



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 12 OF 2021

(FORMERLY HIGH COURT CIVIL NO. 120 OF 2004)

JEMIMAH BITUTU GAL.....1ST PLAINTIFF/ RESPONDENT

ELIJAH NYAGAMI GAL.....2ND PLAINTIFF/RESPONDENT

VERSUS

GECHURE NYABANDO.....1ST DEFENDANT

ONGUBO OSINDI.....2ND DEFENDANT

CHRISTOPHER MAUBI OKINDO NYABANDO....3RD DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. This Ruling is in respect of the Notice of Motion filed by the 3rd Defendant on 5th February, 2021 brought pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act seeking the following orders:

i. Spent

ii. That this Honourable Court be pleased to set aside and/or vary its interlocutory judgment entered on 13th February, 2006 for the Plaintiff against the 3rd Defendant in default of entering appearance and filing a defence together with any consequential decree and orders of the court as the court may deem fit and just.

iii. The court be pleased to grant the 3rd Defendant herein leave to file his defence and defend the suit albeit out of time as per the draft defence annexed to this application that raises triable issues.

iv. The Honourable Court be pleased to grant stay of execution of the judgment and Decree entered on 17th June, 2010 and/or any further proceedings or subsequent orders there from pending the hearing and determination of this application.

v. The costs of this application be provided for.

2. The application was supported by an Affidavit sworn by the 3rd Defendant/Applicant. In the said Affidavit he deponed that he is the eldest son out of the seven children of the late Misati Nyabando who settled on a parcel of land known as NO. CENTRAL KITUTU/MWAMANWA/558 (hereinafter referred to as the suit property).

3. The Applicant averred that his late father was present during the Adjudication Process that led to the allocation of the suit property to the Plaintiff's late father and that his father was in occupation of the said parcel of land.

4. The Applicant further averred that there were previous claims by the Plaintiffs' father Gai Nyachwaya (now deceased) that the land occupied by their family formed part of the suit property. He further deponed that the said claims by the late Gai Nyachwaya were taken to a panel of elders in Land Case No. 285 of 1953 and a determination was made in favor of his late father.

5. It was his averment that in 1986 the Plaintiffs revived their claims over the land occupied by the Applicant's family. He explained that the

claims were taken to a land tribunal and an award was once more delivered in favour of the Applicant's family vide Kisii Resident Magistrate's Court Land Case No, 21 of 1987.

6. He contended that throughout the above proceedings and after the confirmation of the award, his family and that of his late father continued to occupy the suit property.

7. He further contended that the award of the 1987 has never been set aside and thus the Plaintiffs suit is *res judicata*.

8. The 3rd Defendant complained that the Plaintiff never served him with summons to enter appearance. He disputed the contents of the Affidavit of Service sworn by the Process Server one Benjamin H. O. who alleged that he served him on 13th December, 2005 at Water Bank Hotel as he stated that he has never been employed by the said Hotel.

9. He also denied that he was served with the notice of entry of judgment in this suit.

10. He expressed fears that he was likely to suffer prejudice as a result of the judgment in this suit as the District Land Registrar and the County Surveyor are using the said judgment as a basis to alter the records and eliminate the existence of Parcel KITUTU CENTRAL/MWAMANWA/557 and its resultant subdivisions as shown in their joint report dated 17th July, 2020.

11. He expressed confidence that he had a good defence which raises triable issues and urged the court to grant him a chance to be heard.

12. In response to the application, the Respondents/Plaintiffs filed a Replying Affidavit sworn by Elijah Nyagami Gai the 2nd Plaintiff/Respondent herein on 2nd March, 2021. In his Replying Affidavit the Plaintiff averred that the 1st and the 3rd Defendants were duly served with summons but they failed to enter appearance. As a result of their failure to enter appearance, the court entered a default judgment against the two while the case against the 2nd Defendant proceeded.

13. The 2nd Plaintiff averred that at the conclusion of the hearing of the case against the 2nd Defendant, the court delivered a final judgment which amalgamated the initial interlocutory judgment that had been entered against the 1st and 3rd Defendants/Applicants. It was his contention that after the court rendered its final judgment the interlocutory judgement that the Applicant wants this court to set aside ceased to exist and therefore the same cannot be subject to any legal argument. He deponed that even though the 3rd and 1st Defendants never entered appearance or filed a Defence, they were aware of the case because they variously attended court during the hearing of the case.

14. He deponed that after the delivery of the final judgement, the court proceeded to issue an eviction order which was executed by M/s MOCO AUCTIONEERS. He deponed that in the course of implementing the eviction order, the 2nd Defendant returned to this court seeking to review the judgment through a Notice of Motion which was dismissed on 14th November, 2014. The Respondent is of the view that this application was a ploy to introduce the dismissed application that was filed by the 2nd Defendant.

15. He contended that the Applicant was aware of the said application filed by the 2nd Defendant and he even attended court when the application came up for hearing. He drew the court's attention to the application filed by his brother one Richard Nyabando which application was later withdrawn. He therefore argued that the Applicant could not feign ignorance of the suit herein.

16. He contended that since the judgment together with all the resultant orders had since been executed, this court had no jurisdiction to hear this application.

17. On 12th May, 2021 this court directed that the application be canvassed by way of written submissions. The Applicant filed his submissions on 23rd July, 2021 while the Respondents filed their submissions on 27th July, 2021.

ISSUES FOR DETERMINATION

18. From my analysis of the application, the response thereto and the submissions filed by both parties, the sole issue for determination is whether this court should set aside and/or vary the interlocutory judgment entered on 13th February, 2006.

ANALYSIS AND DETERMINATION

19. A default interlocutory judgment may be set aside under Order 10 Rule 11 of the Civil Procedure Rules which stipulates 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.”

20. A reading of the above provision shows that the court's discretion to set aside or vary an ex parte judgment entered in default of appearance or defence is intended to be exercised to avoid injustice. It is an established principle that the discretion is intended to be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But the discretion is not intended to assist a party who has deliberately sought to obstruct or delay the course of justice. This was stated in the case of **Patel -Vs- E.A Cargo Handling Services Ltd (1974) EA 75**, where it held that: -

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary

the judgment, he does so on such terms as may be just. 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.”

21. In the instant suit, the Applicant alleges that he was not served with the Plaintiff and Summons to enter appearance and that the Affidavit of service sworn by the Process Server one Benjamin H. O. who alleged that he served him on 13th December, 2005 at Water Bank Hotel is false. He therefore claims that he was not aware of the proceedings that led to the default judgement that was entered against him. He argues that he has a defence that raises triable issues which ought to be heard on merits. It is his contention that if the judgment is not set aside, he will be condemned unheard and he will end up being evicted from the suit property which they have occupied for a period of over 60 years.

22. The Respondent on the other hand has argued that the Applicant is not honest in his claim that he was not aware of the default judgment or that he was not served with the Plaintiff and the Summons to enter Appearance.

23. The Respondent averred that the Applicant was present during the proceedings that led to the delivery of final judgment delivered on 17th June, 2010. He was also present during the review proceedings filed by the 2nd Defendant.

24. Further, the Applicant drew the court's attention to an application filed by one Richard Nyabando on behalf of the Applicant and other family members in which he attempted to have the judgment set aside but along the way he withdrew the said application.

25. The Respondent argued that this application seeks to set aside an interlocutory judgment entered 15 years ago. The said judgment has been extinguished by the final judgment which has already been executed.

26. He argued that the Applicant had carefully avoided to state when and how he got to learn of the existence of this suit, as he has all along been aware of the suit since he attended court on various occasions.

27. There is no dispute that this application that has been filed after inordinate delay. To be specific this application seeks to set aside an Interlocutory Judgment entered on 13th February, 2006 which is more than 15 years ago. The most important question for consideration therefore is whether there has been a satisfactory explanation for the delay in filing this application. The only reason that has been given is that the Applicant was not served.

28. However, the Applicant has not shown in anyway how he got to learn of the existence of the suit now that he was not served with the same. He could not have woken up 15 years later and decided to come to court to seek the setting aside of a suit he was never alerted of. I agree with the Respondents that such information was necessary in order to determine if the court should exercise its discretion in his favour.

29. I note that the Respondents have alluded to the fact that the Applicant has been keenly following the proceedings of this court given that he attended court on several occasions yet the Applicant has not bothered to file any Further Affidavit to controvert the allegations by the Respondents.

30. The Respondent has also drawn the court's contention to an application by the Applicant's brother dated 30th October, 2018. This application seems to have been filed immediately after this court issued an eviction order on 28th October, 2018. In the Supporting Affidavit of the said application the Applicant's brother who sought to have the judgment delivered on 10th June, 2010 set aside averred that he was a brother to the Applicant. The brother subsequently withdrew the application before the same could be heard. I note that the Applicant has not bothered to disown the said application which is a clear indication that the Applicant was aware of the proceedings of the court and only choose to come to court after his brother withdrew his application probably because he had no *locus standi*.

31. The Applicant has further submitted that he is likely to suffer if the execution of the orders of this court is not stayed because he is in occupation of the suit property together with his other family members. I note however that Respondent has not tendered any evidence to prove his occupation of the property. I also note that during the hearing of the case against the 2nd Defendant, it was stated that the reason why the 1st Defendant and 3rd Defendant had not entered appearance was because they had moved out of the suit property. It is strange that the Applicant did not find it necessary to controvert these allegations.

32. Furthermore there is uncontroverted evidence by the Respondent that the execution of the judgment against the 2nd Defendant who was in occupation of the suit property has already been concluded. It will therefore be futile to allow the Applicant who has not proved his occupation of the suit property and who as I have observed hereinabove has not controverted the Respondent's averments that he was aware of the proceedings of this court and even attended court on various occasions.

33. In view of the foregoing, I am not persuaded that I should exercise my discretion in the Applicant's favour. It is therefore my finding that the application lacks merit *and the same is dismissed with costs to the Respondents*.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE