



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL CASE NO. 42 OF 2001**

**KERINA MAIRURA SAGANA .....1<sup>ST</sup> PLAINTIFF/ RESPONDENT**

**VERSUS**

**MECHA MARITA**

**ALIAS DAVID MECHA NJOROGE.....DEFENDANT**

**AND**

**CHARLES OKARU MECHA...INTENDED DEFENDANT/APPLICANT**

**RULING**

1. On 7<sup>th</sup> October 2020, the Intended Applicant filed a Notice of Motion dated 7<sup>th</sup> October, 2020 seeking the following orders;

**a. Spent**

**b. THAT pending the hearing and determination of this instant Application, the intended Defendant Mr. CHARLES OKARU MECHA be substituted in the place of MECHA MARITA, the Defendant herein who has since passed on.**

**c. THAT pending the hearing and determination of instant Application, there be a stay of execution of orders, proceedings and all consequential orders to the *Exparte Judgment* delivered on the 30<sup>th</sup> April 2009.**

**d. THAT pending the hearing and determination of the suit, there be a stay of execution of orders, proceedings and all consequential orders to the *Exparte Judgment* delivered on 30<sup>th</sup> April 2009.**

**e. THAT the Honourable Court be pleased to set aside and vary the *Exparte judgment* delivered on 30<sup>th</sup> April 2009, proceedings and all consequential orders.**

**f. THAT pending the hearing and determination of the main suit, the land registrar kisii be directed to rectify the record on land parcel numbers NYARIBARI/MASABA/1941, 1942, and 1943 respectively to the original number before the sub-division which is NYARIBARI/MASABA/935 measuring 2.2 HA to read in the name of the intended defendant herein.**

**g. Costs of this application and interest thereon be provided for.**

2. The Application is grounded on Sections 1A, 3A 63 (e) and 95 of the Civil Procedure Act, Order 24 Rule 4, Order 10 rule 11 order 6 Rule 1, Order 22 Rule 25 and Order 51 Rule 1, 2, 3 and of the Civil Procedure Rules 2010 and Article 50 and 159 (d) of the Constitution of Kenya. The intended Defendant/Applicant also swore an Affidavit in support of his Application on 7<sup>th</sup> October 2020.

3. The grounds that support this Application are that;

a. The intended Defendant is the Administrator of the estate of his late father, the Defendant herein vide Kisii Chief Magistrate Court Succession Cause No. 397 of 2020.

b. In 2001 the Plaintiff sued the Defendant who passed on some time on 13<sup>th</sup> August 2020 claiming a portion of all part of land parcel known as NYARIBARI/MASABA/BONYAKONI/835 herein after referred to as the Suit Property.

- c. The intended Defendant/Applicant's late father appointed the firms of S.M SAGWE & CO. ADVOCATES and NYARIKI & CO. ADVOCATES to represent him in the Proceedings.
- d. However, the intended Defendant's late father never received any communication from the said firms of Advocates concerning the suit until the completion whereupon the court entered an *Exparte* Judgment against him on 30<sup>th</sup> April 2009.
- e. Until his death, the intended Defendant's father never received updates of the case nor did the said Advocates inform him of the proceedings.
- f. Consequently the Plaintiff/ Respondent proceeded to subdivide the suit property into three portions namely MASABA/BONYAKONI/1491, 1492 and 1493 without his father's knowledge.
- g. Before the *Exparte* Judgement was entered, the intended Defendant/Applicant's father had transferred the Suit Property to him and he now has an original title deed to it.
- h. That when he got information about the subdivision, the intended Defendant/Applicant filed a fresh suit at the Chief Magistrate Court at Kisii; ELC Case No. 48 of 2020 whereby the Plaintiff was the Defendant among others.
- i. Upon serving the Plaintiff/Respondent with the side proceedings, that is when the Intended Defendant/Applicant learned of the instant suit.
- j. The suit property is an ancestral land which the intended Defendant/Applicant's father transferred to him to hold it in trust of the family members.
- k. As a result of the Plaintiff/Respondent's illegitimate actions, the intended Defendant/Applicant and his family members have been dispossessed of their property.
- l. The said Application is merited because it was not the mistake of the Intended Defendant or his late father but the Advocates on record who were seized of the matter but did not represent their client as required by the law.
- m. The intended Defendant/Applicant is apprehensive that there was a collusion and/or conspiracy between the Plaintiff/Respondent and the said Advocates on record who did not inform his father about the proceedings of the case.
- n. The mistake of the advocate should not be visited upon an innocent litigant who is legally being represented.
- o. The orders were never served upon the registered proprietor of the suit property who is the Intended Defendant/Applicant.
- p. The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be,
- q. Justice demands that every party in the suit be accorded an opportunity to present his or her defence before being condemned unheard and that is as per Article 50 of the Constitution of Kenya, 2010.
- r. Besides, the actions and the *Exparte* Judgement complained of are contrary and/or a violation of the provisions of Article 40 of the Constitution of Kenya.
- s. The sanctity of a title deed should be respected as vindicated by Section 24 of the Land Registration Act 2012 Laws of Kenya.
- t. There was no Order which compelled the Land Registrar to sub divide the suit property which is registered in the name of the Intended Defendant.
- u. Before the *Exparte* Judgment was effected the intended Defendant was the registered proprietor of the suit property.
- v. The actions and/or omissions complained of are un-procedural, unjust and without any legal backing hence dehumanising and discriminatory in nature.
- w. The Application is brought in good faith and it is in the interest of justice that the same be granted *Ex-Debito justitiae*.

4. The Application is opposed vide a Replying Affidavit dated 6<sup>th</sup> November, 2020 and filed in this court on 10<sup>th</sup> November, 2020 where in the Respondent avers:

- a) That the matter was long determined and a judgment delivered on his favour on 30<sup>th</sup> April, 2009.
- b) That the Applicant's father was represented by NYARIKI & CO. ADVOCATES together with SAGWE & Co. Advocates a fact that is not denied by both parties.

- c) That it is a fact that when the proceedings commenced he also filed an Application seeking to injunct the Applicant's father from transferring or doing anything on the Suit Property until the suit is determined.
- d) That the aforementioned orders were accordingly issued before the case was fixed for hearing.
- e) That the Applicant and his late father conspired wherein he (his father) proceeded to transfer the suit property to the Applicant.
- f) That the Applicant's late father misled the Land Registrar who proceeded to effect the transfer of the Suit Property to the Applicant being much aware of the Court Order against any transfer of the suit property.
- g) That consequently when he won the case, he proceeded to Kisii Lands Office to process his title deed only to discover that the Applicant and his father had conspired in misleading the land registrar.
- h) That upon the land registrar perusing the Judgment of the honourable court, he cancelled the title deed issued in favour of the Applicant and summoned the Applicant to surrender the title deed issued to him vide a letter dated 14<sup>th</sup> September, 2010.
- i) That it goes without saying that the Applicant and his father were aware of the Judgement.
- j) That the Applicant and his father were very much aware of the Judgment given that the Applicant was charged in Keroka CR. NO. 1555 of 2015 for chasing the respondent's workers from the Suit Property and was found guilty.
- k) That the Applicant is clearly misleading the Court that he came to learn of the Exparte Judgment in 2020 when he was served with an order of the Court to cut down trees given that he was party to the above-mentioned criminal case in 2015.
- l) That the Applicant and his late father are persons who have no respect for the court orders.
- m) That when the Applicant father died, the Applicant and his mother interred his remains on the suit property and he (the respondent) has filed a suit against the Applicant seeking an order to exhume the said remains from the suit property which suit is pending determination.
- n) That the filing of this Application has been provoked by the above mentioned suit filed in the lower court seeking the exhumation orders.
- o) That if at all its true that the Advocates acting for his father did not inform him about the Judgment and the proceedings of the court, why didn't they get anxious to know what happened to their case and had to wait for ten years to lapse?
- p) That the Applicant has not annexed any copy of the official search to show that the purported title that he has is genuine nor have they sued the Land Registrar to challenge the current status of the Suit Property.

5. The parties filed their respective submissions which I have considered together with their dispositions.

## **BACKGROUND OF THE CASE**

6. It would be very necessary to give a background of this suit more specifically the proceedings thereto before delving into examining the issues raised in the Intended Defendant's/Applicant's Application and opposed by the Plaintiff/Respondent in his Replying Affidavit.

7. The Plaintiff/ Respondent herein filed this suit on 4<sup>th</sup> April, 2001 vide an Originating Summons praying for a declaration that he was the absolute owner of a parcel of land measuring 1 ½ Acres forming part of land title number **NYARIBARI/MASABA/935** herein after referred to as "the Suit Property" having purchased the same from **MECHA MARITA ALIAS DAVID MECHA NJOROGI** the Defendant herein in 1974 and having taken possession immediately and occupied it peacefully, openly and interruptedly since then. He also prayed for an order that the Defendant do execute all necessary documents for subdivision and transfer of the suit property to him failure of which the Deputy Registrar be empowered to execute the same. He further prayed for an injunction to restrain the family members and legal representation from interference with and/or dealing with the Suit Property in anyway.

8. The Defendant filed a Replying Affidavit on 13<sup>th</sup> June, 2001 in which he stated that he had agreed to sell the suit property to the Plaintiff but his father objected the said transaction. The Defendant further stated it was then mutually agreed that he will refund the plaintiff the purchase price that had been paid. Thereafter the Plaintiff requested the Defendant to allow him to lease the land for 10 years to recover the purchase price instead of refunding it a suggestion that was agreed by the Defendant hence the allegation by the Plaintiff that he refused to transfer the property did not arise.

9. On 28<sup>th</sup> April 2003, the parties who were all present in court recorded a consent to refer the matter for arbitration by then Divisional Officer, Masimba Division in the assistance of 4 elders appointed by all the parties. The report was filed in court on 11<sup>th</sup> February 2004 court but was eventually read in open court on 18<sup>th</sup> October 2006 in the presence of counsels for both parties. The report was vacated after the Plaintiff through an Application dated 7<sup>th</sup> November, 2005 convinced Bauni J that the same was generated without the approval of the elders whose signature were not appended thereon hence could not be said to be binding. Counsel for the Defendant conceded to the Application. The court then directed the parties to take a Hearing date from the registry so that the case could be heard.

10. After several days of the Plaintiff trying to fix the matter for hearing at the registry in the absence of the Defendant, the matter finally came up for hearing before Musinga J on 5<sup>th</sup> February, 2009 on which date only counsel for the Plaintiff was present and after confirming that the Defendant was duly served proceeded to hear the Plaintiff.

11. An Exparte judgment was finally delivered on 30<sup>th</sup> April, 2009 which in this current Application the intended Defendant/Applicant seeks to be set aside on grounds that the Defendant was not given an opportunity to defend the suit since his counsel on record failed to give him any communication regarding the hearing date.

#### **ANALYSIS AND DETERMINATION**

12. The Application seeks two major orders; an order for substitution of parties, and an order setting aside the ex parte judgment and stay of execution of the decree.

13. From the introduction and the background above I deduce the following as the issues for determination;

- a) whether there was an improper service of the hearing notice on which basis the Applicant can be entitled to stay of execution of the Exparte judgment dated 30<sup>th</sup> April 2009.
- b) whether the Replying Affidavit filed by the Defendant raise triable issues to warrant the stay of the Exparte judgment.
- c) whether the Intended Defendant can be allowed to substitute his deceased father as a Defendant in this suit

#### **WHETHER THERE WAS AN IMPROPER SERVICE OF THE HEARING NOTICE ON WHICH BASIS THE APPLICANT CAN BE ENTITLED TO STAY OF EXECUTION OF THE EXPARTE JUDGMENT DATED 30TH APRIL 2009.**

14. The first issue that the court must deal with is whether there was proper service of the hearing notice upon the Applicant's Father. The Applicant in paragraph 11 of his Supporting Affidavit acknowledges that his father's Advocates were indeed served with the hearing notice on 10<sup>th</sup> November, 2008 and goes ahead to attach a copy of the same. His main problem though is that his father's advocates despite being served and actually acknowledged receipt of the hearing notice, they ignored to inform his father of the hearing and only told him all was well when he inquired. He goes ahead to aver in paragraph 18 of his supporting Affidavit that the Court record showed that neither his father nor his Advocates participated in the case prompting the Court to proceed ex parte and all this happened because of his father's advocates whom he believes were compromised by the Respondent and decided to hide all the whereabouts of the case and what was required of him. In paragraphs 17 of his Supporting Affidavit he avers that he only came to learn of the proceedings of this case and the judgement delivered therein in 2020 after the death of his father when he, while serving summons of a case he had filed at the chief Magistrate (**KISII CMCC. NO 78 OF 2020**), was shown to his disbelief the Judgment emanating from this suit.

15. In response to the above assertions by the Applicant, the Respondent averred that, the Land Registrar made the Applicant aware of the Judgment when he through a letter dated 14<sup>th</sup> September, 2010 summoned him to surrender the title deed issued to him after the Registrar found out that his late father had unlawfully transferred the suit property to him. Further he the Applicant was further made aware of the Judgement and the proceedings in 2015 when he was found guilty of chasing the Respondent's workers from the suit property. He went on to state that the Applicant was being an indolent party who only showed up in court to claim that his father's advocates failed to inform him of the hearing date 10 years after a judgement had been entered.

16. From the forgoing, is it true that the Applicant and his father were total strangers to the proceedings of this suit? Certainly not. From the background of the case hereinabove, his father through the firm of **NYARIKI & CO. ADVOCATES** entered appearance and filed a Replying Affidavit on 16<sup>th</sup> June, 2001. In fact, it is clear on the court proceedings that on 28<sup>th</sup> April 2003 his father was present in court on which date a consent to refer the matter for arbitration to the then Divisional Officer, Masimba Division in the assistance of 4 elders appointed by all the parties was recorded. The report that dated 11<sup>th</sup> February, 2004 was read in open court on 18<sup>th</sup> October, 2006 in the presence of counsels for both parties. The same was vacated after the Respondent through an Application dated 7<sup>th</sup> November, 2005 convinced the court that the same was generated without the approval of the elders whose signatures were not appended thereon hence could not be said to be binding. It is clearly shown on the court's proceedings that his father's advocate who was present in court agreed to the vacation of the said award and in fact indicated that he was agreeable to the matter being set up for hearing. I therefore find that the Applicant is being dishonest by claiming his father was a stranger to the suit. I also find the evidence submitted especially the letter dated 14<sup>th</sup> September 2010 from the land registrar and the proceedings and Judgement in **KEROKA PMC CR. CASE NO. 1555 of 2015** wherein the Applicant was convicted sufficient prove that the Applicant was fully aware of the Judgment as early as 2010 but failed to file this present Application.

17. In trying shift blame for not attending court to the former advocates, the Applicant's counsel in his submissions argued that it was the mistake of the former advocates that the Applicant's father failed to attend court and defend the suit and that a mistake of an advocate should not be visited upon his client as such will amount to driving a party from the seat of justice and in fact deprive him of his right to a fair hearing Under Article 50 of the Constitution of Kenya, 2010. He supported his argument with the case of **JULIUS NJUGI MBUI .VS. KENYA NUT COMPANY LIMITED [2018] EKR**. Counsel for the Respondent on his part argued that it was quite unusual for a party who had been sued to keep silent for a period of more than 10 years about the status of his case or even without contacting his advocates. According to him the Applicant filed the Application with a sole purpose of defeating justice by misleading the court.

18. In as much I agree with the court in the case highlighted above by the Applicant's Counsel that mistake by an advocate should not be visited upon his client, it would be prudent of him to know that such a holding is discretionary which discretion varies from case to case depending on the underlying circumstances.

19. The Court in the case of *SHAH VS MBOGO (1967) EA 166*, held that: -

**“.....this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice....” (emphasis mine)**

20. From the above case, can it be said that the Applicant has demonstrated that the failure of his father’s advocates to attend the Court during date was an excusable mistake? Absolutely no. In my analysis herein above the Applicant’s father never cared about the proceedings of the case. It is not demonstrated in the Application, the efforts the Applicant’s father made in following up on the proceedings of the case. All that is alleged by the Applicant who was not a party to the suit is that, his father got an assurance that all was well. The Applicant argues that he only got to learn about the case after his father’s death, almost 20 years after he gave instructions to his advocates to handle the case filed against him. This clearly paints his father as an indolent party whom the doctrines of equity cannot aid. I also wonder how the Applicant got hold of the hearing notice which he attached to his Application and which notice he claims was never brought to the attention of his father. Further, now that the Applicant was not party to this instant suit, I find his account that his father was not informed about the hearing date nor the proceedings as hearsay evidence. For instance, the allegations that his father was assured by the advocates that all was well when he inquired about the status of case can only be held to be hearsay now that his father is dead and cannot be called upon to substantiate the same or much better a letter of comfort from any of the advocates bearing such information.

21. I agree with counsel for the Respondent that this court should not come to the aid of a party who comes to Court seeking to set aside a judgment that was delivered more than 10 years after the same had been passed on a suit that was filed in court 20 years against him, on grounds that he was not informed by the advocate concerning the hearing date nor the proceedings of the court and that he only learnt of the Judgment when he was confronted with execution orders. If I allowed this Application on such reasons, I will be going against the Doctrine of Equity that states that; Equity aids the vigilant and not the indolent.

22. In the case *WILLIAM MACHARIA MAINA & ANOTHER V FRANCIS BARCHURO & 3 OTHERS, KIBIWOTT YATOR KURYASES & 8 OTHERS (INTERESTED PARTIES) ECLR*, Odeny J clearly stated, that;

**“.....It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the way they prosecute their cases. A party can be enjoying some interim orders of status quo which might necessitate the reluctance in prosecuting a case. On the issue of service I find that there was proper service and the defendants just woke up when the judgment and decree were up for execution.....” (emphasis mine)**

23. From the forgoing therefore I find that the Applicant’s father was properly served with the hearing notice through his Advocates. Further, the Learned Judge having ascertained that he was properly served and proceeded to hear the Respondent *Exparte* and delivered its Judgment in open court on 30<sup>th</sup> April, 2020 I see no sense of staying his Judgment on ground that the Respondent was not aware of the hearing date.

#### **WHETHER THE REPLYING AFFIDAVIT RAISE TRIABLE ISSUES TO WARRANT THE STAY OF THE EXPARTE JUDGEMENT**

24. In an Application for setting aside *Exparte* judgment, the Applicant must establish that he or she has a defense with triable issues. Setting aside ex parte judgment is not automatic. From the *Exparte* Judgment, the learned Judge had an opportunity to have a careful consideration the defendant’s Replying Affidavit wherein he noted that the Defendant (the Applicant’s father) had agreed to sell the suit property but his father refused. Thereafter the parties agreed that the Respondent was to lease the property for 10 years to recover the purchase price paid. The court observed that the agreement became null and void by dint of section 6 of the Land Control Act that makes mandatory for transaction of that nature to get a consent of the Land Control Board within a period of six months from the date of its execution. The court having established that the sale Agreement was null and void and that the parties had been restored to status quo, it went on to establish that it was uncontroverted by the Defendant that the Plaintiff had maintained the occupation of the suit property beyond the lease period which was to expire in 1984 until the year 2001 when he filed the suit which period was beyond 12 years making his claim for adverse possession valid.

25. It is clear from the forgoing that the court incorporated the Defendants claim in the Judgment even though the Defendant did not appear in court, it will be an uphill task for the applicant to prove that the Plaintiff has not acquired the property by way of adverse possession.

26. I therefore find that the Replying Affidavit does not raise any other triable issue that will warrant this court to set aside the *exparte* Judgment and its execution.

#### **WHETHER THE DEFENDANT CAN BE ALLOWED TO SUBSTITUTE HIS DECEASED FATHER AS THE DEFENDANT IN THIS SUIT**

27. Having found that Defendant was properly served with the hearing notice through his Advocates, that there was inordinate delay in bringing this Application for revival of this suit and that the Replying Affidavit does not raise any other triable issue that will warrant this court to set aside the *Exparte* Judgment, I find that it will be an exercise in futility establishing whether the Applicant can be allowed to substitute his father hence decline to grant him the prayer.

28. In the light of the aforesaid, I dismiss the Notice of Motion Application dated 7<sup>th</sup> October 2020 with costs to the Respondents.

**Dated, signed and delivered at Kisii this 9<sup>th</sup> day of February 2021.**

.....

**J.M ONYANGO**

**JUDGE**