants were trespassers on the suit property. She urged the court to dismiss the application.

7. In his brief oral submissions, Mr. Muthomi, counsel for the plaintiff, submitted that the defendants were duly served with court papers but chose to ignore them, adding that the defendants were only awoken by the ex-parte court order. Counsel added that the defendants had no interest in the suit land. He faulted the defendants for electing not to cross-examine the process server.

8. I have considered the application dated 10/1/2022 together with the response to the application. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether there is a proper basis for exercising the discretionary jurisdiction to set aside the ex-parte order issued on 18/11/2021.

9. The Court of Appeal outlined the following guiding principles in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016]eKLR* on how the discretionary jurisdiction to set aside an ex-parte order or judgment is to be exercised:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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.....

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into consideration of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our justice system.”

10. The Supreme Court of India underlined the importance of the right to be heard in *Sangram Singh v Election Tribunal, Kotah, AIR 1955 SC 664 at 711* as follows:

“There must be ever present to the mind the fact that our law of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

11. I have looked at the affidavit of service sworn on 15/11/2021 by **Joseph Simon Mutunga**. Attached to the said affidavit of service are two different hearing notices dated 30/9/2021 and 12/11/2021 respectively. The hearing notice dated 30/9/2021 indicated that the hearing was slated for 25/10/2021 while the hearing notice dated 12/11/2021 indicated that the hearing was slated for 18/11/2021. Certainly, the hearing notice dated 30/9/2021 cannot be said to be a proper notification on the hearing that was slated for 18/11/2021 because it related to a hearing slated for 25/10/2021.

12. Secondly, in paragraph 4 of the affidavit of service, Mr Mutunga deposed that he failed to find the 2nd defendant and he decided to serve a manager of the 2nd defendant. The said manager was not identified in the affidavit of service. Nothing was done to clarify this issue through an affidavit when the alleged service was contested by the defendant. Without clear identification of the person who was purportedly served on behalf of the 2nd defendant, the court has no basis upon which to make a finding that the 2nd defendant was properly served.

13. For the above two reasons, the court finds that there was no proper service of a hearing notice relating to the hearing of 18/11/2021. The result is that the ex-parte orders granted on 18/11/2021 are set aside. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF MARCH 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MS MWABI FOR THE DEFENDANT/APPLICANT

COURT ASSISTANT: LUCY MUTHONI