



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 175 OF 2016

SICILY MIKUI MULWA.....PLAINTIFF

-VERSUS-

JOHN MULWA KATHANZU.....1ST DEFENDANT

DAVID MUTINDA MUTUKU.....2ND DEFENDANT

RULING

INTRODUCTION:

1. In the Notice of Motion application dated 14th May 2018, the 2nd Defendant/Applicant sought for the following orders;

a) **THAT the court hereby sets aside the Order of the court issued on the 25th day of May 2017.**

b) **THAT the court hereby orders cross examination of Stephen Makanga Katiwa on his affidavit of service dated 28th November 2016.**

c) **THAT costs of this Application be provided for.**

2. The Application was premised on grounds on the face of it and on the Supporting Affidavit of **DAVID MUTINDA MUTUKU** sworn on the 14th day of May, 2018 where he deposed to have purchased 3 acres of land comprised in Land Reference Number Masinga/Kangonde/2352 (hereinafter referred to as the suit property) from the 1st Defendant on diverse dates between the years 2013 to 2016, at a cumulative sum of Kshs. 3,340,000/= upon the same had been advertised for sale; that at the time of purchasing the suit property, the title thereof had not yet been issued as Masinga area was still under adjudication; that the property was not occupied apart from having a crumbling shop; that according to the 1st Defendant and the neighbors around, the suit property was ancestral land which belonged to the 1st Defendant.

3. The 2nd Defendant further averred that he was not served with any court papers, since he was not in Kikumini on the alleged date of service, being 7th November 2017, as he was in Kisumu for a meeting; that the process server committed perjury in his Affidavit of service since the averments thereon were not factual. He thus claimed not to have been accorded an opportunity to defend himself and his rights under the natural justice doctrine of *audi alteram partem* were infringed.

4. The Applicant further stated that he only learnt of the case through one of his workers when a person came to the suit property and pasted a court order on 17th February 2018. He explained that this was almost a year after the orders were issued, and he had already fenced the suit property and demolished the shop.

5. The application is opposed. The Plaintiff/Respondent filed her Affidavit in response to the Application on 4th July 2018. She averred that the 1st Defendant is her lawfully wedded husband; that the suit property was not ancestral property as per the allegations by the Applicant, but that it was matrimonial property; that the suit property had been jointly acquired by the Plaintiff and 1st Defendant by obtaining loans through the ministry of health from Afya Sacco; that the suit property was registered in the name of the 1st Defendant who held the same in trust for the family.

6. The Respondent further stated that she had placed cautions on the suit property in 2014 when the 1st Defendant had lapsed into heavy drinking and made attempts to sell the matrimonial property. Consequently, she averred that any sale to the 2nd Defendant was void since she did not give any consent nor was she made aware of the transaction between the 1st and 2nd Defendants.

7. As regards service, she averred to have obtained and served court orders upon both Defendants restraining them from undertaking any construction or interfering with the suit property.

8. The 1st Defendant did not file any response to the Application dated 14th May, 2018.

9. The application was canvassed by written submissions. On record are the 2nd Defendant/Applicant's submissions filed on 28th March 2019. Before the application was determined, on 19th May 2021 the Plaintiff and the 2nd Defendant had recorded a consent dated 31st August 2020 with the intention of having the orders granted on 6th December, 2016 discharged and the suit marked as withdrawn, but the parties changed their minds before the same could be adopted as the orders of the court. Those are the same orders issued on 25th May 2017.

SUBMISSIONS

10. Counsel for the Applicant submitted that the court ordered that the process server be availed in court for purposes of cross-examination on his affidavit on 19th February 2019, but he failed to appear in court on the said date though the date was given in the presence of the Plaintiff's counsel. Counsel submitted that the Applicant did not have a home in Kikumini hence service could not have been effected there, nor was he at Kikumini on the alleged date of service as he was in Kisumu for a meeting. Counsel urged that the Respondent and the process server acted maliciously by waiting for almost a year without informing the applicant of the order, when he had invested on the suit property. Counsel pointed out that these facts were uncontroverted in the Plaintiff's replying affidavit.

11. Counsel relied on provisions of Order 40 Rule 7 of the Civil Procedures Rules which empowers a court to set aside interlocutory orders on application of a dissatisfied party. Counsel further cited Rule 6 of the same order for the proposition that an injunction shall lapse where it is issued and the suit is not determined within twelve months. Reliance was further placed on Rule 4(3) which require that such an order be served within 3 days after the date of issue. They simultaneously relied on the laws of natural justice that give a party rights to be heard before they are condemned, citing Article 50 of the Constitution.

12. Counsel concluded by stating that the Process server did not serve the court orders as alleged in the Affidavit of service and that he failed to come to court twice to be cross-examined on the same. It was the Applicant's contention that the process server claimed to have served the Applicant at his Kikumini home yet he had no home in Kikumini and that the server did not state in his Affidavit who identified the Applicant to him or whether he knew him before. He opined that this was "sufficient cause" for setting aside ex parte judgment as was held in the case of *Wachira Karani vs Bildad Wachira (2016) eKLR*. He prayed that the court orders be set aside for lack of service.

ANALYSIS AND DETERMINATION

13. I have carefully considered the application, the response and the submissions. The issue that emerge for determination is whether the orders issued on 25th May 2017 ought to be set aside.

14. In the orders issued on 25th May 2017, the court made exparte orders of temporary injunction restraining the defendants either by their agents, employees, proxies and or themselves from occupying, selling, disposing, wasting, cultivating, alienating and or dealing in any way with land parcel No. Masinga/ Kangonde/2352 and Masinga/ Kangonde/2353 pending the hearing and determination of this suit. These orders were granted on 6th December 2016. The orders were made after the court was satisfied that the application was unopposed.

15. The Applicant claims not to have been served with any application or court orders until 17th February 2018 when the orders were pasted on his gate. He further claimed that by the time the orders were served upon him, he had already developed the suit property. He opined that the process server failed to show up for cross examination. On her part, the Respondent simply stated in her replying Affidavit that both Defendants were served with the court orders.

16. The question on whether service was effected on the Applicant or not is best answered by considering the contents of the return of service which was filed in court. I have considered the record and I note that two affidavits of service dated 5th December 2016 and 28th November 2016 respectively, were filed on 6th December 2016. Attached to the two affidavits are two hearing notices; dated 8th November 2016 and 29th November 2016 respectively. In the affidavit of service sworn on 28th November 2016, the process server one Stephen Makanga Katiwa stated that on 25th November 2016 he received hearing Notice with application dated 27th October 2016 with instructions to serve the 2nd Defendant and that on 7th November 2016 with the help of the plaintiff travelled to Kikumini village in Masinga Division and served the 2nd Defendant who declined to sign the return copy. In my view it is not possible for the process server to have received a hearing notice and the application for service on 25th November 2016 and managed to serve the same on 7th November 2016, as this means that he served the documents on an earlier date before he received the documents. The affidavit of 5th December 2016 by the said Stephen Makanga Katiwa, states that on 1st December 2016 he travelled to Kikumini village within Masinga Division and served the 2nd Defendant with the hearing Notice. He does not state who pointed the 2nd Defendant to him or whether the 2nd Defendant was a person known to him at the time of service.

17. Order 5 Rule 15 (1) of the Civil Procedure Rules provide the manner in which service ought to be effected as follows;

The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in

which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in form No 4 of Appendix A with such variations as circumstances may require.

18. In his Affidavit of service dated 28th November 2016, the process server who identified in paragraph 3 claims to have travelled to Kikumini village within Masinga Division where he met the 2nd Defendant and served him but he declined to sign. He did not state the time of service nor explain how the Defendant was identified to him or if he already knew him.

19. Since the 2nd Defendant denies ever being served with any pleadings prior to February 2018, the process server could have cleared the doubts by presenting himself in court for cross examination on his mode of service. Order 5 Rule 16 of the Civil Procedure Rules provides as follows;

On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

20. In this matter, the record shows that on 13th November 2018, the court ordered the process server to appear in court on 9th January 2019 for cross examination. On that date counsel for the Plaintiff stated that the process server was unwell and could not attend court. The court then adjourned the process server's cross examination to 19th February 2019, but again on that date, the process server was not in court and the court directed parties to file submissions. In my considered view, as the process server did not attend court, to shed light on how he effected service on the 2nd Defendant, in view of the allegations of the second defendant that he was not served and in view of the contents of the affidavits of service which fail to state when service of the application in issue was made, it is my finding that the Plaintiff has not demonstrated that the 2nd Defendant was duly served with both the application and the hearing notices giving rise to the orders issued on 25th May 2017.

21. Setting aside orders made without service of summons/notice is a matter of right for the aggrieved party as no one should be condemned unheard. The court has inherent jurisdiction to ensure that justice is done for all the parties in a suit. In the case of *Ali Bin Khamis v. Salim Khamis Korobe & 2 Others* [1956] 23 EACA 195 cited with approval in the case of *Gulf Fabricators v County Government of Siaya* [2020] e KLR, it was held that an order made without service of summons to enter appearance is a nullity which must be set aside *ex debito justitiae*. See also the case of *James Kanyita Nderitu v Maries Philotus Ghika & Another* [2016] e KLR. However, where *ex parte* orders have been made upon due service, it is within the court's discretion to set aside such orders as long as the discretion is exercised judiciously and not capriciously.

22. In the case of *Shah vs Mbogo and Another* [1967] EA 116, the Court of Appeal of East Africa held as follows;

This discretion (to set aside *Ex parte* proceedings or decision) is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

23. In the instant suit, it is clear that the 2nd Defendant was not duly served with both the application and hearing notices that led to the grant of the impugned orders. As the 2nd Defendant has a right not to be condemned unheard, it is only fair and reasonable that the *Ex parte* orders made against him are set aside.

24. In addition, the orders issued on 25th May 2017 were temporary injunctions. Therefore the same could only remain in force for twelve months. Order 40 Rule 6 provides as follows;

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

25. As the orders subject of this ruling, have been in force for over five years, without the suit being set down for hearing, it is my considered view that the orders do not serve the interests of justice and the same ought to be set aside.

26. In the premises, I find and hold that the application dated 14th May 2018 is merited and the same is hereby allowed with the effect that the orders of this court issued on 25th May 2017 are hereby set aside. Costs shall abide the outcome of the suit.

27. Orders accordingly.

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:

Ms Mbabu for the 2nd Defendant/Applicant

No appearance for the Plaintiff

No appearance for the 1st Defendant

Josphine Misigo – Court Assistant