



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 724 of 2016**

**MICHAEL KINYUA.....PLAINTIFF**

**VERSUS**

**SIMON CHEGE RUKUA.....1<sup>ST</sup> DEFENDANT**

**WALLACE MWARAGE.....2<sup>ND</sup> DEFENDANT**

**SALIM TUKUTU MAEMA.....3<sup>RD</sup> DEFENDANT**

**(Sued as officers of Ruai Chokaa Housing Scheme)**

**JAMES NYAGA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 26<sup>th</sup> January 2021 brought forth by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants seeking the following orders:

***i. Spent***

***ii. Spent***

***iii. That this Honourable Court be pleased to set aside its order issued on 13<sup>th</sup> July, 2017 by Honourable Justice B.M. Eboso granting the Plaintiff leave to serve by way of substituted service.***

***iv. That this Honourable Court be pleased to set aside and or vary its judgment delivered on the 15<sup>th</sup> January, 2020 by Honourable Justice B.M. Eboso together with any consequential Decree and Orders.***

***v. That this Honourable Court be pleased to grant the Defendants herein leave to file their Defence and defend the suit as per the draft Defence annexed to this Application that raises cogent triable issues.***

***vi. That pending the hearing and determination of this application, this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree entered on the 15<sup>th</sup> January, 2020 and/or any further proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application.***

***vii. That cost of this Application be provided for.***

2. The application supported by the sworn affidavits of the 1<sup>st</sup> and 4<sup>th</sup> Defendants (Simon Chege and James Nyaga) dated 26<sup>th</sup> January 2021 is premised on grounds that the Plaintiff got an *ex parte* judgement based on misleading information to the court. They stated that the Plaintiff failed to serve them personally despite knowing the location of their office which is always open and operational and went ahead to effect substituted service by notice on the Daily Nation newspaper. The Defendants also averred that the Plaintiff was well aware of their postal address having correctly captured it in his plaint and would have effected service by post had he failed to reach them, before turning to the newspaper. They added that their names had also been wrongly spelt on the newspaper service which was not only misleading but meant to get orders without the Defendants' knowledge.

3. The 1<sup>st</sup> Defendant (Simon Chege) who is the chairman of Chokaa Ruai Settlement Self Help group indicated that the 2<sup>nd</sup> Defendant Wallace Mwarage was unknown to them adding that they have been residents of LR No. 11531/8 Chokaa, Ruai which has over time been subdivided into sub plots including the property in contention in this suit.

4. In their affidavits, they affirmed that the 4<sup>th</sup> Defendant was the *bona fide* purchaser for value and registered owner of Plot No. G3-05 the plot which the plaintiff was staking claim against. The 4<sup>th</sup> Defendant duly took possession of the aforementioned plot where he has invested over Kshs. 5,000,000 in putting up a commercial premise that brings him a monthly income of about Kshs. 70,000.

5. The Applicants contend that they have an arguable defence which raises triable issues. And that they stand to suffer irreparable loss and damage should the Plaintiff execute the decree.

6. The Plaintiff / Respondent did not file a replying affidavit, hence the application is unopposed.

7. The issue for determination is ***Whether the grounds for setting aside an ex parte judgement have been met in the current application.***

8. The Applicants contend that the substituted service was uncalled for since their physical address was known by the Respondent. The Plaintiff was granted leave to serve vide a notice in either the Daily Nation or Standard Newspaper. In the Court of Appeal case of **Ephraim Njugu Njeru v Justin Bedan Njoka Muturi & 2 others [2006] eKLR** it was held that,

***“... Substituted service is resorted to after all reasonable and proper efforts have been made to trace the respondent but in vain...”***

9. The Applicants indicated that they learnt of the suit when they were served with a decree in 2020 and moved to court timeously seeking to set aside the judgement. I find that the Applicants have given a plausible explanation as to why they failed to defend the suit. I also find that the issues raised by the defendants raises a triable issue. Further, the rules of justice implore courts to give parties an opportunity to be heard. Thus the prayer for setting aside the judgment is merited.

10. In conclusion, I proceed to allow the application dated 26.1.2021 in the following terms;

***1) The ex-parte judgment delivered on 15<sup>th</sup> January 2020 is hereby set aside.***

***2) Subsequent orders emanating from the said judgment are also set aside.***

***3) The defendants are granted leave to file and serve their memorandum of appearance and defence within 14 days failure to which the orders granted herein shall lapse.***

***4) Costs shall be in the cause.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

McRonal for the 1st, 2nd and 3rd Defendants

Court Assistant: Edel Barasa