



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO 58 OF 2017

HANNAH WARUGURU MWANGI.....1ST PLAINTIFF/RESPONDENT

PAUL MWAURA MWANGI..... 2ND PLAINTIFF/RESPONDENT

(suing as administrators and legal representatives Of the estate of SIMON RYBOY MWANGI-DCD)

VERSUS

SALOME WANJIRU GITOHO.....1ST DEFENDANT/APPLICANT

DISTRICT LAND REGISTRAR, MURANGA.....2ND DEFENDANT/APPLICANT

RULING

1. Vide a Notice of Motion dated 15/2/2012 the Applicant filed an application seeking;

- a) Spent.
- b) Spent.
- c) That the Honorable Court be pleased to set aside ex-parte ruling entered against the 1st Defendant.
- d) That the Honorable Court be pleased to grant leave to the 1st Defendant to file defence.
- e) That the costs of this application be provided for.

2. The application is based on six grounds and the supporting Affidavit of SALOME WANJIRU GITOHO. The Applicant deponed that the order for injunction was obtained ex-parte as she was not served with any pleadings and raises doubt on the Affidavit of Service filed by the Respondent. She further avers that her defence raises triable issues and it is for the interest of justice that she be given an opportunity to defend the suit.

3. The Respondent in opposing the application avers that the Applicant was duly served and the order was duly issued. In opposing the prayer for leave, the Respondent contends that the Applicant is guilty of delay which is unexplained and inordinate, further that the defence raises no triable issue as it consists of mere denials. The Respondent leads evidence as to the ownership of the property which goes to the merit of the case.

4. The application was canvassed by way of submissions, and the Applicant filed a further Affidavit accusing the Respondent of filing his response late in time. She faults the Respondent for not prosecuting the suit for such a long time and also intimates to the death of one of the Respondent but does not buttress the same. The averments contained therein require full hearing to determine the real issues.

5. The Applicant submitted on two issues, whether service was effected and whether the orders issued should be set aside. On whether service was effected, the Applicant submitted that the Affidavit of Service was falsified as she does not live in Kimukii Village, the area disclosed in the Affidavit of service. That she does not know where the said village is and sought to be allowed at the earliest the opportunity to cross examine the Advocate who is alleged to have effected service. In the end she submitted that there was no service thus was unaware of the suit. On the second issue, the Applicant invited the Court to adopt the rationale in **Mbogo vs Shah (1968) EA 93** on the discretion to set aside an order on avoidance of injustice. The Applicant also submitted on difference between regular and irregular judgment and relied on

the distinction laid down in **Fidelity Commercial Bank Ltd vs Owen Amos Ndung'u & Anor HCCC NO 241 of 1998** and invited this Court to determine the same. On triable issues the Applicant relied on the decision of the Court in **Tree Shade Motors Ltd Vs D T Dobie & Anor (1995-98) 1EA 324** and **Patel Vs E.A Cargo Handling Services Ltd (1974)** and concluded that the defence as drawn raises triable issues that this Court should be invited to look into.

6. The Respondent on the other hand submitted on whether the orders for stay should be granted. The Respondent submits that a delay of five years before bringing the instant application is inordinate and opposes the Applicant's contention that she was not served, he confirms the authenticity of the Affidavit of Service and invited this Court to the cases of **Stanley Kahoro Mwangi** and **George Kagima Kariuki**. It was further the Respondent's submission that the application is an abuse of the process of Court and should be not be entertained. In the end he submitted that the application be dismissed for lack of merits.

7. Having gone through the application and the responses thereof as well as the rival submissions, the issues for determination by this Court would be; Whether there was service; Whether the orders should be set aside; Whether the Defence raises triable issues; who meets the costs of the application.

8. The Applicant has not adduced any reasons to warrant the setting aside of the orders. The Court having held that the Applicant failed to prove non service, it is the conclusion of the Court that since the case has not been heard, the orders are presumed to be subsisting.

9. Before determining whether the Applicant should be granted leave, it is relevant to consider whether there was service of pleadings. Order 5 Rule 8 provides that "Service to be on Defendant in person or on his agent. (1)

Wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient" where there are several Defendants Rule 7 requires that each Defendant be served in person.

10. The Affidavit of Service dated 25/11/2015 sworn by JOHN MUTURI NJOROGE demonstrates that service was effected on the Applicant. Order 5 Rule 15 requires the person effecting service to file an Affidavit of service which shall detail the time when service was effected, the manner of effecting service and the name and address of the person identifying the party to be served. The Affidavit indicates the date of service, the mode of service was personal and the Plaintiff identified the 1st Defendant. Despite this, the Applicant submits that she does not reside in Kimukii Village as indicated in the Affidavit of Service, though the Respondent maintains that service was effected as per the Affidavit of Service.

11. Order 5 Rule 16 empowers this Court to make investigation where there are allegations as to the veracity of an Affidavit of service. The Applicant contends that she became aware of the suit in December, 2020 when the Respondent sent goons to harvest her grevillea. She challenges the Affidavit of Service alleging that is false on the grounds that she does not live in the disclosed village and that she was not served. Though she intimated that she would at the opportune time seek leave to cross examine the Advocate who effected service, she did not. It is trite that whoever is challenging service has the burden to prove that she was indeed not served. The Applicant has not discharged the burden of proof and there is nothing to persuade the Court that indeed she was not served.

12. As stated in the preceding paragraph, the Applicant has explained that she became aware of the suit in December 2020 when the Respondents allegedly sent goons to trespass onto the property and harvest grevilia trees, an act that prompted her to file a complaint with the area chief and the police. That it is when the orders of the Court were sent to her husband one Isaac Gitoh through whatsapp message. This has not been controverted by the Respondents and the Court is inclined to take it on its face value as having transpired.

13. On whether the orders should be set aside, Order 40 Rule 7 of the Civil Procedure Rules provides that any order for an injunction may be discharged, varied, set aside by the Court on application made thereto by any party dissatisfied with such order. The records indicate that the injunctive orders were issued on the 1st December, 2015 before Justice B Olao and upon being satisfied that the Applicant herein had been served the Court then issued ex-parte orders.

14. Order 40 Rule 6 is categorical on the lapse of injunctions and it provides: "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." The procedure of practice has always been that parties seek for extension of interim orders, to this end that has never been done. This rule makes it mandatory for the matter to be concluded within 12 months of the injunctions.

15. On the issue of whether to grant leave, to file their Defence, the Applicant deposes that the Defence raises triable issues that need to be determined. She pegs her failure to file the defence on not being aware of the suit all along until the events described in para 15. I find no grounds to disbelieve the Applicant and am satisfied that the Applicant has sufficiently explained the delay in filing defence.

16. Needless to say, it is the finding of the Court that the Respondent has not demonstrated in any way how he will suffer prejudice should the leave to file the defence be granted.

17. It is on record that the Respondents applied and obtained judgement in default of appearance and filing of a defence on the 14/12/2016. That said, the Court has also perused the draft statement of defence and counterclaim dated the 15/2/2021. In it the Applicant pleads that she is the rightful owner of the suit land and has occupied it since 1997. It is clear from the Plaintiff's pleadings that the Plaintiffs too have staked a claim on the same suit land. Clearly the issue of who is the rightful owner of the property is one that must be submitted to the Court for hearing and determination on its merits. I have no difficulty in arriving at the conclusion that the proposed defence contains triable issues.

18. In the end I set aside the orders issued on the 14/12/2016 and allow the Applicant to file and serve the statement of defence and counterclaim within the next 15 days from the date hereof. In default the said orders shall lapse.

19. Costs shall be payable by the Applicant in favour of the Respondents/Plaintiffs.

20. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF MAY 2021

J.G. KEMEI

JUDGE

Delivered online in the presence of:

1st and 2nd Plaintiffs/Respondents

Muiru HB for Irungu Mwangi for the 1st Defendant/Appellant

2nd Defendant – Absent

Kuiyaki, Court Assistant