



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 809 OF 2017**

**JOYCE MUKONYO MUTINDA .....PLAINTIFF/RESPONDENT**

**VERSUS**

**FREDRICK OUMA OGOL.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated 3<sup>rd</sup> September 2020, by the 1<sup>st</sup> Defendant/ Applicant seeking for orders that;

- 1. The Honourable Court be pleased to set aside Ex Parte Judgment entered herein on 5<sup>th</sup> March 2020, against the 1<sup>st</sup> Defendant/ Applicant and all consequential orders and proceeding thereto.***
- 2. The Applicant be granted leave to file a Defence out of time or in the alternatively the attached draft defence be deemed as properly filed after the payment of the requisite Court fees.***
- 3. The cost of this Application be provided for .***

The Application is premised on the grounds that the 1<sup>st</sup> Defendant/ Applicant is the legal owner of the suit property and has always been in occupation. That the 1<sup>st</sup> Defendant/ Applicant was and is still a member and shareholder of **Mahira Housing Company Limited**, the Company which bought the suit property and subdivided it to members and not **Gatundu Nyakinyua Company Limited**, as alleged by the Plaintiff/ Respondent. That **Mahira Housing Limited**, was only selling the parcel of land to its shareholders way back in 1989. Further that the suit was initiated against the 1<sup>st</sup> Defendant/ Applicant without him being notified or served with the suit paper. That on **5<sup>th</sup> March 2020**, the Court issued an **Ex parte Judgment** and subsequent orders which were unfair and amounts to injustice. That the Plaintiff/ Respondent misled the Court that the parties had been served and if the judgment issued against the 1<sup>st</sup> Defendant/ Applicant is extracted and executed, he would be occasioned loss and will suffer injustice.

In his Supporting Affidavit, **Fredrick Ouma Ogol**, averred that he has never been served with the suit papers and the averment by the process server are false. That the process server alleges to have served him with the suit papers in **Githurai Kimbo**, but that he has never resided in the said place and the said allegations are false as on that day, he was in India with his wife wherein they were both getting treatment and he would seek to have the process server cross examined. That he learnt of the matter when it was brought to his attention by the Investigating Officer, from Thika CID, when he had lodged a complaint after he was informed that the green card to his property could not be traced and what was in the parcel showed a different owner and he equally reported the matter to the police to be investigated.

That on **7<sup>th</sup> June 2016**, through his Advocates he wrote to the Land Registrar requesting for registration of a restriction. That by virtue of his membership in **Mahira Housing**, he was issued with plot share certificate **No. 1383 dated 12<sup>th</sup> June 1989 in respect of L.R 10901/37** located in **Kahawa South of Ruiru**. That he was the original allottee of **L.R 1090/37**, which culminated to **L.R Block 10(Mahira) 1251** after the subdivision. That he was issued with a title deed on **20<sup>th</sup> March 2013**, after a transfer was done from Mahira Housing Company Limited. That on **5<sup>th</sup> November 2015**, he conducted a search on the suit property and an official search confirmed he was the registered owner. Further that the purported registration of **Samuel Mbauni Gachai on 11<sup>th</sup> September 1996**, as being an owner who later transferred to the Plaintiff/ Respondent is fraudulent and illegal.

That he was never accorded an opportunity to challenge and controvert the averments in the suit papers as the Plaintiff/ Respondent's documentations are marred with swearing of false affidavits of service.

The Plaintiff/ Respondent filed a Replying Affidavit sworn on **10<sup>th</sup> December 2020**, by **John Muturi Njoroge** her Advocate on record who averred that the Summons and Plaint were duly served upon the Defendant/ Applicant who failed to enter appearance. That the Ex Parte Judgment issued by the Court was procedural as the Plaintiff/ Respondent filed an Affidavit of service dated **9<sup>th</sup> May 2018**, proving that the Defendant/ Applicant had been served. That the Plaintiff/ Applicant was registered as the owner of the suit property upon acquiring it vide a sale agreement from the registered owner **Samuel Mbauni Gachahi**, who averred that he had procured the same by virtue of being a member of **Mahira Housing Company limited**. That he was issued with a title deed on **11<sup>th</sup> September 1986**, and the same was transferred to the Plaintiff/ Respondent. That the inclusion of **Gatundu Nyakinyua Company Limited** is a typographical error.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the Application, the Affidavits, the annexures thereto and the relevant provisions of law and finds that the issue for determination is **Whether the 1<sup>st</sup> Defendant/ Applicants is entitled to the orders sought**.

The 1<sup>st</sup> Defendant/Applicant has sought for the setting aside of the Ex Parte Judgment entered **5<sup>th</sup> March 2020**, against him and further that he be allowed to file his Defence. The guiding provisions of law with regards to setting aside Ex Parte Judgment are to be found under the provisions of **Order 12 Rule 7 of the Civil Procedure Rules** which provides:-

**"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

**"The court may set aside an order made ex parte"**

In the case of **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd ...Vs... Augustine Kubede (1982-1988) KAR page 1036**, the Court of Appeal held that:

**"The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani -v- MC Connell (1966) EA 545 where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."**

From the above provisions of law, it is very clear that the Court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. In deciding the same, the Court is guided by the decision of the Court of Appeal in the case of **James Kanyita Nderitu & another ...Vs... Marios Philotas Ghikas & another [2016] eKLR**, where the Court of Appeal stated thus:

**"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.**

**In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."**

The Court must therefore determine whether or not the Judgment entered was regular or irregular. The 1<sup>st</sup> Defendant/ Applicant has denied ever being served with the **Summons to Enter Appearance**. It is his contention that at the time the process server alleges to have served him, he was not in the Country. To prove his assertion, he has produced in evidence a copy of his passport. The Court has seen the said passport and notes that there is a stamp dated **5<sup>th</sup> February 2018**, indicating that the 1<sup>st</sup> Defendant/ Applicant arrived in **Mumbai, India** on the said date and further a stamp indicating that he returned to the Country on **8<sup>th</sup> April 2018**. The Court has also perused the Affidavit of Service sworn on **9<sup>th</sup> May 2018**, by the process server alleging that the 1<sup>st</sup> Defendant/ Applicant was served with the pleadings on **19<sup>th</sup> March 2018**. There is no way this could have been possible as it is clear that the 1<sup>st</sup> Defendant/ Applicants was not in the Country within the said month.

The Court has further scrutinized the sworn Affidavit of service by the process server and notes that the same does not indicate how the

said process server knew that the 1<sup>st</sup> Defendant/ Applicant lived in **Githurai Kimbo**, nor does it state how he was able to identify the 1<sup>st</sup> Defendant/ Applicant. There is therefore no doubt in the Court's mind that the said Affidavit of Service was based on lies and therefore the Judgment that was entered on the basis of the said Affidavit of Service was then irregular. This Court will therefore not set aside the Judgment as a matter of discretion, but ex debito justitiae, for a court should never countenance an irregular judgment on its record.

Having set aside the Judgment, then it would only suffice that the 1<sup>st</sup> Defendant/Applicant should be allowed to defend the suit and thus file his Defence.

The Upshot of the foregoing is that the Court finds that the 1<sup>st</sup> Defendant/ Applicant is entitled to the orders sought. Consequently, the Court having carefully read and considered the **Notice of Motion Application** dated **3<sup>rd</sup> September 2020**, the Affidavit in support, the written submissions and the relevant provisions of law finds that the said application **is merited**, and the same is allowed entirely with costs to the Applicant.

It is so ordered

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**