



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 188 OF 2017

(FORMERLY MACHAKOS HCCC NO. 114 OF 2012 'OS')

MICHAEL OLE DIKIRR.....PLAINTIFF

VERSUS

TANANKO OLE KWENA.....1ST DEFENDANT

MOTONKA OLE NKOTIKO.....2ND DEFENDANT

TIPATEL OLE NTIMERI.....3RD DEFENDANT

PETER MOLINKE SEMEYIAN.....4TH DEFENDANT

RULING

What is before Court for determination is the 2nd, 3rd and 4th Defendants' Notice of Motion application dated the 7th September, 2020 brought pursuant to Sections 1A, 1B & 3A of the Civil Procedure Act; Order 45 Rules 1, 2, 3 and 5 including Order 51 Rule 1 of the Civil Procedure Rules. The Applicants seek the following orders:

1. Spent
2. That a stay of execution and/or further execution of the Judgement of this Honourable Court made on 7th day of February, 2018, Decree and all consequential orders issued or made herein in purported execution of the said Judgement be granted pending the hearing and determination of this Application.
3. That the Honourable Court grants leave for the Process Server, one Joel Mburu Nganga, to be put into the witness box for cross examination by the Applicants herein.
4. That the Judgement of this Honourable Court made on 7th day of February, 2018 and ALL the other consequential and subsequent Decrees, Orders, Notices and other processes issued or made in purported execution of the said judgement be set aside and reviewed for the court to rehear the case or make such orders in regard to the rehearing as it thinks fit.
5. Costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of PETER MOLINKE SEMEYIAN the 4th Defendant herein where he explains that the Plaintiff obtained judgement against the Applicants who are the registered owners of land parcel number Kajiado/Olchoro Onyore/746 hereinafter referred to as the 'suit land', in error, as they were never served with any summons to enter appearance, pleadings and/or court documents whatsoever. He avers that the Applicants intend to put the process server on the witness box for cross examination to prove that they were not served at all and that the process server intentionally misled the court. He deposes that there was a delay in filing this Application as the Applicants only learnt of the Judgement of this Honourable Court dated the 7th February, 2018 sometime in July, 2020 when there was a threat of revocation of their title deed and hence instructed their Advocate on record to file the instant Application as their last chance to save their property. He denies knowledge of the Application dated the 11th June, 2018 and insist they never instructed an Advocate to handle any aspect of the matter which they did not know of its existence. Further, the said Application was supported by the affidavit of Tananko Ole Kwena who never informed them of the suit since, they are not very close and neither did they authorize him to appear, plead or act on their behalf. He states that the Applicants deny that the Plaintiff's use of the suit land was so visible

and apparent that it gave notice to the legal owner that someone may assert claim. He confirms that the Applicants legally bought the suit land on 27th May, 2010, from the 1st Defendant and have been in full possession and control of it and at no time did the Plaintiff use the said land in a manner that gives notice to them that someone may assert claim. Further, that at the time they purchased the suit land, the Plaintiff was not in possession. He reiterates that there was no actual, visible, exclusive, open and notorious possession by the Plaintiff and therefore adverse possession could not succeed. Further, that in any event adverse possession cannot succeed if the Plaintiff is in possession with the permission of the owner in accordance with provisions of an agreement of sale as he alleges. He insists their Defence raises triable issues and they should not be condemned unheard.

The Plaintiff opposed the application and filed a replying affidavit where he deposes that the Applicants' motion is null and void having been filed by an advocate purporting to act for them whilst he is not properly on record and not competent to represent as well as address the court at all. He contends that the matters raised in the application are *res judicata* as they have already been canvassed and determined by a court of competent jurisdiction. He explains that the Defendants had filed a Notice of Motion application dated the 11th June, 2018 seeking a stay of execution as well as setting aside of the judgement dated 7th February, 2018 and consequential orders thereto. Further, he opposed the application and filed a replying affidavit and the Court rendered its Ruling on 25th November, 2019. He avers that the application is barred in law, vexatious and an abuse of the court process. Further, the application has not been made in good faith and filed grossly inordinately late; while the Applicants do not point out particular portion of the judgement that needs review. He reiterates that the judgement is well reasoned and the Applicants have not demonstrated they discovered new evidence which was not within their knowledge and neither is there an error apparent on record. He states that there is no meritorious Defence and the Application does not meet the condition and threshold for grant of the order of review.

The 4th Defendant PETER MOLINKE SEMEYIAN filed a supplementary affidavit reiterating their claim and insists the error apparent on the face of the record necessitates this review as the court relied on the Affidavit of Service by the Process Server one Joel Mburu Nganga who intentionally gave false information and misled the court by stating that he served them with summons to enter appearance including pleadings. He deposes that the Applicants seek a chance to be heard and deny authorizing any person nor advocate to file any Review Application on their behalf.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 7th September, 2020 including the respective affidavits and rivalling submissions, the issues for determination are:

- Whether this application is *res judicata*
- Whether the judgement delivered on 7th day of February, 2018 should be set aside and the process server Joel Mburu Nganga cross examined.

As to whether this application is *res judicata* and if the judgement delivered on 7th day of February, 2018 should be set aside and the process server Joel Mburu Nganga cross examined. The Applicants in their submissions, reiterated their averments as contained in the supporting including supplementary affidavits and insist that adverse possession cannot succeed if the Plaintiff was in possession of the suit land with permission of the owner or in accordance with provisions of an agreement of sale as he alleges. They further submit that the error on the face of record necessitates a review of the judgement and the process server has to be cross examined. Further, that they should not be condemned unheard.

The Plaintiff in his submissions insist the delay in filing the application is inordinate and matters raised in the said application are *res judicata*. He further submits that an advocate represented the interests of the Defendants as there is a Notice of Appointment dated 31st May, 2018 and the Applicants have no excuse for not defending the suit. Further, that proper service was effected upon the Defendants and there is no triable defence. He avers that the application is not merited. To support his averments, he has relied on very many authorities which I have enumerated hereunder: **Independent Electoral and Boundaries Commission V Maina Kiai & 5 others (2017) eKLR; Herderson V Herderson (1843) 67 ER 313; Michael Kungu Kigia V Agricultural Finance Corporation & 6 Others (2019) eKLR; E. T V Attorney General & Another (2012) eKLR; Maithene Malindi Enterprises Limited V Kaniki Karisa Kaniki & 2 Others (2018) eKLR; Nairobi City Council V Thabiti Enterprises Limited (1997) eKLR; Parliamentary Service Commission V Martin Nyaga Wambora & Others (2018) eKLR; Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2014) eKLR; Leah Wambui Kuria & 2 Others V Jane Muchunu & 2 Others (2018) eKLR; Hezekiah O Obunja V Kuguru Food Complex Ltd Nairobi HMCA No. 400 of 2001; Kinluc Holdings Ltd V Mint Holdings Ltd & Another (1998) eKLR; Cooperative Insurance Company Limited V Secucentre Limited & Another (2016) eKLR; Kodak Kenya Limited V Edward Kamau Ndungi T/A Edkan Photo Studio (2005) eKLR; Shadrack Arap Baiywo V Bodi Bach (1987) eKLR; Kenya Orient Insurance Limited V Cargo Stars Limited & 2 Others (2017) eKLR; Stephen Wanganga Njoroge V Stanley Ngugi Njoroge & Another (2017) eKLR; Kingsway Tyres & Automart Ltd V Rafiki Enterprises Ltd (1996) eKLR; K- Rep Bank Limited V Segment Distributors Limited (2017) eKLR; Kenneth K. Mwangi V City Council of Nairobi & 2 Others (2017) eKLR; Scooby Enterprises Ltd V Kisii County Assembly Service Board (2016) eKLR; Derby Registrars Limited V Kenya National Assurance Co. (2001) Ltd (2019) eKLR; Nicholas Kiptoo Arap Korir Salat V Independent Electoral & Boundaries Commission & 6 Others (2013) eKLR; Johanna Muturi Njogo V Joseph Njogo Mathenge & 2 Others (2008) eKLR; Phillis Mbogo V Charles Muriithi & Another (2014) eKLR; Salesio Njiru Njeru V Njiru Mbogo (2016) eKLR; and African Inland Church – Kenya (Registered Trustees) V Catherine Nduku & 12 others (2017) eKLR.**

Before I proceed to make a determination of the issues above, I wish to provide a brief background of this matter. As per the court records the Defendants were all served with the Originating Summons, Supporting Affidavit and Verifying Affidavit on 21st May, 2012 by one process server Joel Mburu Nganga who filed an affidavit of service sworn on 4th July, 2012. After which an interlocutory Judgement in default of appearance was duly entered on 8th July, 2012 when this matter was still in Machakos ELC and matter was set for formal proof.

Further, this matter proceeded for formal proof on 15th December, 2014 but since the file had been transferred to this Court from Machakos ELC, on 13th July, 2017, the court directed that this matter to proceed de novo. The matter then proceeded *de novo* on 2nd November, 2017 after which judgment was entered in favour of the Plaintiff on **7th February, 2018**, which judgement is the subject of the application herein. I note the Defendants were initially represented by the firm of messrs Agina & Associates who made an application dated 11th June, 2018 seeking to set aside the said judgement. As per the records, on 4th October, 2018, the 1st, 3rd and 4th Defendants were present in court and intimated that the 2nd Defendant was in hospital. Further, on the said date the 1st Defendant informed court that their lawyer was late and their application seeking to set aside the judgement adjourned for hearing. The court on 25th November, 2019, declined to set aside the ex parte judgement and dismissed the application. The 2nd, 3rd and 4th Defendants have now filed the instant application denying instructing messrs Agina & Associates to defend them and seeking to set aside the judgement dated the 7th February, 2018 and cross examine the process server. The Plaintiff has vehemently opposed the application and insist the Application is *res judicata*, has been filed late and is an abuse of the court process. Order 10 Rule 11 of the Civil Procedure Rules stipulates that; **‘where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.’**

In this instance, the 2nd, 3rd and 4th Defendants have not furnished court with any affidavit from the firm of messrs Agina & Associates to confirm he was not acting for all of them. Further, they have also not filed an affidavit from the 1st Defendant to confirm he did not have instructions to act on their behalf. As I indicated earlier, on 4th October, 2018, the Applicants herein except for 2nd Defendant had actually appeared in court together with the 1st Defendant who confirmed their lawyer was late. As per the court records, the said Law firm is still on record for them. The current advocate did not file any application to seek to take over the matter from messrs Agina & Associates and I find that he is hence not properly on record. The 2nd, 3rd and 4th Defendants claim they were not served with summons to enter appearance and insist their Defence raises triable issues. On perusal of the affidavit of service, the process server outlined how he served the Defendants and the location where they were served namely Corner Baridi in Ngong. The Defendants have denied service but not indicated whether they reside in Corner Baridi or not. In the case of **Shadrack Arap Baiwo V Bodi Bach (1987) eKLR** the Court of Appeal while dealing with an issue of service held thus: **‘There is a presumption of services as stated in the process server’s report and the burden lies on the party questioning it to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.’** It is worth noting that in the previous application to set aside Judgement, the Defendants never sought leave to cross examine the process server and now are insisting in doing so since this Court had highlighted this, in its Ruling. To my mind, I find that the 2nd to 4th Defendants are not being candid with the court as they were served with summons to enter appearance but have brought the same application twice.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to *res judicata*: **‘No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’**

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** the Court referred to the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

‘in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.’

Based on the facts as presented while relying on the above cited legal provisions as well as associating myself with the quoted judicial authorities, I find that the issues in the application dated 11th June, 2018 are still substantially the same issue in the instant application. I further find that the 2nd to 4th Defendants’ claim is still the same but the only thing they have done is to cloth the prayers sought in a different apparel, however, if the same is dissected it remains one and the same. The Defendants have now merely insisted that they seek to cross examine the process server which prayer they never sought earlier. I find that the issue of review or setting aside of the impugned judgement and stay of execution was already heard and determined by a Court of competent jurisdiction. It is against the foregoing that I find this instant application is indeed *res judicata* and to borrow the words of Kuloba J, that this is indeed a cosmetic facelift to give the application a different face.

As to whether I should set aside the impugned judgement delivered on 7th February, 2018 and if the process server should be cross examined, I will make reference to the case of **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75 at page 76 C and E** where the court held as follows:-

‘There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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.’

Since I have already held that this instant application is *res judicata* as I had already dealt with the issue earlier in my Ruling dated 25th November, 2019 and in view of the fact that setting aside is discretionary, I opine that this will incur an injustice to the Plaintiff as the Decree had already been executed. Further, the 2nd to 4th Defendants chose not to defend the suit herein but seek to stretch this matter. They have sought for review of the judgement after two years and do not explain the cause of delay. I opine that litigation must come to an end. I note the Plaintiff confirmed in his submissions that the Land Registrar wrote to the Defendants in 2018 informing them of this court’s judgment and cancellation of their title but they have chosen not to inform the court clearly when they became aware of this court’s judgement. They insist the Plaintiff has not fulfilled the requirements of adverse possession as he was a purchaser but I beg to disagree and refer them to the case of **Public Trustee -v- Wanduru, (1984) KLR 314 at 319** where Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a

person in whose favour the period of limitation can run.

In this instance the Plaintiff had entered into a Sale Agreement with the 1st Defendant in 1988 and took possession of the suit land; but the 1st Defendant later sold the suit land to the 2nd, 3rd and 4th Defendants in 2010 when the period of limitation had elapsed.

Based on my analysis above while relying on the quoted legal provisions and in associating myself with the cited decisions, I find that there is no evidence of triable issues raised to warrant the setting aside of the judgment. Further, I note that the Plaintiff had already executed the Decree herein and there is inordinate delay by the Defendants in filing this application.

In the circumstance, I find the Notice of Motion application dated 7th September, 2020 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE