



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 197 OF 2017

GEORGE STEPHEN MACHARIA.....PLAINTIFF

-VERSUS-

ISSA NJAWIRI JABIRI 1ST DEFENDANT

STANLEY NDIINGURI WANJIRU 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

(Application by the 2nd defendant to set aside an ex parte judgment; applicant claiming that summons to enter appearance were not served; plaintiff having applied to serve summons through a newspaper advertisement; applicant pointing out that the names used in the suit and in the advertisement are not the proper names of himself and the 1st defendant; matter proceeding and judgment entered for the plaintiff; plaintiff proceeding to execute the judgment and transferring the land in dispute to himself following the judgment; clear that the names of the 1st and 2nd defendant were different from the names noted in the title sought to be impugned by the plaintiff; summons served upon parties who were wrongly described; applicant demonstrating a good defence that he ought to be allowed to ventilate; application allowed; judgment set aside; further order that the title of the plaintiff be revoked and title to revert as it was before the suit was filed)

1. The application before me is that dated 1 February 2021 and filed on 3 February 2021 by the 2nd defendant. The main prayer sought is the setting aside of the ex parte judgment herein and for the applicant to be granted unconditional leave to file a statement of defence and defend the suit. The applicant also wants orders to have the plaintiff/respondent restrained from interfering with the land parcel Kwale/Diani Settlement Scheme/397, which is the subject matter of this suit, until the hearing and final determination of the case. The application is based on the grounds inter alia that the defendants were not properly served with summons and further that the proceedings against the 1st defendant are a nullity as he is deceased.

2. To put matters into context, this suit was instituted by way of a plaint filed on 6 June 2017. The defendants named were Issa Njawiri Jabiri, Stanley Ndinguri Wanjiru and the Chief Land Registrar, as the 1st, 2nd and 3rd defendants respectively. The plaintiff pleaded that in the year 1978 he was allocated the plot No. 397 situated in Diani Settlement Scheme Kwale (the suit land) by the Ministry of Lands through Settlement Fund Trustee. He averred that he accepted the offer and paid the requisite fee and was issued with a certificate of outright purchase pending the issuance of title deed. He pleaded that on or about March 2015 whilst he was pursuing the issue of transfer with the Ministry of Lands, he discovered that the title deed of the suit land was on 17 December 2002, issued to the 1st defendant, and subsequently transferred to the 2nd defendant on 19 November 2009, and a title deed issued to him. He claimed that the 1st defendant's title was fraudulent. In the suit, he asked for judgment against the defendants for *inter alia* a declaration that title issued to the 1st defendant is null and void on account of fraud and that the 1st defendant could not pass a good title to the 2nd defendant. He also asked for an order for the 3rd defendant to cancel or expunge from its records the title held by the 2nd defendant, and title be transferred to him.

3. On 19 June 2017, the plaintiff took out summons to enter appearance against the 1st and 2nd defendants. The summons were addressed to Issa Njawiri Jabiri and Stanley Ndinguri Wanjiru.

4. On 4 July 2018, the plaintiff filed an application of even date, where he sought orders *inter alia* that summons be re-issued, and that he be granted leave to serve the 1st defendant 'Issa Njawiri Jabiri' and the 2nd defendant 'Stanley Ndinguri Wanjiru' with summons to enter appearance and all the entire pleadings by way of substituted service through advertisement in any of the Kenyan local dailies either the Standard Newspaper or the Daily Nation. It is instructive to note that up to this time the plaintiff was acting in person. On 18 October 2018, when the application came up before court, a person by name of Thomas Muli Munyao, filed a notice that he is acting as an appointed attorney of the plaintiff. The court on the said day did allow the application to serve by advertisement. On 24 October 2018 an advertisement

was placed in the Daily Nation newspaper serving 'Issa Nyawiri Jabiri' and 'Stanley Ndinguri Wanjiru.' That advertisement gave notice of an application dated 4 July 2018 which application could be collected from the offices of Muttisya & Co. advocates, and further notified the named defendants to enter appearance in 21 days. When the advertisement was placed, Muttisya & Company Advocates were not on record for the plaintiff, as the said firm filed a notice of appointment of advocate on 15 November 2018. No appearance was entered, and on 16 November 2018, a request for interlocutory judgment was filed. Interlocutory judgment was entered on 29 November 2018 and the matter was subsequently set down for hearing ex parte. The case proceeded for hearing on 25 April 2019 before my predecessor, Omollo J, when the plaintiff testified in support of his case. Judgment was thereafter delivered on 31 July 2019. The court entered judgment for the plaintiff as his evidence was uncontroverted. It is this judgment that the 2nd plaintiff/applicant seeks to set aside.

5. The application is based on several grounds and is supported by the affidavit of the applicant. He asserts that he is the legal owner of the suit land and that he has been the registered proprietor of the suit land from the year 2009 to the year 2020 when his title deed was cancelled by the order of this court. He further stated that the plaintiff is in the process of subdividing the land with the intent of selling it to third parties in order to benefit from the illegal acts perpetuated throughout these proceedings. He contended that the interlocutory judgment was irregularly and illegally entered because the court had directed service of summons through substituted service, however, fresh summons were not extracted by the plaintiff for service, yet the summons had expired. The applicant also claimed that there is no record of the plaintiff extracting fresh summons to enter appearance to be served on the defendants after expiry of the ones issued upon filing this suit. The applicant further averred that this court directed that service of summons to enter appearance should be through substituted service however, the Nation newspaper advertisement that appeared on 24 October 2018, did not refer to summons to enter appearance, but rather stated that the defendants should take note of an application dated 4 July 2018 that had been filed. He pointed out that their names as they appear in the green card is not similar to the names appearing in the pleadings as defendants nor in the newspaper advertisement. He demonstrated that the proper name of the 1st defendant is Issa Mjawiri Jabiri and not Issa Nyawiri/Njawiri Jabiri, while his proper name is Stanley Ndinguri Wanjiku and not Wanjiru. He claimed that the plaintiff deliberately used other names despite being in possession of the green card. He further claimed that according to the advertisement that appeared on the 24 October 2018, the said application was to be picked from a firm of advocates, yet from the record before this court, the firm of advocates filed a notice of appointment on the 15 November 2018, and as such, were not on record at the time of the advertisement. He also claimed that the plaintiff had sued the Chief Land Registrar whose offices are in Nairobi, yet he served the office of the Kwale Land Registrar who was not a party to this proceedings. He further stated that the 1st defendant is deceased and any proceedings against him were a nullity. He stated that he is keen to defend this suit and that he has a valid defence to the suit which raises triable issues and that he should be allowed to ventilate his case. He mentioned that he stands to suffer irreparable harm as any continued dealings over the suit land would greatly interfere with his proprietary rights. He averred that it is a cardinal principle in law that a party should not be condemned unheard.

6. The applicant deposed that he has been in possession of the suit land since 2004 when he first purchased two and a half acres out of the five acres from the 1st defendant at a consideration of Kshs. 100,000,000/=. He further deposed that at the time of purchase, the 1st defendant was the absolute and indefeasible owner of the suit land and the registered owner. He deposed that in the year 2009, the 1st defendant decided to sell the entire parcel of land as he wanted to relocate to Kilifi. He deposed that they executed the sale agreement for the entire parcel of land and thereafter the 1st defendant executed the transfer in his favor, and he, the applicant, successfully became registered as the new proprietor. He deposed that before the sale in the year 2004, the 1st defendant had been in occupation of the suit land from the year 1970 when he took possession from one Ali Mwachivirima.

7. The applicant deposed that although the plaintiff claims that he was allocated the suit land in 1977, he did not place any restriction on the land during the period of issuance of the title deed in favor of the 1st defendant, and he also did not place any restriction when he was transacting with the 1st defendant. He deposed that on 19 November 2009 he was issued with the original title deed and he has been enjoying quiet and uninterrupted possession. He deposed that after acquiring title, he erected a perimeter wall around the premises, built permanent structures, and sunk a borehole. He also employed a farmhand who has been on the parcel for years. He deposed that though the plaintiff alleges that he was allocated the suit land in 1997, no explanation has been presented to the court to show why the plaintiff never took occupation of the suit land, 23 years later. He stated that the 1st defendant was issued with the original title deed of the suit land in the year 2002, and the plaintiff presented this case in the year 2017, 15 years after the title deed was issued to the 1st defendant. He deposed that the 1st defendant had been living on the suit land for over 30 years before he transferred the suit land to him. He added that contrary to the plaintiff's assertion, the initial allottee of the suit land by the Settlement Fund Trustee was Ali Salim Mwachivirima who was allocated the suit land in the year 1977. He further deposed that it is within his knowledge that Mr. Mwachivirima issued the 1st defendant with all the relevant documents to effect transfer into his name.

8. He deposed that the plaintiff is aware that the 1st defendant is deceased but nevertheless proceeded without disclosing this fact to the court. He pressed that he intends to raise a preliminary objection to the whole suit as the plaintiff is barred from coming to this court over 40 years from when the cause of action arose. He further deposed that he has a reasonable defence and counter claim against the plaintiff, and as such, the matter should proceed to be heard on its merits once he is served with proper summons.

9. Counsel filed written submissions and I have taken note of these. I will be brief in my delivery because it is clear in my mind that the application must be allowed.

10. The first contention of the applicant is that service was improper and I agree. Putting aside the technical issue of whether or not there were valid summons at the time that the advertisement in the newspaper was placed, it is clear to me that there was a clear misdescription of the parties to this suit, who were named as "Issa Njawiri Jabiri" and Stanley Ndinguri Wanjiru. The plaintiff himself presented a Green Card of the suit land showing the first registered proprietor to be "Issa Mjawiri Jabiri" and the second registered proprietor to be "Stanley Ndinguri Wanjiku." Now "Njawiri" is not the same as "Mjawiri" and "Wanjiru" is certainly not "Wanjiku." Summons, if at all there were any proper summons, were thus not addressed to the correct parties. The wrong naming of the parties, given the circumstances herein, and especially given that the summonses were not personally served (so as to argue that it was a mere misnomer/misinterpretation but the correct party was served), is in my view a reasonable and solid ground upon which the ex parte judgment herein can be set aside. I do not know whether the misdescription was deliberate, so as to steal a march on the 1st and 2nd defendants, but what I am not in doubt of, is that the judgment was entered pursuant to a misdescription of the parties that led to an injustice. A person named "Wanjiku" seeing the advertisement, especially since the advertisement did not give context to the case or mention the land in dispute, would be excused from not

thinking it referred to him, if the advertisement read, “Wanjiru”, for in Kenya, these are two completely different names. This cannot be said to be a regular judgment and must be set aside *ex debito justitiae*. So that the misdescription does not continue, I order that the names of the 1st and 2nd defendants be amended to read “Issa Mjawiri Jabiri” and “Stanley Ndinguri Wanjiku”. The plaintiff to effect the amendments within 14 days of this ruling, and if he does not do so, then the plaint be struck out with costs and it be considered that there is no suit filed by him. I am aware that there is an allegation that the 1st defendant is deceased. I cannot dwell too deeply into that at this juncture for I have not been shown any certificate of death.

1. Even if I was to assume that the judgment was regular, which it was not, I would still set aside the judgment for the applicant has demonstrated that he has a good defence and he needs to be given a chance to ventilate it. In the case of *Patel v East Africa Cargo Handling Services Ltd [1974] E.A. 75*, the Court of Appeal, Duffus J, put the point succinctly as follows at page 76:-

“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. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”

11. The applicant has asserted that he has good title to the land. He ought to be allowed to ventilate that defence. That is another reason why the judgment needs to be set aside.

12. There is the prayer for injunction sought by the applicant. I think the applicant deserves this prayer. He has placed before this court sufficient material to demonstrate that it is him who has been in possession of the land throughout and even before this case was commenced. I am indeed at a loss as to why the plaintiff claimed that the defendants cannot be traced and that they need to be served by substituted means, yet the property was already developed by the applicant complete with a wall and gate. I am not in doubt that it is the applicant who was in possession of the land before the case was filed. That possession needs to be protected and retained by him unless and until the plaintiff succeeds in this suit. The plaintiff is therefore hereby barred from entering, being in possession of, dealing or entering into any dealings, or in any other way interfering with the possession of the applicant on the suit land until the completion of this suit.

13. I observe that following the judgment, the plaintiff proceeded to register himself as the proprietor of the suit land. That must be cancelled so that the proprietorship of the suit land reverts back to what it was before the judgment was made. The plaintiff can then litigate on the title as it was when he filed suit, and if he will be successful, he can have title registered in his name. I thus order the Land Registrar Kwale, to proceed and cancel the entry that registered the plaintiff as the registered proprietor of the land parcel Kwale/Diani Settlement Scheme/397 and further cancel any title held by the plaintiff. The register should revert back to the way that it was before the filing of this suit.

14. The only issue left is costs. I think there was calculated mischief on the part of the plaintiff. He will bear the costs of this application.

15. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

In the presence of:

Mrs. Kihika for the applicant/2nd defendant

Mr. Odhiambo for the plaintiff/respondent

Court Assistant; Wilson Rabong’o