



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 95 OF 2018**

**NELLY WANJIRU NJENGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ROBINSON MAINA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOYCE WANJIRU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**MR. NJENGA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**JAMES MUNGAI.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

There are **two** Notices of Motion Applications for determination. The first one is the one dated **3<sup>rd</sup> July 2020**, by the Defendants/ Applicants and the **2<sup>nd</sup>** one is the one dated **1<sup>st</sup> October 2020**, by the Plaintiff.

In the Application dated **3<sup>rd</sup> July 2020**, the Defendants/ Applicants have sought for orders that;

- 1. That the Law Firm of Mburu Machua & Company Advocates be allowed to come on record for the Applicant herein.***
- 2. That the Judgment delivered on 27<sup>th</sup> February 2020, and the resultant Decree be reviewed and / or set aside.***
- 3. That costs be provided for.***

The Application is premised on the grounds that the Judgment was substantially based on the evidence as submitted by the Plaintiff when the matter proceeded via formal proof, although the Plaintiff/ Respondent misled the Court as to service on the Applicant, who was the **4<sup>th</sup>** Defendant. That the **4<sup>th</sup>** Defendant/ Applicant was never served with any documents by the Plaintiff/ Respondent or her Advocate. Further, that by the time of institution of this suit, there was already another pending matter before Court over the same subject matter and involving the Plaintiff and the Defendant and the said evidence therefore misled the Court into making the current orders. That the Defendants/Applicants are facing eviction and the subject orders are greatly prejudicial to him.

In his Supporting Affidavit, **James Mungai**, the **4<sup>th</sup>** Defendant/Applicant, averred that the Plaintiff/ Respondent who is his mother never served him with the pleadings or other documents. That he was served with the Judgment on **26<sup>th</sup> June 2020**, and ordered orally to vacate within 30 days. That Judgment was entered for the Plaintiff/ Respondent on the belief that he had been served and failed to enter appearance and it is therefore desirable that the Judgment be reviewed.

The Application is opposed and **Nelly Wanjiru Njenga**, the Plaintiff/Respondent, swore a Replying Affidavit on **1<sup>st</sup> October 2020**, and averred that she filed the instant suit in the year **2018**, and her then Advocates on record ensured that the **4<sup>th</sup>** Defendant/ Applicant was served together with other Defendants. That her then Advocates instructed a Court process server, who effected service on all the Defendants/Applicants herein and that on the said date, she was physically present and she accompanied the process server and pointed out the Defendants, who had encroached onto her land. Further that the Defendant/ Applicant has not challenged the details of service provided on the Process Servers Affidavit of Service and merely seeks to set aside the entire process, without providing clarification. That the **4<sup>th</sup>** Defendant/ Applicant is her son, and he was well aware of the matter and has physically assault her and his father. Further, that he is a liar and is encroaching on her parcel of land without any lawful justification.

That the suit property is in her name and she is the bonafide registered owner of the suit property and the **4<sup>th</sup>** Defendant/ Applicant has brought other Defendants into the property to disturb her peaceful enjoyment of the same without any lawful reason. She further averred

that she has been advised by her Advocates on record, which advice she believes to be true that the 4<sup>th</sup> Defendant/ Applicant ought to have attached a draft Defence to his Supporting Affidavit to enable the Court appreciate whether his Defence raises triable issues or not, and which failure is fatal to his Application. That the 4<sup>th</sup> Defendant/ Applicant is not genuine in his attempts to set aside the Judgment as he cannot challenge her title.

The 2<sup>nd</sup> Application is the one dated 1<sup>st</sup> **October 2020**, by the Plaintiff/Applicant seeking for orders that;

- 1. The Honourable Court be pleased to admit the Notice of change of Advocates filed by the Law Firm of M.K Mwangi & Company Advocates and permit the Plaintiffs change of Advocates.**
- 2. That Honourable Court be pleased to order that its Decree issued in this matter be executed by way of eviction of the Defendants, their agents, servants, employees and any other person authorized by the Defendants to encroach on the Plaintiff's land from the Plaintiff's parcel of land Kabete/Kibichiko/3736.**
- 3. The Honourable Court be pleased to order that the OCS Kingero Police Station do provide security to the Auctioneer/Court Bailiff executing the orders of eviction of this Court.**
- 4. The Cost of this Application be in the cause.**

The Application is premised on the grounds that Judgment was entered on 27<sup>th</sup> **February 2020**, against the Defendants and the Decree of the Court subsequently issued. That the Defendants did not enter appearance in this suit and have not appealed against the said Judgment of the Court, despite being served with the Decree. Further, that the Defendants have continued their illegal occupation and trespass on the Plaintiff's land to wit the suit property, and they have taken to digging pit latrines, erecting containers and subletting portions of the said structures.

That the Defendants actions are an affront to the rule of law, the authority of the Court and are calculated to deny the Decree holder enjoyment of her Judgment. That since the Defendants have refused to peacefully vacate the premises, the only recourse is for the Court to permit the execution of the Decree through the eviction of the Defendants from the Plaintiff's property.

In her Supporting Affidavit, the Plaintiff, **Nelly Wanjiru Njenga**, averred that she filed the instant suit in the year **2018**, seeking for relief against trespass and encroachment of her property by the Defendants and Judgment was entered against them. That she has made a complaint to the **OCS Kingero Police Station**, who advised her to seek eviction orders to be able to assist her. That despite having a Judgment and Decree in her favour, she still does not have peaceful occupation of her property. That it is only just and fair that the Court grants the orders sought.

The Application is opposed and **James Mungai**, the 4<sup>th</sup> Defendant herein swore a Replying Affidavit on 26<sup>th</sup> **January 2021**, and averred that he was opposed to the coming on record of the Plaintiff's/ Applicant Advocates as the reason for the change is pure mischief as the previous Advocates had filed the instant suit, despite having knowledge that there was a similar suit over the same subject matter and same parties and thus guilty of abuse of the Court process. That the said Advocate was on record for the Plaintiff/ Respondent in **ELC 817 of 2017**, filed at Thika, ELC but did not bring to the Court's attention that another suit was before it, over the same subject matter. That the Plaintiff/ Respondent admits that she filed this suit in **2018**, despite knowing that there was a matter before Court over the same subject matter and that they filed the suit to overtake the Applicants suit and intended to achieve forged Return of Service as against the Applicant and only ambushed him with the Judgment. He urged the Court to allow him cross examine the process server, who is alleged to have effected service upon him. That the Plaintiff/ Respondent is mischievous and approached the Court in bad faith and has a habit of orchestrating lies. That the Plaintiff is the registered owner of the suit property but that the same was done fraudulently, as she has taken advantage of their father's senile state. Further, that the Plaintiff/Respondent subdivided the suit property illegally and the process of the illegal subdivision is being investigated.

Further that the Plaintiff/ Respondent has had the intention of selling the whole suit property, leaving them homeless and that the suit property is ancestral land wherein they have lived all their lives. That the Plaintiff/ Respondent is guilty of abuse of Court process and that he was never served with pleadings in the instant suit and Judgment was made based on the deceitful facts and execution of the same would be greatly unjust and unfair since the Plaintiff/ Respondent has come to Court with unclean hands and the Court should consider setting aside the Judgment.

The Applications were canvassed by way of Written Submissions, which the Court has carefully read and considered. The Court has also read and considered the instant Applications, Affidavits and the annexures thereto and finds that the issues for determination are;

- 1. Whether the Court should grant leave to the Plaintiffs/ Respondent's Advocates to come on record.**
- 2. Whether the Notice of Motion Application dated 3<sup>rd</sup> July 2020 by the 4<sup>th</sup> Defendant/ Applicant is merited**
- 3. Whether the Notice of Motion Application dated 1<sup>st</sup> October 2020 by the Plaintiff/ Applicant is merited**

**1. Whether the Court should grant leave to the Plaintiff's/ Respondent's Advocates to come on record**

The Plaintiff/ Respondent has through its Application sought for leave from the Court to have the **Firm of Advocates M.K Mwangi**, come on record in place of her previous Advocates. The granting of the said order have been opposed by the 4<sup>th</sup> Defendant/ Applicant, who avers that the seeking of the said orders by the Plaintiff/Respondent is only meant to escape from liability, the said Advocates having filed the

instant suit, while there is another suit pending before this Court over the same matter.

The guiding provisions of law with regards to granting of leave for an Advocate to come on record after entry of Judgment is to be found in the provisions of **Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR)** provides that:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

The rationale of the said order has been set out by the Court in the case of *S. K. Tarwadi...Vs... Veronica Muehlemann [2019] eKLR* where the Court held that;

**18. In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:....”**

Further in the case of *Connection Joint ....Vs...Apollo Insurance [2006] eKLR*;-

**“ I do accept as correct, the Plaintiff's contention that if a party who was acting for himself, subsequently appointed an advocate, the said advocate did not have to first seek leave to come on record, even if he did come on record after judgement had been passed. I say that, because of the plain meaning of the wording of Order 3 rule 9 A of the Civil Procedure Rules. Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.”**

The Plaintiff/Respondent has produced in evidence a Consent letter dated **1<sup>st</sup> October 2020**, in which the Law Firm of **S.M Gitau & Company Advocates** consenting to the Law Firm of **M.K Mwangi & Company Advocates**, coming on record for the Plaintiff/ Respondent. Bearing in mind that the mischief which was targeted by the introduction of the said Order was so as to avoid a situation in which Advocates are not paid their fees and to allow them file any objection they might have, the previous Advocates herein have no objection to the said change. Therefore, the Court cannot compel a party to be represented by a particular Advocate in the absence of any reason and thus the Court finds and holds that no proper reason has been advanced to enable it not grant the leave sought.

The leave for the said Advocates Firm of to come on record is allowed.

## **2. Whether the Notice of Motion Application dated 3<sup>rd</sup> July 2020 by the 4<sup>th</sup> Defendant/ Applicant is merited.**

The 4<sup>th</sup> Defendant/ Applicant has sought for the setting aside of the Judgment entered on **27<sup>th</sup> February 2020**, and the resultant **Decree** on the basis that he was never served with the suit papers and that was in an effort to conceal the fact from the Court that there was another Court case involving the same subject matter between the same parties.

The Plaintiff/ Respondent has reiterated the fact that the Defendants/Respondents were served with the Summons to enter Appearance. In her Replying Affidavit, the Plaintiff has contended that she was physically present when the Defendants/Applicants were served with the suit papers and she is the one who pointed out to the process server the Defendants/ Applicants.

The Court has gone through the Affidavit of Service sworn on **5<sup>th</sup> April 2018**, and notes that the said Affidavit of Service complies with the provisions of **order 5 Rule 15(1)** of the Civil Procedure Rules which provides that:-

**“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons...”**

Having perused the said Affidavit of service the Court notes that it states the manner in which the summons were served, and the address and the person Identifying the Defendants/Respondents. The 4<sup>th</sup> Defendant/ Applicant has not impugned the said Affidavit of Service. He did not seek to either cross examine the Plaintiff/ Respondent who contends that she was present when he was being serve. However, he sought to cross examine the Process Server who allegedly served him. While the same may not be fatal to the case, the Court though aware it is only required to look at a draft Defence if the Judgment that was entered was irregular, has further sought to look at the issue

wholistically.

The Court kept wondering if there is another case, why would the 4<sup>th</sup> Defendant/Applicant not Enter Appearance in this suit if he was truly indeed served with the Summons to Enter Appearance? It then dawned to the Court that the 4<sup>th</sup> Defendants/ Applicant might not have had a Defence to the said case and the Court says this as it notes that the Plaintiff/Respondent raised the issue of non filing of a Draft Defence in its Replying Affidavit. The 4<sup>th</sup> Defendant/ Applicant had an opportunity to controvert the same and or even annex a draft Defence to a Supplementary Affidavit, but failed to do so. Further in his Submissions, the 4<sup>th</sup> Defendant/ Applicant completely ignored the issue and steered clear of the draft Defence.

At this stage the 4<sup>th</sup> Defendant/Applicant was only seeking for setting aside and or review of the Court's orders and his anchor is on the fact that the instant suit is subjudice.

The Court can review its orders as per the provisions of **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules** if there is discovery of new and important evidence and or if there is an error apparent on the face of record. The 4<sup>th</sup> Defendant/ Applicant failed to annex the pleadings of **ELC 817 of 2017**. However, the Court has perused the Defence and witness statement annexed to his Replying Affidavit and notes that the property in issue in the said suit is **L.R Kabete/Kibichiko/1158 and not L.R 3736**, which is the suit property and therefore the subject matter are different. This Court cannot confirm which orders have been sought nor can it confirm whether the said suit also involved the instant suit property and therefore cannot find that the matter is subjudice, for it to make an order of review. The guiding provisions of the law with regard to setting aside of Judgment are to be found in **Order 12 Rule 7 of the Civil Procedure Rules** 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 above provision of law is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

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

The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. In the case of **Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR**, the Court held that In the exercise of this discretion the Court will consider inter alia if:

- i) ***the Defendant has a real prospect of successfully defending the claim; or***
- ii) ***it appears to the court that there is some other good reason why;***
- iii) ***the judgment should be set aside or varied; or***
- iv) ***the Defendant should be allowed to defend the claim***

Further in the case of **Mwala ...Vs...Kenya Bureau of Standards EA LR (2001) 1 EA 148**, the court stated;

***"to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record."***

Having carefully considered all the factors in this case, the Court finds and holds that the Defendants/Respondents were served with **Summons to Enter Appearance**, as the Applicant has failed to impugn the Affidavit of Service. Therefore, it follows that there is a regular Judgment on record. However, this may have not been fatal to the Applicants/ had produced a Draft Defence for the Court to establish whether the said Draft Defence raises a triable issue. Failure to file a draft Defence means that the Court can not make a determination on whether there is merit or even a need of setting aside the Judgment. The Court finds and holds that the Applicant has not met the threshold to warrant the Court exercise its discretion and set aside the Ex Parte Judgment. His Application is only merited in so far as leave is granted to the Advocates to come on record. The Court finds **no merit** in setting aside the Judgment. See the case of **Thomas Odhiambo Okello ...Vs... Peter Wanyama [2019] eKLR** where the Court held that:-

***"The 2<sup>nd</sup> issue raised in this appeal is that the trial magistrate declined to set aside the interlocutory judgement on the ground that no draft defence was annexed to the application. The principles of setting aside interlocutory judgement on ground that no defence was annexed were properly stated in Patel v East Africa Cargo handling services Ltd. (1974) EA 75."***

***In this case there is no evidence that the appellant demonstrated that he had a defence on merit or a defence at all as no draft defence was annexed to the application. This being so, the learned trial magistrate properly dismissed the application.."***

**3. Whether the Notice of Motion Application dated 1<sup>st</sup> October 2020 by the Plaintiff/ Applicant merited.**

The Court has already held that the Law Firm of **M.K Mwangi & Company Advocates** are allowed to come on record.

The Plaintiff/Applicant herein had also sought to have the Execution of the Decree carried out by way of **Eviction**. The Court having held that there is a Regular Judgment on record finds no basis to disallow the same. For proper order, peace and security of the parties, since there have been allegations of the parties squabbling, the Court will also grant the orders of Police assistance if only to ensure Order, peace and security.

Consequently, the Court finds that the Notice of Motion Application by the Plaintiff **is merited** and the orders sought therein are allowed entirely.

Having carefully read and considered both Applications, the Affidavits, the written submissions and provisions of law, the Court finds and holds that the 4<sup>th</sup> Defendant/ Applicant has not established the threshold required for the court to exercise its discretion and grant the orders sought in his application and therefore, he is not entitled to the order of setting aside the Judgment. His Application dated **3<sup>rd</sup> July 2020**, is consequently dismissed with the Court only granting leave for his Advocates to come on record.

In relation to the Plaintiff's Application dated **1<sup>st</sup> October 2020**, the Court finds it merited and the same is allowed entirely with costs to the Plaintiff/Applicant.

It is so ordered.

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

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**