



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC CASE NO.139 OF 2015

1. MAHMOUD ABDALLA MOHAMED
2. YATHRIBA KHAMIS RASHID SHIKELY
3. NAHYA ABDALLAH MOHAMED
4. NASREEN ABDALLAH
5. NOOR ABDALLAH
6. MAJID ABDALLAH
7. MOHSIN ABDALLAH
8. FATMA ABDALLAH
9. NAIMA ABDALLAH
10. MOHAMED ABDALLAH.....PLAINTIFFS

VERSUS

1. KALAMA RIMBA GONA
2. KAJOJI RIMBA GONA
3. CHARO RIMBA GONA
4. KEA RIMBA GONA.....DEFENDANTS
- FLORENCE NINGALA CHIMEGA.....INTENDED 5TH DEFENDANT

RULING

1. Before me for consideration are two Notices of Motion both dated and filed herein on 10th December 2018.
2. The First Motion brought by the 4th Defendant Kea Rimba Gona prays for orders:

2. That the Court be pleased to set aside the interlocutory Judgment entered against the Defendants herein and the consequential Judgment issued on 20th May 2016.

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4. That Alfred Owino, the Process Server who swore the Affidavit of Service dated 25th November 2015 and filed in these proceedings on 3rd December 2015 be ordered to attend Court for cross-examination on his said Affidavit of Service.

5. That the Costs of this application be provided for.

3. The application which is supported by the 4th Defendant's affidavit is based on the grounds:-

i) That Judgment was delivered herein following ex-parte proceedings on 20th May 2016.

ii) That the Defendants were not served with summons and that indeed the 2nd Defendant said to have been served on 23rd November 2015 passed away on 16th May 2007 long before the suit was filed.

iii) That the Affidavits of Service upon which the Court relied to proceed with the matter for formal proof on ex parte basis are the product of a monumental fraud as the Defendants were never served with the pleadings or at all.

iv) That the Defendants are now faced with eviction in execution of the Judgment arising from the ex-parte proceedings and they stand to suffer extreme loss that may not be capable of compensation through an award of damages.

4. But in a Replying Affidavit sworn and filed herein on 19th March 2019 on behalf of the Plaintiffs by Abdalla Said Abdalla (the 1st Plaintiff's Attorney), they aver that the Defendants were duly served with Summons to Enter Appearance as per an Affidavit of Service filed in Court on 21st September 2015. The Plaintiffs aver that the application is based on falsehoods as the Defendants deliberately failed to enter appearance and/or to file a Statement of Defence in opposition to the Plaintiff's claim.

5. The Plaintiffs assert that the Defendants are trespassers to the suit property and they ought to vacate the same immediately to enable the Plaintiffs enjoy the fruits of their Judgment.

6. The Second application on the other hand also seeks the setting aside of the Judgment dated 20th May 2016 as well as an order enjoining the Applicant, one Florence Ngingala Chimega as the 5th Defendant in these proceedings.

7. The said application is premised on the grounds inter alia:-

a) That the Intended 5th Defendant filed Mombasa ELC 93/2014 against the Plaintiffs herein seeking to be declared the owner of the suit property by virtue of adverse possession.

b) That on 8th May 2014, the Court granted an order maintaining the status quo and the said suit remains pending for determination.

c) That despite their knowledge of the existence of the said case, the Plaintiffs proceeded with the suit herein without enjoining the Intended 5th Defendant who is now at risk of being evicted from the suitland pursuant to the Judgment delivered herein.

8. The Second application is equally opposed. In a Replying Affidavit sworn by the same Abdalla Said Abdalla and filed herein on 21st February 2019 on behalf of all the Plaintiffs, they assert that the parties in the Mombasa suit and the cause of action are different. It is the Plaintiff's case that the Intended 5th Defendant is not a party in these proceedings and no execution can therefore issue against her herein.

9. In addition to the Replying Affidavit in response to the Intended 5th Defendant's application the Plaintiffs have also filed a Notice of Preliminary Objection dated 24th January 2019 objecting to the Motion on the grounds:-

1. That the Court is functus officio as final Judgment had already been rendered on 20th May 2016 and orders issued against the Defendants.

2. That it is a general principle of law that a Court after passing Judgment becomes functus officio and cannot revisit the Judgment on merits, or exercise judicial power over the same matter.

3. That the Intended 5th Defendant lacks locus standi to seek enjoining in the concluded suit since she had no identifiable interest in the matter.

10. I have perused the two applications, the responses thereto and the Notice of Preliminary Objection. I have equally perused and considered the submissions and authorities placed before this Court by the Learned Advocates for the parties.

11. The Court's power in considering an application to set aside Judgment is discretionary As was held in **Patel –vs- EA Cargo Handling Services Ltd (1974)EA 75:-**

“There are no limits or restrictions on the Judges discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. 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 it by the rules”.

12. In the First Application before me, the 4th Defendant contends that the Defendants herein were not served with the pleadings and

summons to Enter Appearance. The Plaintiffs on the other hand insists that the Defendants were served in accordance with the Affidavit of Service filed herein by the Process Server on 21st September 2015.

13. I have perused and considered the said Affidavit sworn by one Alfred Owino Ouma, a Licensed Process Server of this Court. It reads in its entirety as follows:-

1. *That I am (an) adult of sound mind residing and working for gain at Mombasa hence competent to swear this Affidavit.*
2. *That I am a Licensed Court Process Server of the High Court of Kenya.*
3. *That on the 24th August 2015, I received copies of summons together with the Plaint from the firm of Kamiti and Omollo & Company Advocates with instructions to effect service upon the Defendants herein.*
4. *That on the same day I proceeded to Kikambala Maweni near Gorofani where the aforesaid Defendants resides being accompanied by the 1st Plaintiff herein.*
5. *That on entering the compound of the 3rd Defendant, the Plaintiff pointed out to me to the old man to whom I introduced myself and the purpose of my visit, I tendered copies thereof and requiring his signature at the back of my copy at 2.40 p.m.*
6. *That the 3rd Defendant acknowledged and accepted service but declined to sign claiming that the land belongs to them.*
7. *That whatever is deponed herein is true according to my personal knowledge and beliefs same for matter of confirmation and information, n if any in which event the source and reason therefore are disclosed.”*

14. Without doubt, the 1st, 2nd and 4th Defendants were neither served with the pleadings nor the Summons to Enter Appearance. The inescapable conclusion accordingly is that the 4th Defendant's application to set aside has merit and there is no need to call the Process Server for cross-examination.

15. In regard to the Intended 5th Defendant's application, it is also evident that she resides on the suit property being claimed by the Plaintiffs herein and that any orders given by this Court may affect her one way or the other.

16. She has indeed demonstrated that she has filed a suit seeking ownership of the very same suit property in **Mombasa ELC Case No. 93 of 2014**. There are existing orders of status quo in the said matter, a fact which was not disclosed to this Court as at the time the impugned Judgment was rendered.

17. In the premises I am equally persuaded that the Intended 5th Defendants application has merit.

18. Accordingly I hereby allow the two applications before me in terms with an order that the costs shall be in the cause.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE