



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO E14 OF 2021

SAMUEL NJUNG'E KARIUKI.....PLAINTIFF

VERSUS

VICTOR KIBINU MUTURI.....DEFENDANT

RULING

1. The plaintiff, **Samuel Njung'e Kariuki**, initiated this suit through a plaint dated 5/2/2021. His case was that he was the beneficial owner of Land Parcel Numbers **Kabete/Kibichiku/1189, 1190, 1191 and 1192** (formerly **Kabete/Kibichiku/660**), located at Mwimuto, Kabete Sub-County, Kiambu County (**the suit Properties**). The suit properties were at the time of bringing the suit, registered in the name of the defendant's late father, **Francis Muturi Muniu [the deceased]**, who died in October 2019. The suit properties were previously registered in the name of the plaintiff's grandmother, **Grace Wanjiru**.

2. The plaintiff contended that vide **Nairobi ELC Case No. 642 of 2009**, he sued the defendant's deceased father, advancing a claim of adverse possession. The defendant's father died while the said suit was still pending. None of the deceased's relatives initiated succession proceedings, forcing him (the plaintiff) to take out a citation relating to the estate of the deceased.

3. The plaintiff further averred that on 24/12/2020, the defendant, in the company of a gang of about 40 men, stormed into the suit properties, broke the gate and proceeded to damage the plaintiff's crops and flattened the two graves of the plaintiff's relatives using a grader. He added that the defendant threatened him and his family with violence.

4. Consequently, he brought this suit seeking the following verbatim reliefs:

a) A declaration that the plaintiff is the beneficial owner of the suit land title numbers Kabete/Kibichiku/1189, 1190, 1191, and 1192.

b) A declaration that the defendant has no lawful interest in the suit land title numbers Kabete/Kibichiku/1189, 1190, 1191, and 1192.

c) A permanent injunction restraining the defendant, his employees, servants, agents or any person claiming interest through the defendant from entering into, remaining on, damaging, or in any manner interfering with the suit land title numbers Kabete/Kibichiku/1189, 1190, 1191, and 1192 or evicting the plaintiff therefrom and general damages.

d) Costs of the suit

e) Any other or further relief that this honourable court may deem fit and just to grant.

5. Together with the plaint, the plaintiff brought a notice of motion dated 5/2/2021, seeking an interlocutory injunctive order against the defendant, pending the hearing and determination of the suit. The plaintiff subsequently filed two affidavits of service: (i) an affidavit of service dated 4/3/2021 in which a process server by the name **Francis M Njoroge** deponed that on 12/2/2021, he received a hearing notice together with the notice of motion dated 5/2/2021 from **M/s Kamunye Gichingi & Co Advocates** with instructions to serve the defendant and he proceeded to effect service on 12/2/2021; and (ii) an affidavit of service dated 7/4/2020 [sic] by the same process server, in which he deponed that he had served a hearing notice on the defendant on 6/4/2021 relating to the hearing of 9/4/2021. Based on the said affidavit of service, the plaintiff procured an ex parte hearing of the notice of motion on 9/4/2021 before Gacheru J and obtained the interlocutory injunction.

6. On 15/6/2021, the defendant brought a notice of motion dated 10/6/2021, seeking an order setting aside and vacating the said ex-parte

order of 9/4/2021. The said application dated 10/6/2021 is the subject of this ruling.

7. The application was supported by the defendant's affidavit sworn on 10/6/2021, and the further affidavit sworn by the defendant on 21/7/2021. The application was canvassed through written submissions dated 13/8/2021, filed by the firm of *Kingara & Co Advocates*. The defendant deposed that he had never been served with the notice of motion nor the hearing notice and that he learnt about this case when he went to Kikuyu Law Courts where he was a complainant in a criminal case in which the plaintiff was an accused person facing a criminal charge of damage to property. He added that the process server had made false affidavits purporting to have served him. The defendant contended that the firm of **Kamunye Gichigi and Co Advocates** was not on record in this suit and could not have instructed the process server to serve the notice of motion or the hearing notice. He contended that he was away from home on 12/2/2021 and 6/4/2021. He contended that the plaintiff had taken advantage of the ex parte orders to vandalize his property. He further deposed that **Nairobi ELC Case No. 642 of 2009** had abated.

8. Urging the court to vacate the ex parte orders, Mr Kingara, counsel for the defendant, submitted that the firm of *Kamunye Gichigi & Co Advocates* had never been on record in this suit and there could not be proper service of the notice of motion nor the hearing by the said firm. Counsel added that the defendant had demonstrated that he was away on the two occasions the process server alleged to have served him. Counsel added that the affidavits of service failed to meet the requirements of the law because the process server did not indicate the time and manner of service.

9. Relying on the decisions in: (i) **Patel v EA Cargo Handling Services (1974) EA 75**; and (ii) **James Kanyita Nderitu & another v Marios Philotas Ghikas & another (2016) eKLR**, counsel for the defendant submitted that the ex-parte orders should be set aside *ex-debito justitiae*. In conclusion, counsel urged the court to uphold the principle that a court should, in all circumstances, afford a hearing to a party who has come to seek the court's audience and not to shut him out.

10. The plaintiff opposed the application through a replying affidavit dated 2/7/2021, and written submissions dated 6/10/2021. He deposed that he was present when the defendant's wife was served with the hearing notice and the notice of motion on 12/2/2021. He added that the process server had previously served court process on the defendant on behalf of the firm of *Kamunye Gichigi & Co Advocates* in Nairobi ELC 642 of 2009. It was his case that the process server's previous engagements with the said law firm was the reason why he deposed that he effected service of the notice of motion and the hearing notice on behalf of the said law firm. He further deposed that because of the "present technology", he was "aware that most people usually use previous documents in their computer and amend them where necessary hence occasionally errors of retaining some irrelevant or wrong information from previous documents are not uncommon."

11. Urging the court to reject the application, counsel for the plaintiff submitted that the application was fatally defective because it lacked grounds as required under Order 51 rule 4.

12. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant law and jurisprudence relating to the key question in this application. The single question falling for determination in this application is whether the defendant was served with the notice of motion dated 5/2/2021 and the relevant hearing notices.

13. Before I focus on the key question, I will dispose the issue relating to the defendant's failure to itemize the grounds upon which the notice of motion dated 10/6/2021 was premised. Counsel for the plaintiff contended that the application was fatally defective because it did not contain the grounds upon which it was premised, as required under **Order 51 rule 4** of the **Civil Procedure Rules**. The said rule provides thus:

"4. Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

14. My understanding of the above legal framework is that, where the motion is grounded on affidavit evidence, the applicant is required to attach, file, and serve the affidavit, alongside the motion. There is no mandatory requirement that every motion must contain itemized grounds. It suffices when the supporting affidavit is attached, filed and served alongside the motion. Failure to itemize the grounds is therefore not a fatal error or a proper basis for locking an applicant out of the seat of justice [See Article 159 of the Constitution]. I now turn to the key question in the application.

15. It does emerge from the court record that upon the application dated 5/2/2021 being filed, the court file was sent to **Muranga Environment and Land Court** and placed before Kemei J. Kemei J dealt with the file on 10/2/2021 and declined to certify the application as urgent. For avoidance of doubt, the Learned Judge made the following orders:

"1. I have read and considered the application dated 5/2/2021.

2. The application is not declared urgent.

3. The applicant is ordered to serve the application upon the defendant and thereafter fix the matter for inter partes hearing at the ELC Registry at Thika on priority basis.

4. Costs in the cause".

16. Subsequently, on 12/2/2021, the Deputy Registrar at **Muranga Environment and Land Court** wrote a letter dated 12/2/2021, forwarding this file together with 10 other files to **Thika Environment and Land Court**. The court record shows that the subsequent activity in this file was on 22/2/2021 when Samuel K Gichigi attended the Court Registry at **Thika Environment and Land Court** and fixed a hearing date for the application dated 5/2/2021. The court record does not bear any Court Registry activity culminating in the fixing

of a hearing date as at 12/2/2021.

17. As earlier indicated, the ex parte hearing of the application dated 5/2/21 was procured on the basis of two affidavits: (i) an affidavit sworn on 4/3/2021 by Francis M Njoroge in which he deposed that he had served on the defendant's wife a hearing notice dated 12/2/2021 and the notice of motion dated 5/2/2021; and (ii) an affidavit sworn on 7/4/2021 by Francis M Njoroge in which he deposed that on 6/4/2021, he served a hearing notice on the defendant, relating to the hearing of 9/4/2021. The said service is denied by the defendant.

18. For clarity, the said process server deposed as follows at paragraph 2 of the affidavit of service sworn on 4/3/2021:

“That on 12th day of February 2021 I received copies of hearing notice, notice of motion under certificate of urgency attached with supporting affidavit together with the annexures thereto and the plaint thereof all dated 12th February 2021 and 5th February 2021 respectively and coming up for interparties hearing on 10th day of March 2021, from the firm of Kamunye Gichigi & Co. Advocates with instructions to effect service of the same upon VICTOR KIBINU MUTURI the defendant herein.”

19. I have examined the two affidavits of service alongside the court record. The order issued by Kemei J was clear that, first the application was to be served on the defendant. Thereafter, the application was to be fixed for interpartes hearing. The relevant file was dispatched from Muranga on 12/2/2021. There was no date-fixing activity in the file on that date. The subsequent date-fixing activity was on 22/2/21, when the application was fixed for hearing on 10/3/2021. It is therefore not possible that on 12/2/2021, the process server had a genuine **hearing notice dated 12/2/2021** which he allegedly served alongside the notice of motion on the same day that the file was dispatched from **Muranga Environment and Land Court to Thika Environment and Land Court**. If the Court Registry had given a hearing date as at 12/2/2021, the same would be reflecting in the court record. Secondly, any purported fixing of a hearing date before serving the application would have been in breach of the order made by Kemei J on 10/2/2021. Thirdly, the hearing date contained in the hearing notice dated 12/2/2021 had not been fixed as at 12/2/2021, the day when the process server purports to have served the defendant's wife.

20. Fourthly, the firm of *Kamunye Gichigi & Co Advocates* which purportedly instructed the process server to serve the notice of motion was not on record in this file. They acted for the plaintiff in a different suit. The process server said nothing to address this issue. I therefore entirely agree with counsel for the defendant that service of documents from a law firm that was not on record in this suit cannot be taken to be proper service to warrant the shutting of the defendant out of the seat of justice.

21. The totality of the foregoing is that the defendant has proved, on a balance of probabilities, that there was no service of the notice of motion dated 5/2/2021 or any relevant hearing notice on him. The Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghika & another [2016] eKLR** outlined the following principle regarding the fate of ex parte irregular judgments or orders procured without proper service:

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

‘There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.’

22. In light of the foregoing, the ex parte orders obtained herein on 9/4/2021 suffers the same fate as that of an irregular judgment. Consequently, the defendant's notice of motion dated 10/6/2021 is allowed in terms of prayer 3. Disposal directions relating to the interpartes hearing of the plaintiff application dated 5/2/2021 shall be given at the time of reading this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF DECEMBER 2021

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR KING'ARA FOR THE DEFENDANT/APPLICANT

COURT ASSISTANT: LUCY MUTHONI