



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 128 OF 2017

DUNCAN MWANGI NDOORE.....PLAINTIFF

-VERSUS-

ELIZABETH WANGARI KIRAGU.....DEFENDANT

RULING

1. By the Notice of Motion dated 10th January 2019, Elizabeth Wangari Kiragu (*the Defendant*) prays for orders:

1. *That this Honourable Court be pleased to review the Judgment read on 25th September, 2018;*
2. *That an order (be made to allow the Defendant) to file (a) memorandum of appearance and defence out of time;*
3. *That an order (be made) for stay of eviction and taxation due on 21st January, 2019;*
4. *That the costs of the application be in the cause.*

2. The application is supported by a brief affidavit sworn by the Defendant who is acting in person in which she states in the relevant paragraphs 2 to 9 thereof as follows;

“2 That on 31st December, 2018, I received a letter addressed to the Respondent/Plaintiff herein through the local Chief informing him that the taxation is scheduled on 4th January, 2019 (see the attached copy of the said letter marked “EWK 1”).

3. That with the same copy of the said letter a copy of the decree was attached indicating that there has been a matter in this court concerning land parcel No. Chinga/Gikige/646 where I am named as the Defendant (see the attached copy of decree marked EWK 2).

4. That after receiving the said letter is when I realized that there has been a case against me which has been heard and determined in my absence.

5. That on 8th January, 2019, I proceeded to Nyeri court to peruse the said file and found that it is true there existed such a case.

6. That I also found that there is an affidavit of return of (service) sworn by John Kariuki Mundia stating that I was served with summons and a copy of the Plaint on 14th August, 2017 but I have never seen or been served with any documents concerning this matter by any person.

7. That I also went through the court file and found that there are several documents indicating that I was served but I have never received any document from any corner and hence this application.

8. That it is noteworthy that this is a land matter where I was born and brought (sic) and have developed and (I have) no any other land to go if evicted and (as) such I could not have ignored any document served upon me by this Honourable court.

9. That I am ready to file the necessary documents required by law to present my case if a review order is granted for Judgment delivered on 25th day of September, 2018 and the taxation due on 21st January, 2019 be stayed.”

3. The application is opposed by the Plaintiff Duncan Mwangi Ndoore. In his replying affidavit sworn and filed herein on 31st January, 2019,

he avers as follows in the relevant paragraphs 3 to 11 thereof:

“3. That I wish to state that the application dated 10th January, 2019 is frivolous, vexatious, purely false and only calculated to win the sympathy of the court where none is deserved (and) as such it should be dismissed with costs.

4. That I am advised by my advocate on record which advise I verily believe to be true that this application does not meet the legal threshold to allow this court to grant the orders sought herein.

5. That the applicant herein has all along been trespassing on my land as such service upon her was easily completed as I was aware of her whereabouts all through the pendency of this suit.

6. That in response to paragraph 8 of the supporting affidavit, I wish to state that the Respondent is untruthful as she only began trespassing on my land after she realized the same had been sold to me and registered in my name. Annexed hereto is a copy of the title and certificate of official search marked “DMN 1” (a) and (b).

7. That the applicant is a habitual trespasser who had been forcefully evicted from the land by the previous owner by the order dated 28th November, 2012 issued in Nyeri HCCA No. 154 of 2002. Annexed hereto is a copy of the order marked “DMN 2”.

8. That the Applicant is well aware that the suit property belongs to me as such she has no valid defence to my claim against her.

9. That the Applicant has not raised any meritorious issues in defence against my claim for the Honourable court to determine and therefore this application is an abuse of the court process.

10. That the applicant simply wishes to validate the illegal acts of trespass and cause me further prejudice and also further costs.

11. That in further response to paragraph 8 of the supporting affidavit I wish to state that the Applicant herein wishes to win the sympathy of this Honourable Court by misleading it into believing that she has no other land yet the Honourable Court in Nyeri HCCA No. 154 of 2002 determined that she had already been bequeathed 4 acres of land by her husband. Annexed hereto is a copy of the Judgment marked “DMN 3”.

4. On 4th February, 2019 when the application came up for hearing, the Plaintiff sought leave to file an affidavit by the process server and for the process server to be cross-examined on the affidavit of service. The said process server Julius Kariuki Mundia subsequently swore an affidavit filed herein on 11th February, 2019 in which he states as follows at paragraphs 3 and 4 thereof:

“3. That on the 17th June, 2017 while being guided by one Jenerica who is her step sister, I proceeded to the residence of Elizabeth Wangari Kiragu who is the Defendant herein situated at

Mucharage village in Chinga Location, Othaya Sub-County whereby I met her. After introducing myself and the purpose of my visit, I served her with the demand notice by tendering duplicate copies thereof. Annexed hereto and marked JKM 1(a), 1(b) and 1(c) are copies of the receipt, affidavit of service and demand notice.

4. That having been introduced to the Defendant herein and being familiar with her place of residence after serving her with the Demand Notice I was able to serve her with all the court documents on the 14th August, 2017, 8th January, 2019 and 16th January, 2019.”

5. The process server subsequently appeared in court on 5th March, 2019 and was cross-examined on the contents of the affidavit. He reiterated in court that he had met the Defendant on 17th June, 2017 when he first served her with the Demand Notice and that he had visited the Defendants home for service severally thereafter.

6. I have carefully considered the application and the response thereto. While the application sought for an order of review of the Judgment delivered herein on 25th September 2018, it was clear to me upon a holistic consideration of the application that what the Defendant prays for in actual fact, is an order setting aside the said Judgment on the grounds that she was never served with the summons to enter appearance and/or any other pleadings emanating therefrom.

7. The power to set aside an ex-parte Judgment entered in default of appearance is discretionary. The principles upon which such discretion is to be exercised were set out by the Court of Appeal in **Philip Kiptoo Chemwolo and Mumias Sugar Company Limited –vs- Augustine Kubende (1982 0 1988) KAR 1036**, thus:

“The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence.

The reason, if any, for allowing Judgment and thereafter applying to set it aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a Judgment upon the merits or by consent, it is to have the power to revoke the expression of the coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

8. However in **Shah –vs- Mbogo and Another (1967) EA 116** it was explained that:

“The court’s discretion to set aside an ex-parte Judgment is

intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice ...”

9. In the matter before me, the Plaintiff obtained Judgment herein *ex-parte* against the Defendant on 25th September, 2018 requiring that the Defendant vacates the suit property and pays to the Plaintiff *mesne* profits at the rate of Kshs.20,000/- from 27th September, 2016 until such a time that the Defendant shall vacate the suit property.

10. The matter proceeded to hearing *ex-parte* on the basis that the Defendant had been served with summons to enter appearance in accordance with the provisions of **Order 10 Rule 9 of the Civil Procedure Rules** and that the Defendant had failed and/or neglected thereafter to enter appearance and/or to file a statement of defence.

11. According to the Defendant however, she was never aware of these proceedings until sometime after the Judgment when on 31st December 2018, her Area Chief handed her a copy of a letter

addressed to the Plaintiff informing him of the date when the matter was to come for taxation. The Defendant told the court that it was only thereafter that she travelled to Nyeri Law Courts, perused the court file and realized that the matter had proceeded in her absence.

12. The *ex-parte* proceedings were pegged on an affidavit of service sworn on 14th August, 2017 by one Julius Kariuki Mundia, a process server of this court filed herein on 15th August, 2017. At paragraph 3 of that affidavit, the process server deposes that he served the Defendant with the summons on the same 14th August, 2017 at her residence situated at Mucharage Village in Chinga Location, Othaya Sub-County. The Defendant is said to have accepted service but refused to sign documents.

13. At paragraph 5 of that affidavit the process server states without any elaboration that the Defendant was personally known to him before. After the Defendant challenged these proceedings, the same process server swore the affidavit filed herein on 11th February, 2019 in which he now offered an elaborate explanation that he was guided to the Defendant’s home by one Madam Jenerica who is a step sister to the Defendant.

14. The process server does not give the full name of this Madam Jenerica and/or state who introduced the said Madam Jenerica to himself. Nor does he explain how he came to know that the said Madam Jenerica is a step sister to the Defendant or offer any proof of such relationship.

15. I have looked at the Plaintiff’s Replying Affidavit in response to the application and there is nowhere where he makes reference either to the process server, the said Madam Jenerica or even how or when the Defendant was served with the summons.

16. Taking the totality of the circumstances herein, I am not persuaded that the Defendant was served with the summons to enter appearance and/or any pleadings. I have also not seen anything to even remotely suggest that the Defendant has deliberately sought either by evasion or otherwise to obstruct or delay the cause of justice in this matter.

17. The upshot is that I find merit in the Defendants application, set aside the Judgment of the Honourable Justice Lucy Waitthaka delivered herein on 25th September, 2018 and/or any decree emanating therefrom with the direction that the Defendant is hereby granted leave to file and serve her statement of defence, witness statements and any documents she wishes to rely on upon the Plaintiff within 21 days from today.

18. The costs of this application shall be in the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF NOVEMBER, 2021.

In the presence of:

Mr. Mshila for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Court assistant - Wario

J. O. Olola

JUDGE