



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 27 OF 2017

PHILLIP MUTISO MULALYA.....PLAINTIFF

-VERSUS-

SAMUEL DOMINIC MUATHE.....1ST DEFENDANT

JAMAL ABDALA.....2ND DEFENDANT

ABDI ABDALA.....3RD DEFENDANT

RULING

INTRODUCTION:

1. This Ruling is in relation to a Notice of Motion Application dated 17th May 2021 filed by the 2nd and 3rd Defendants/Applicants seeking for the following orders:

a) Spent.

b) Spent.

c) That this Honourable court be pleased to set aside the *ex parte* judgment delivered herein on 12th June, 2020 and the Decree issued on 15th June, 2020 and all consequential orders thereto including the one issued on 19th February, 2021 and the 2nd and 3rd Defendants be accorded unconditional leave to defend the Plaintiff's suit.

d) That this Honourable court be pleased to issue an order cancelling the Title Deed issued in favour of the Plaintiff and to rectify the register reverting the suit property to the 2nd and 3rd Defendants.

e) That leave be and is hereby granted to the 2nd and 3rd Defendants herein to file their Defence and other pleadings within (14) Days from the date when such leave is granted.

f) That pending the hearing and determination of this suit herein, the Plaintiff/Respondent, his servants, agents or any other person claiming through him be restrained from entering, accessing, encroaching, alienating, developing, subdividing or otherwise interfering with the Applicants' quiet possession of the property known as Title No. Donyo Sabuk/Komarock Block 1/16.

g) That the costs of the application be borne by the Plaintiff.

2. The application is supported by the Supporting Affidavit of the 2nd Defendant sworn on 17th May 2020 who deposed that sometime in 2016 they intended to undertake the business of quarrying and manufacturing of concrete on the property known as Title No. Donyo Sabuk/Komarock Block 1/16 (hereinafter known as the suit property); that they proceeded to purchase the suit property following laid down legal procedures, having conducted due diligence over the property and payment of full purchase price to the rightful owner as per the agreement, and therefore, there is no way they participated in any fraud; that they were innocent purchasers for value without notice having purchased the suit property from one SAMUEL DOMINIC MUATHE; that they were unaware of the Plaintiff's alleged claim of balance or the existence of the alleged Memorandum of Understanding and deserved protection from this court; that at the time of purchase of the suit property there was no inhibition or encumbrance to warn potential purchasers.

3. He further deposed that a further perusal of the court file shows that this court allowed the Plaintiff's case to proceed *ex parte* on the basis

that they had been served by way of substituted service; that he had now learnt of a small print in the standard newspaper on page 34 which he did not see before and asked the court to grant them an opportunity to be heard on merits.

4. In response, the Plaintiff filed Grounds of Opposition dated 28th September 2021 where he stated that he was not privy to the agreement and subsequent transactions between the 1st Defendant and the Applicants.

5. Counsel stated that substituted service by way of advertisement in a newspaper of nationwide circulation such as the standard is allowed under the Civil Procedure Rules; that the Applicant's indolence in keeping up with the developments in the matter is not in any way a fault to be visited upon the Plaintiff who is the bona fide owner of the suit property herein; that the orders made by the court were proper as there was evidence of service and that the discretion to set aside a court order issued ex parte is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

6. The 2nd Defendant filed a Supplementary Affidavit and urged the court to set aside the ex parte judgment delivered as well as the orders issued in favour of the Plaintiff for the reasons that they had a viable defence to the suit that merits consideration by the court.

7. He further deposed that prior to the instant application, they sought to have a caution registered against the title to prevent further dealings and safeguard the property and upon numerous follow ups the Registrar declined to register the caution advising that they should seek redress from the courts.

8. The application was canvassed by way of written submissions and on record are the 2nd and 3rd Defendants'/Applicants submissions filed on 22nd November 2021 as well as the Plaintiff's submissions filed on 5th November 2021.

2ND AND 3RD DEFENDANTS' SUBMISSIONS

9. Counsel for the 2nd and 3rd Defendants/Applicants submitted that the Defendants have a right to a fair trial under Article 50 of the Constitution of Kenya 2010 and it is only just that the Defendants are allowed to defend their claim in the suit property and that the Judgment delivered on 12th June, 2020 and all other consequential orders be set aside. Counsel relied on the cases of ***Shah v Mbogo [1967] EA 116, Captain Philip Ongom v Catherine Nyero Owota SCCA 14/2/2001 [2003] KALR*** and ***The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal 147 of 2006*** for the proposition that where there is a sufficient reason to set aside Ex parte judgment to avoid injustice the court ought to set aside such ex parte judgment.

10. Counsel submitted that the 2nd Defendant in his supporting affidavit explained that the 2nd and 3rd Defendants purchased the suit property from the 1st Defendant who legally bought the property from the Plaintiff, which is why the Plaintiff had sought in his prayers a refund of Kshs. 14,555,000/= from the 1st Defendant. Further, counsel urged that even though the Civil Procedure Rules, 2010 allowed service by way of advertisement, personal service still remained the best option of service of summons as was seen in ***Haile Menkerios v Francis Mureithi & Another [2019] eKLR***.

11. Counsel contended that the process server should have demonstrated clearly after several attempts why personal service had become futile. Relying on the case of ***Bernard Mbole Kavoo @& 2 others v Lukenya Ranching and Farming Co-operative Society Limited & 3 others [2021] e KLR***, for the proposition that the court should only allow substituted service where personal service is not possible, counsel faulted the service of summons by the process server in this matter and pointed out that the affidavit of service failed to show where the process server obtained details of the 2nd and 3rd Defendants' residence and also failed to show the house number which the process server attempted to serve.

12. In placing reliance in the case of ***Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR***, counsel emphasized that if the decree is not set aside in this matter, the 2nd and 3rd Defendants stand to suffer irreparable loss as they will be condemned unheard.

13. As regards whether the defence raises triable issues, counsel argued that the defence by the 2nd and 3rd Defendant raises triable issues which ought to be determined on merit. Counsel referred the court to the cases of ***CMC Holdings v Nzioki [2004] 1KLR 173, Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR, Prime Bank Limited v Paul Otieno Nyamodi [2014] eKLR*** and ***Moi University v Vishva Builders Limited Civil Appeal No. 296 of 2004***, for the proposition that a court can set aside a regular Ex parte judgment if it is satisfied that the defendant has a reasonable defence on merits. Counsel argued that the averments of the applicants show that they have a triable defence.

14. Regarding execution of the ex parte decree, counsel submitted that the same was not within the confines of the law since the Plaintiff did not comply with Order 22 Rule 6 of the Civil Procedure Rules as no notice was ever served upon the 2nd and 3rd Defendants prior to the commencement of execution process.

15. Counsel finally submitted that the application was filed without delay as soon as they learnt about the suit and prayed that the 2nd and 3rd Defendants' application be allowed and the orders sought therein be granted.

PLAINTIFF'S SUBMISSIONS

16. Counsel for the Plaintiff relied on Order 5, Rule 17 of the Civil Procedure Rules 2010 which govern the grant of leave to effect substituted service and submitted that the Standard newspaper advertisement was effectual as if it had been made to the 2nd and 3rd Defendants personally. Reliance was placed on the case of ***Mary Mbula Mukuyi v David Mwose Mwaluko T/A Aberdeen Properties***

Limited & 5 others [2014] eKLR for the proposition that substituted service was proper in the circumstances of this case.

17. As regards the question as to whether the applicants had met the threshold for setting aside an ex parte judgment, counsel contended that any party in default of appearance and defence under Order 10 of the Civil Procedure Rules cannot without good reasons use Article 159 of the Constitution to hide from clear timelines stipulated by law. Counsel relied on the case of *Tree Shade Motors Limited vs DT Dobie & Another [1995-1998] 1 EA 324* and urged that no draft defence was annexed to the application to show that the Applicants have a reasonable defence. In addition, counsel relied on the case of *Board of Management St. Augustine Secondary School v Chambalili Trading Co. Ltd [2021] eKLR* for the proposition that where the Exparte judgment is regular the court will not usually set it aside except where there is a reasonable defence.

18. As regards the issue of whether the applicants are bonafide purchasers of the suit land, counsel contended that the applicants were not bonafide purchasers for value without notice. Counsel cited the case of *Elijah Makeri Nyangw'ra vs. Stephen Mungai Njuguna & Another [2013] eKLR*, for the proposition that a title held by an innocent third party can be challenged if it is proved that the same was obtained illegally, unprocedurally or through a corrupt scheme as stipulated in section 26 (1) (a) and (b) of the Land Registration Act.

19. On whether the applicants had met the threshold of granting a temporary injunction, counsel stated that the same had not been met according to the threshold set out in *Giella v Cassman Brown & Co. Ltd [1973] EA 358* and *Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR*.

ANALYSIS AND DETERMINATION

20. I have considered the Application, the responses, submissions and authorities cited. In my considered opinion the issues that arise are:-

- a) Whether the court should set aside the exparte judgment delivered on 12th June 2020.
- b) Whether the court should cancel the title deed issued in favour of the plaintiff and revert the suit property to the 2nd and 3rd Defendants
- c) Whether the court should issue a temporary injunction against the Plaintiff regarding the suit property

21. Setting aside exparte judgment, is discretionary where the exparte judgment was regular. However, where the Exparte judgment is irregular, the court ought to set it aside *ex debito justitiae*. In both cases, the concern of the court should be to do substantive justice to all the parties in the suit.

22. Article 50 of the Constitution guarantees fair hearing and sub article (1) thereof provides as follows;

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

23. The right not to be condemned unheard is a cardinal principle of natural justice, without which the rule of law would be without equilibrium. This principle, like a golden thread, must be seen to run throughout all court processes even as the court strives to uphold the law and other legal principles. The legitimacy of court decisions and the rule of law find their bearing on this principle. In my view, denying any person the right not to be condemned unheard, is a grave matter that ought not to be taken lightly. The court is under duty to ensure that every party to a suit, is accorded an opportunity to be heard. This opportunity starts with being made aware of any court processes filed against parties to a suit. In the case of *Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others (2013) e KLR*, the court cited with approval the holding in the case of *The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Miscellaneous Application No. 18 of 2010*, where the Supreme Court of Uganda aptly captured the centrality of this principle of natural justice as follows;

It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rule as captured in the Latin phrase 'audi alteram partem' literally translates in to 'hear the parties in turn,' and has been appropriately paraphrased as 'do not condemn anyone unheard.' This means a person against whom there is a complaint must be given a just and fair hearing.

24. As regards factors to consider in determining whether to set aside exparte judgment, I associate myself with the reasoning in the case of *David Kiptanui Yego & 134 Others v Benjamin Rono & 3 Others [2021] e KLR*, where the court cited with approval the case of *Sebei District Administration vs. Gasyali & Others (1968) EA 300*, where SHERIDAN J made the following observation;

The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of the court.

25. In the case of *Patel v East Africa Cargo Handling Services Limited (1974) EA 75*, the court held that;

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 to 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 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 the trial for adjudication.

26. Similarly, in the case of *CMC Holdings Limited vs. James Mumo Nzioki [2004] e KLR*, the court held as follows;

The law is now well settled that in an application for setting aside Exparte Judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application raises triable issues.

27. It is clear that in considering whether or not to set aside ex parte judgment, the court ought to consider several matters including the reasons advanced by the defendant for failure to defend the suit, whether the defendant has a reasonable defence to the plaintiff's claim, whether the applicant has moved the court with prompt and whether substantive justice for all the parties will be achieved.

28. In the instant case, there is no dispute that the 2nd and 3rd Defendants were duly served with summons to enter appearance by way of substituted service by advertisement in the Newspaper and they neither entered appearance nor filed defence as required by law; hence the judgment entered against them was lawful and regular. The applicants have stated that they did not see the advertisement herein. In my view, it is possible that indeed the applicants failed to see the said advertisement, considering that not everyone in Kenya reads all the newspapers daily. In addition, it is possible that a person may read only a section of a newspaper and fail to read other sections like the classified/advertisement section, depending on what they deem relevant to them. Therefore, substituted service is based on the rebuttable presumption that the defendant shall be able to see the advertisement. The purpose of effecting service, in whichever form, is to notify the defendant of the pendency of a suit against them and to give them opportunity to defend themselves. The provision for substituted service is allowed as an alternative where personal service is not possible. The most desirable and effective mode of service being personal service. However, the bottom-line and the expected outcome of any mode of service is to make the defendant aware of the suit pending against them. If that outcome is not achieved, then subsequent proceedings will not result in substantive justice. In the circumstances, it is my considered view that the reason given by the Applicants that they did not see the advertisement and were therefore not aware of this suit is a reasonable explanation to warrant setting aside the ex parte judgment.

29. I have considered the supporting affidavit of the applicants, and I note that they have raised a plea of being innocent purchasers for value without notice. Among their documents are an official search of the suit property showing that the property was in the 1st Defendant's name at the time of the alleged purchase, the sale agreement between the 1st Defendant on one hand and the 2nd and 3rd Defendants on the other hand, evidence of payment of consideration to the 1st Defendant, transfer documents, consent from the land control board and a copy of the title deed. They have also argued that the Plaintiff's transfer of the suit land to the 1st Defendant is admitted by the plaintiff as having been done voluntarily and therefore that the subsequent transfer to themselves cannot be said to have been unlawful or fraudulent. In a rejoinder, the Plaintiff has relied on the case of *Elijah Makeri Nyangw'ra vs. Stephen Mungai Njuguna & Another [2013] eKLR*, to argue that a title held by an innocent third party can be challenged if it is proved that the same was obtained illegally, unprocedurally or through a corrupt scheme as provided for in section 26 (1) (a) and (b) of the Land Registration Act. In my considered view, the arguments on both sides, indeed confirm that the Applicants have a reasonable defence which raises triable issues, which ought to be heard on merit. It is my finding therefore that although the ex parte judgment in this matter was regular, I am satisfied that the applicants have a reasonable defence deserving an opportunity to be ventilated at a full trial. I therefore set aside the ex parte judgment together with all consequential orders thereto.

30. The applicants have sought for cancellation of the title deed issued in favour of the Plaintiff and rectification of the register to revert the suit property in the name of the 2nd and 3rd Defendants. Having set aside the ex parte judgment herein together with all consequential orders, it follows that the position which the parties held prior to the entry of judgment ought to be reverted to. Therefore, the said prayer is merited and thus allowed as prayed.

31. As both the plaintiff and 2nd and 3rd Defendants have demonstrated arguable cases in regard to their respective claims of ownership of the suit property, this court is enjoined by law to ensure that ultimately, substantive justice is rendered to all the parties in this suit. In the premises, this court is inclined to preserve the subject matter herein, pending the hearing and determination of this suit.

32. As regards the question of whether the applicants are entitled to a temporary injunction, Order 40 Rule 1 of the Civil Procedure Rules provides for grant of temporary injunction as follows;

Where in any suit it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

33. For a court to grant a temporary injunction, an applicant must demonstrate that he has a suit/claim in which the subject matter in the

dispute is in danger of being wasted, damaged, alienated, disposed of or be dealt with in a manner that may obstruct or delay the Applicant in the execution of any decree that may be passed in their favour against the Respondent.

34. Principles for grant of temporary injunctions are well settled. In the case of *American Cyanamid Co vs. Ethicon Limited 1975 AAER 504*, the court enumerated elements to be satisfied before grant of a temporary injunction as follows;

- a) **There must be a serious/fair issue to be tried;**
- b) **Damages shall not be an adequate remedy**
- c) **The balance of convenience lies in favour of granting or refusing the application.**

35. The same principles had earlier been stated in the case of *Giella v Cassman Brown (1973) E.A 358*.

36. In the case of the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] e KLR*, the court held that all the three conditions set out in *Giella v Cassman Brown* (supra) are distinct and logical hurdles which must be surmounted sequentially.

37. A *prima facie* case was described in the case of *Mrao Ltd v First American Bank of Kenya and 2 Others (2003) KLR* in the following terms;

A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

38. In the instant case, the Applicants stated that they crave for leave to file their statement of defence. As of now, they are yet to file a suit/claim upon which an order for temporary injunction can be anchored. It is enough at this point to state that they cannot be granted such orders as no basis or foundation has been laid for grant of the same. In short, currently, the applicants do not have a case, leave alone a *prima facie* case, as against the Plaintiff upon which an application for grant of temporary injunction may be considered.

39. The concept of irreparable injury seeks to protect the *prima facie* case established by the Applicant from being rendered nugatory, hence there must be a *prima facie* case, before the existence of an irreparable injury. To show that the applicant shall suffer irreparable injury, they have to demonstrate that the injury likely to be suffered cannot be adequately compensated by costs. In the case of *Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] eKLR*, the court stated as follows;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

40. As the Applicants have not yet filed a case against the Plaintiff, they have no *prima facie* case upon which the argument of irreparable injury can rest.

41. On the question of balance of convenience, the Applicant must prove that if the injunction is not granted they will suffer greater inconvenience than the inconvenience that may likely be suffered by the Respondent if the injunction is granted and the suit is dismissed in the end. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (supra), the court held that for the balance of convenience to tilt in favour of the Applicant, they must show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it. In my view, in the circumstances of this case, the balance of convenience tilts in favour of rejecting the grant of temporary injunction.

42. In the premises, the Notice of Motion application dated 17th May 2021 is partially allowed in the following terms;

- a) **That the exparte judgment delivered herein on 12th June 2020 and the decree issued on 15th June 2020 and all consequential orders thereto including the one issued on 19th February 2021 are set aside and the 2nd and 3rd Defendants are granted leave to defend the Plaintiff's suit.**
- b) **That this honourable court be and is hereby pleased to issue an order cancelling the title deed issued in favour of the Plaintiff and to rectify the register reverting land parcel number Donyo Sabuk/Komarock Block 1/16 (the suit property) to the 2nd and 3rd Defendants.**
- c) **That the status quo obtaining after cancellation of the title deed issued in favour of the Plaintiff and reversion of the suit property to the 2nd and 3rd Defendants, shall be maintained, with the effect that there shall be no subsequent transfer or registration of any dealings whatsoever in respect of the suit property, pending hearing and determination of this suit.**
- d) **That the 2nd and 3rd Defendants are granted leave of 14 days of this ruling, to file and serve their defence and any other pleading they deem fit.**
- e) **Costs shall abide the determination of the suit.**

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Manyara for 2nd and 3rd Defendants

No appearance for the Plaintiff

No appearance for the 1st defendant

Josephine Misigo – Court Assistant