



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 1212 OF 2013**

**DR. FRANCIS INWANI MALWENYI.....1<sup>ST</sup> PLAINTIFF**

**IRENE WAMBUI INWANI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY KARANJA NGUGI.....1<sup>ST</sup> DEFENDANT**

**ANDREW MUTHEE GATIMU.....2<sup>ND</sup> DEFENDANT**

**FLORENCE ELIZABETH WANJIRU.....3<sup>RD</sup> DEFENDANT**

**AGNES WAMBUI NJERU.....4<sup>TH</sup> DEFENDANT**

**SUPER MICRO VENTURES SELF HELP.....5<sup>TH</sup> DEFENDANT**

**AND**

**MOSES NG'ANG'A MWANGI.....OBJECTOR**

**RULING**

I have before me three (3) applications which were heard together. The first application was brought by the 3<sup>rd</sup> defendant by way of Notice of Motion dated 24<sup>th</sup> July, 2017. In the application the 3<sup>rd</sup> defendant sought the following orders:

1. That this honourable court be pleased to set aside the judgment of this court delivered on 20<sup>th</sup> May, 2015 together with all consequential orders made pursuant thereto.
2. That this honourable Court be pleased to set aside all the proceedings of this court together with all the orders made herein.
3. That this honourable court be pleased to expunge all documents filed in this court by the firm of Kinyanjui & Njau Advocates on behalf of the 3<sup>rd</sup> defendant.
4. That the 3<sup>rd</sup> defendant be granted leave to defend the suit.

The application was brought on the grounds that the court entered judgment herein on 20<sup>th</sup> May, 2015 against the defendants following a hearing that took place on 1<sup>st</sup> October, 2014 and that the said judgment was irregular because the 3<sup>rd</sup> defendant was not served with summons to enter appearance and did not instruct the firm of Kinyanjui & Njau Advocates to act for her in the matter. The 3<sup>rd</sup> defendant contended that the said firm of advocates entered appearance and filed a defence on her behalf without instructions and did not communicate to her regarding the suit. The 3<sup>rd</sup> defendant contended that she was not aware that the suit was listed for hearing on 1<sup>st</sup> October, 2014 and as such she was condemned unheard.

The second application was brought by the objector, Moses Ng'ang'a Mwangi by way of Notice of Motion dated 26/7/2017. In the application, the objector sought the following orders:

1. That the attachment by way of proclamation by Moran Auctioneers dated 20<sup>th</sup> July, 2017 against the objector's goods be

discharged.

2. The cost of the application be borne by the plaintiffs.

The objector's application was brought on the grounds that the goods that were attached by Moran Auctioneers in execution of the decree issued herein belonged to the objector and not to the 3<sup>rd</sup> defendant/judgment debtor.

The third application was brought by the 4<sup>th</sup> defendant, Agnes Wambui Njeru by way of Notice of Motion dated 17<sup>th</sup> August, 2017. In the application, the 4<sup>th</sup> defendant sought the following orders:

1. That this honourable Court be pleased to set aside the ex parte judgment that was entered herein against the 4<sup>th</sup> defendant and all consequential orders.
2. That the 4<sup>th</sup> defendant be granted leave to defend the suit and the attached draft defence be deemed as properly filed and served subject to payment of court fees in respect thereof.
3. That the costs of the application be in the cause.

The 4<sup>th</sup> defendant's application was brought on the grounds that the 4<sup>th</sup> defendant was not served with summons to enter appearance and that the 4<sup>th</sup> defendant has a strong defence to the plaintiffs' claim.

The plaintiffs opposed the three applications through replying affidavits sworn on 28<sup>th</sup> August, 2017. With regard to the objection application, the plaintiffs conceded that Motor Vehicle Registration No. KBD 599 D that was among the items attached by Moran Auctioneers in execution of the decree issued herein belonged to the objector and not to the 3<sup>rd</sup> defendant/judgment debtor. The plaintiffs stated that they had no objection to the vehicle being released from attachment. With regard to the other items which were the subject of the objector's objection, the plaintiffs contended that the receipts that were placed before the court by the objector were not valid as they had not been stamped and were fabricated or sourced only for the purposes of these proceedings. The plaintiffs contended that save for the said motor vehicle, the other items that were attached from the 3<sup>rd</sup> defendant's premises belonged to the 3<sup>rd</sup> defendant and should remain under attachment.

With regard to the 3<sup>rd</sup> and 4<sup>th</sup> defendants' applications seeking to set aside the judgment entered herein on 20<sup>th</sup> May, 2015 and all consequential orders, the plaintiffs averred that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were duly served with summons to enter appearance. The Plaintiffs averred that the 3<sup>rd</sup> defendant was served with summons to enter appearance and together with the 1<sup>st</sup> and 2<sup>nd</sup> defendants appointed the firm of Kinyanjui & Njau Advocates to act for them which firm entered appearance and filed a statement of defence on their behalf. The plaintiff averred that the 3<sup>rd</sup> defendant signed a witness statement prepared by the said firm of advocates which firm also attended court on several occasions to represent her and the other defendants. The plaintiffs averred further that the 3<sup>rd</sup> defendant had no defence to their claim in that the debt the subject matter of the suit arose when she was an official of the 5<sup>th</sup> defendant who entered into an agreement for sale of land in dispute with the plaintiffs. As concerns the 4<sup>th</sup> defendant, the plaintiffs averred that she was duly served with summons to enter appearance and that she had no defence to the plaintiff's claim.

I have considered the three (3) applications before me. I will determine the objector's application first after which I will deal with the 3<sup>rd</sup> and 4<sup>th</sup> defendants' applications together. I am satisfied on the material before me that the objector has established on a balance of probabilities that Motor Vehicle Registration No. KBD 599D, Sony Hi-Fi System, coffee table, Dining table and 7 seater sofa set that were attached by Moran Auctioneers in execution of the decree issued herein belonged to the objector and as such should not have been attached. In the circumstances, I find merit in the objector's Notice of Motion dated 26<sup>th</sup> July, 2017.

With regard to the applications by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the following is my view. I am satisfied on the material before me that the 3<sup>rd</sup> defendant was served with summons to enter appearance and that she appointed the firm of Kinyanjui & Njau Advocates to act for her in this suit which firm entered appearance and filed a defence on her behalf. I am not persuaded that the 3<sup>rd</sup> defendant's signature in the witness statement filed in court on 24<sup>th</sup> May, 2012 together with her statement of defence was forged. The signature in that witness statement resembles the 3<sup>rd</sup> defendant's signature in her affidavit sworn on 24<sup>th</sup> July 2017 in support of the present application. The defence that the 3<sup>rd</sup> defendant intends to put forward is not different from that which was filed on her behalf by the firm of Kinyanjui & Njau Advocates which she has now disowned. The 3<sup>rd</sup> defendant has not given any plausible reason why the firm of Kinyanjui & Njau Advocates would go out of their way to forge her signature. In any event, no evidence was placed before the court showing that her signature was forged or that a complaint had been lodged with the Police or the Law Society of Kenya against the said firm of advocates for acting without instructions and for forgery. I am of the view that the 3<sup>rd</sup> defendant has only disowned the firm of Kinyanjui & Njau Advocates because they failed to turn up in court when the matter came up for hearing leading to an ex parte judgment being entered against her. On whether the 3<sup>rd</sup> defendant has an arguable defence, there is no doubt that the defence that was filed on her behalf by the firm of Kinyanjui & Njau Advocates raises triable issues.

As concerns the 4<sup>th</sup> defendant, I am also satisfied that she was served with summons to enter appearance. According to the affidavit of service that was filed in court on 8<sup>th</sup> March, 2013 sworn by Mark Okinda, the 4<sup>th</sup> defendant was served with summons to enter appearance on 30<sup>th</sup> April, 2012 at the T.S.C Centre, Staffing Section where she was working. The 4<sup>th</sup> defendant has not challenged this affidavit of service in any material respect. The 4<sup>th</sup> defendant has not denied that she was working at T.S.C Centre at the material time and that she was at work when she is said to have been served. No request was also made for cross-examination of the process server. I am satisfied that the 4<sup>th</sup> defendant was served with summons to enter appearance and that she chose for reasons only known to herself not to defend the claim. On

whether the 4<sup>th</sup> defendant has a defence to the claim, I am persuaded that that is the case. Whereas the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were officials of the 5<sup>th</sup> defendant, the 4<sup>th</sup> defendant's involvement in the transaction between the plaintiffs and the 5<sup>th</sup> defendant is not clear.

In the case of Patel v E. A. Cargo Handling Services Ltd. (1974) E.A 75, the court stated as follows on the power of the court to set aside ex parte judgment:-

**“There are no limits or restrictions on the judge’s discretion 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 condition on itself or fetter wide discretion given to it by the rules....”**

In the case of Mbogo v Shah & Another (1967) E.A 116, the Court stated that:

**“I have carefully considered the principles governing the exercise of court’s discretion to set aside judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”**

Although the 3<sup>rd</sup> and 4<sup>th</sup> defendants were served with summons and have not given reasonable excuse as to why they did not defend the plaintiff’s claim, I am inclined to exercise my discretion in their favour and allow them to defend the suit but conditionally. I will however not expunge the documents which were filed herein by the firm of Kinyanjui & Njau Advocates on behalf of the 3<sup>rd</sup> defendant as I am not convinced that the same are improperly on record.

In conclusion, I hereby make the following orders on the three (3) applications before me:

1. The Objector’s Notice of Motion application dated 26/7/2017 is allowed in terms of prayer 3 thereof.
2. The 3<sup>rd</sup> defendant’s Notice of Motion application dated 24/7/2017 is allowed in terms of prayer 4 thereof.
3. The 3<sup>rd</sup> Defendant is at liberty to defend the suit on the basis of her pleadings on record.
4. The 3<sup>rd</sup> defendant shall pay to the plaintiffs thrown away costs assessed at Kshs.20,000/= payable within thirty (30) days from the date hereof in default of which the plaintiffs shall be at liberty to apply for execution for the recovery thereof.
5. The 4<sup>th</sup> defendants Notice of Motion application dated 17<sup>th</sup> August, 2017 is allowed in terms of prayer 4 thereof.
6. The 4<sup>th</sup> defendant is granted leave to file a defence within 21 days from the date hereof.
7. The 4<sup>th</sup> defendant shall pay to the plaintiffs Kshs.20,000/= as thrown away costs within 30 days from the date hereof failure to which the plaintiff shall be at liberty to apply for execution for the recovery thereof.
8. Each party shall bear its own costs of the three (3) applications.
9. The judgment delivered on 20<sup>th</sup> May, 2015 shall remain in force as against the other defendants.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of October 2018**

**S. OKONG’O**

**JUDGE**

**Ruling read in open court in the presence of:**

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the 3<sup>rd</sup> Defendant

.....for the 4<sup>th</sup> Defendant

.....for the 5<sup>th</sup> Defendant

.....Court Assistant