



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO. 361 OF 2016

HELLEN MUKAMIPLAINTIFF/RESPONDENT

VERSUS

1. DORINA ATIENO AMOLLO... DEFENDANT/RESPONDENT

2. HAMISI BUHIRI.....DEFENDANT

RULING

The application is dated 31st March 2021 and is brought under section 1A, 1B, 3&3A of the Civil Procedure Act, order 10 rule 11, order 22 rule 22, order 51 rule 1 of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya seeking the following orders;

1. That this Honourable Court be pleased to reopen the instant suit and hear the applicant's application which is extremely urgent in nature
2. That this Honourable Court be pleased to issue an order for stay execution of its orders/decree in civil suit No.361 of 2016 pending the hearing and determination of this application.
3. That the court be pleased to set aside the ex-parte proceedings and the orders and/or decree issued by this court in this suit.
4. That this Honourable court be pleased to order that the 1st defendant/applicant be served with summons to enter appearance and defend the suit properly.
5. That this Honourable court be pleased to order this case be heard de novo.
6. The costs of this application be borne by the plaintiff/respondent

It is based on the grounds that the 1st defendant/applicant was sued alongside the 2nd defendant by the plaintiff/respondent in Mombasa Civil No. 361 of 2016. That she was never served with summons to enter appearance or any correspondence in respect to the said suit and therefore the same proceeded without her participation. That the said suit was determined in the plaintiff/respondent's favor and she has commenced execution to the 1st defendant/applicant's detriment. That the 1st defendant/applicant only became aware of the suit after the OCS Kimbeni Police Station summoned her and furnished her with warrants to the court bailiff requiring her to give vacant possession in respect to her two plots to with plot numbers MN/3243 and MN/II/9210. That the 1st defendant/applicant was never served with summons or any court papers despite the fact that she lives on the said suit land and has extensively developed the same. The plaintiff therefore has no excuse for failing to serve her. That unless this court stays execution, the 1st defendant/applicant's developments in the suit land stands to be demolished and she shall be unfairly evicted and left destitute and thereby suffer irreparable loss and damage without being heard. That it is only fair and just that this suit be re-opened and the 1st defendant/applicant be accorded a chance to be heard by this court in line with the rules of natural justice enshrined in the constitution. That unless this Honourable Court urgently grants an order for stay of execution the plaintiff/respondent will proceed with execution and the 1st defendant/applicant stands to suffer irreparable loss and damage. That this application is made in utmost good faith and the facts, nature and circumstances of this case are in favour of granting of the orders being sought for vide this application.

The respondent submitted that she is the registered owner of plots numbers 9210/II/MN CR.4005 and 3243/II/MN CR. 33607 measuring 0.0232 Ha and 0.0482 Ha respectively. (HM -1 are copies of certificates of postal search for the said properties). That she obtained judgment in this case after the applicant and the 2nd defendant failed to participate in the court proceedings, the fruits of which she was about to enjoy before the applicant showed up on a bid to unfairly prevent her enjoying after failing to participate in the original proceedings. That she

personally served applicant and the 2nd defendant herein with summons and all court processes on 30th January 2017 and 2nd March 2017 respectively and filed an affidavit of service to that effect. (HM-2 is a copy of the affidavit of service). That not only was the applicant and 2nd defendant herein served with summons and all pleadings to the case, they were also duly served with hearing notices when the application and case came up for hearing and affidavits of service to that effect filed (HM-3 are the affidavits of services). That the applicant and the 2nd defendant have twice been served with hearing notices through newspapers (Daily Nation), on 10th October 2018 and on 16th January 2019 but they have never participated in the court proceedings in any manner. That the applicant was well aware of these court proceedings since the matter began but she knowingly failed to participate in the proceedings. That the affidavit of service sworn on 3rd March 2017, a copy of which is attached herewith illustrates how she proceeded to the applicant's school, shown in the photograph annexed to her affidavit and effected service upon her through her authorized servant. That the application before court is frivolous, totally devoid of merit and an abuse of the court process. It should be dismissed with costs.

This court has carefully considered the application and the submissions therein. Order 10 Rule 11 of the Civil Procedure Rules provides that;

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

However, the Court has unfettered discretion to set aside or vary any default judgment, so long as it does so judiciously. In the case of **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** the court stated that;

"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 to it by the rules ... 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."

Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. In the Court of Appeal for Kenya *Pithon Waweru Maina vs Thuka Mugiria (1983) eKLR, Kneller JA observed as follows;*

"The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118."

The discretion here is intended to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistake or error, but is not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice see *Shah vs Mbogo (1969) EA 116,123 BC Harris J*. I have perused the application before me and the documents annexed and it is the applicant's submissions that there were never served and if their agent was served then it was improper. I find that the respondent personally served the applicant at her school as per the affidavit of service. The defendants were served severally with the hearing notices and including twice in a National Newspaper, the Daily Nation. I find the applicant failed and or refused to participate in the court process which was well within her knowledge at all material times. I find this application is not merited and I dismiss it with costs to the plaintiff/respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH OCTOBER, 2021

N.A. MATHEKA

JUDGE