



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 40 OF 2021

FRANCIS & 41 OTHERS KOIGU KIRAGURIPLAINTIFFS/RESPONDENTS

-VERSUS-

MARGARET NJOKI KARANJA.....1ST DEFENDANT/APPLICANT

AGATHA NJAMBI KARIUKI.....2ND DEFENDANT/APPLICANT

RULING

The Application

1. The applicant moved the court through Notice of Motion dated **5th July, 2021** and brought under (**Order 40 Rule 7 of the Civil Procedure Rules**) seeking the following orders:-

a) [Spent]

*b) THAT this Honourable Court be pleased to suspend the orders issued on **27th May, 2021** pending the hearing and determination of this Application.*

*c) THAT this Honourable Court be pleased to set aside and or discharge the court orders of **27th May, 2021**.*

d) THAT the costs of this Application be borne by the Plaintiffs/Respondents.

2. The application is supported by an affidavit dated **5th July, 2021** sworn by Margaret Njoki Karanja where she deposed that she learnt that this case had been filed by the plaintiffs against her and her co-applicant and that a court order issued against them on **27th May, 2021**; that the orders issued on that day were issued on the strength of an Affidavit of Service sworn by Jacob S.A Obulemire on **26th May, 2021** filed on the same day; that the court process server misled the court in his affidavit of service as it contains untruths, misinformation and inaccuracies.

3. She went on to depose that **paragraphs 3,4,5,6,7, and 8** of the affidavit are all false because the **2nd** defendant/applicant was residing with her children in Nairobi as from **7th January, 2021** and remained there until after **25th June 2021** when the doctor reviewed her condition; that it is therefore misleading for the court process server to state that the **2nd** defendant/applicant was at Lakeview Estate in Naivasha on **22nd May, 2021**; that the process server has not said that he served the **2nd** defendant/applicant's son or husband but states that he served the **2nd** defendant/applicant in person which in the applicants' view is incorrect.

4. She stated that the photograph of the **2nd** defendant/applicant as produced by the court process server was obtained from her WhatsApp profile picture; that **paragraph 10** of the affidavit which states that he called her is misinformed and to establish the truth of her allegation, she annexed call log history on her cell phone; that neither she nor her co-defendant has ever met the court process server and that the court orders of **27th May, 2021** were granted on the basis of falsehoods.

5. She finally stated that the defendants were condemned unheard and the court should set aside or discharge the court orders of **27th May, 2021**.

Response

6. The plaintiffs/respondents in opposing the application filed a replying affidavit dated **10th August, 2021** sworn by **Francis Koigu Kiraguri** on behalf of the other co-plaintiffs/respondents. He deposed that the application is unmerited as the same contains falsehoods and misinformation; that service was actually effected upon the 2nd defendant/applicant at their home in Naivasha as evidenced by the photographs taken; that the court granted the orders sought in the application as it was satisfied that they had a *prima facie* case against the defendants/applicants.

7. He further deposed that the defendant/applicants have not filed any statement of defence raising any triable issues with respect to the plaintiffs/respondents; that the defendants/applicants have not demonstrated what prejudice they are suffering or would continue to suffer by virtue of the said orders being in place; that if lifted, the plaintiffs/respondents are the ones likely to be prejudiced since they are in occupation of their respective plots whereas the defendants/applicants have failed to perform their contractual obligations with a view of transferring the same to the plaintiff/respondents.

8. He finally urged the court that the interim orders issued remain in force and the defendant/applicants file their defence for a just and expeditious conclusion of the suit.

Submissions

9. Upon perusing the file, I found that there are no submissions on record. At the discretion of this court the application was nevertheless assessed on its merits and did not suffer dismissal for want of prosecution as would have been the case in normal circumstances when submissions of an applicant are missing.

Determination

10. It is this court's opinion that the two main issues for determination are whether the applicants' are entitled to a suspension and setting aside of the orders issued on **28th May, 2021** and whether the applicants were properly served with the application dated **13th May, 2021**. In this court's view by the word "*suspension*" the applicants seek the equivalent of a "*stay*." In the case of **Masisi Mwita V Damaris Wanjiku Njeri (2016) eKLR**, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

*“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- **Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.**[Emphasis mine]*

11. It is my view that in dealing with the first issue for determination, it is vital to establish whether the applicant met the above ingredients before granting of stay of an order, that is whether the application was filed timeously, whether there is sufficient cause, whether the applicant will suffer substantial loss if the orders are not granted and the issuance of security.

12. In the instant case, the applicants filed the application on **13th July, 2021** which is about a month after the delivery of the ruling. It is my opinion that the application was filed without undue delay.

13. On the issue of substantial loss, the applicants must demonstrate that they will suffer loss if the orders are not granted. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held that:

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

14. The applicant in her supporting affidavit states that they were condemned and sanctioned unheard and are highly prejudiced by the orders. However, she has not shown the specific substantial loss she stands to suffer. It is my considered opinion that proof of substantial loss needs much more than merely stating that one will be highly prejudiced. She should have gone further to explain the nature of the loss that she is likely to suffer and therefore, the said condition, which I believe should be cornerstone of her applications for grant of a suspension of the orders, has not been fully proved. Besides, the applicants have also not clearly exhibited any probable defence to the action which would have greatly helped in their application for suspension and setting aside. The applicants do not therefore deserve the suspension order sought.

15. On the second issue for determination, it is necessary to first establish what constitutes service and whether the applicants were in fact properly served with the application.

16. **Section 20** of the **Civil Procedure Act** requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. **Order 5** provides the details regarding service. **Order 5 Rule 1(1)** requires that:

‘When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.’

17. **Rules 13** and **15** state that a person who has been served is required to sign acknowledgment of service on the original summons, and an Affidavit of Service must be consequently filed as proof that service has been effected. The Affidavit of Service should show the time when and the manner in which summons were served and the name and address of the person (if any) identifying the person served and witnessing

the delivery or tender of summons. **Order 5 Rule 12** further provides that where the defendant cannot be found service may be effected through an agent or adult member of the family.

18. In the instant suit the applicant alleges that the 2nd applicant was not personally served with the application. She contends that the allegations in the Affidavit of Service sworn by one Jacob S.A Obulemire, a process server on **22nd May, 2021** are not true since the 2nd applicant was residing in Nairobi and not Naivasha hence he could not have served her and that the photograph of the 2nd applicant as annexed in the affidavit of service was lifted from her WhatsApp profile. She avers that she was also not served and that they have never met with the process server and that the orders of injunction granted on **27th May, 2021** were issued on the strength of the affidavit of service sworn by Jacob Obulemire on **26th May, 2021**.

19. In response to the above averments by the applicants' the respondents stated that service was actually effected upon the applicants as elaborated in the affidavit of service and that the order granted was not merely on the basis of evidence of service but the court was satisfied that they had a *prima facie* case against the applicants. Further, that the applicants have not demonstrated what prejudice they would suffer by virtue of the orders being in place.

20. It is this court's opinion that in line with **Order 5 Rule 12** of the **Civil Procedure Rules**, service can also be effected upon an adult member of the family. One thing that stands out is that the applicant does not deny that the 2nd applicant's husband was present at the time of service. The process server indicated in the affidavit of service under **paragraph 8** that the 2nd applicant declined to sign on the documents as her husband instructed her not to sign before they talked to their advocate. It is a fact that at no point has the applicant denied that the 2nd applicant's husband was not present at the time of service, her only contention is that the 2nd applicant was residing with her children in Nairobi. It is therefore my opinion that from the above, there was indeed proper service of the application. On the other hand, the 1st applicant casually denies being served but fails to produce any evidence to confirm the same. It is thus my view that there was proper service upon the 1st applicant as well.

21. It is also important to note that a temporary injunction is for the greater part merely meant to maintain the *status quo* of the property as it were pending the determination of the main suit so that all parties may be granted a hearing and it is my view that no defendant stands to be prejudiced by any orders granted earlier in this suit.

22. In view of the foregoing, it is my opinion that the application dated **5th July, 2021** lacks merit and the same is hereby dismissed with costs to the respondents.

23. The parties shall comply with **Order 11** of the **Civil Procedure Rules** and the matter shall be mentioned on the **30th November 2021** for the fixing of a hearing date.

Dated, Signed and Delivered at Nakuru via electronic mail on this 14th day of October, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.