



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 204 OF 2016

BOSCO NTHENGE NZIOKIPLAINTIFF

VERSUS

WAYUA MUEMADEFENDANT

AND

MATHII *alias* MATHEI *alias* MANTHEI MUEMA....APPLICANT

RULING

1. In the Application dated 28th January, 2019, the Applicant is seeking for the following orders:

a. That the Judgment delivered on 23rd February, 2018, Decree and all subsequential orders thereto be set aside.

b. That the Applicant be enjoined in this suit as the 2nd Defendant and be granted leave to file appearance and her Defence and the Defence annexed hereto be deemed as duly filed and served.

2. The Application is supported by the Affidavit of the Applicant who has deponed that the Defendant herein is her co-wife; that she is member number 1714 in Katelembo Athiani Muputi Farming and Ranching Co-operative (*the Society*) and that the Defendant is member number 1830 in the same Society.

3. According to the Applicant, by virtue of being member number 1714, she was allocated plot number 1714 measuring approximately 2.04 acres; that later on, she was given plot number 757 measuring 0.5 acres and that she took possession of plot number 757 and put up a temporary structure.

4. It is the deposition of the Applicant that subsequently, the Society realized that that it had also issued to J. Peter Kivanga plot number 757 by mistake; that the said J. Peter Kivanga was allocated an alternative plot by the Society and that her co-wife sold her plot number 756 leaving her family on plot number 1715.

5. It is the Applicant's case that she sub-divided plot number 757 into four portions known as 757A, 757 B, 757C and 757D; that she sold plot number 757A to Fredrick Musau Mwaniki and plot numbers 757C and 757D to Muthesya Self Help Group and that plot number 757 which is being claimed by the Plaintiff belongs to him.

6. The Applicant finally deponed that the Plaintiff sued the wrong party; that being the legal owner of plot number 757, she should be joined in the suit and that unless the Judgment of the court is set aside, she will lose her property without being heard.

7. In reply, the Plaintiff deponed that he purchased plot number 757 within the Society; that the Judgment entered was against the Defendant and not the Applicant and that the Judgment of the court has already been enforced. According to the Applicant, he has no cause of action as against the Applicant herein.

8. The Applicant's advocate submitted that the Respondent sued the wrong party; that the Defendant has never owned or entered into plot number 757 and that the letters from the Society shows that the suit land belongs to the Applicant.

9. The Plaintiff's advocate submitted that the Applicant is not a party to this suit and has no right to apply to set aside a valid Judgment; that the Applicant cannot be joined in a suit which has already been heard and determined and that the Applicant has no interest in the suit.

10. This suit was commenced by way of a Plaint dated 9th November, 2016. In the Plaint, the Plaintiff averred that at all material times, he was the lawful and legal owner of land known as plot number 757-Katelembo Athiani Muputi Farming and Ranching Co-operative Society (*the Society*).

11. It was the Plaintiff's case that the Defendant had encroached on the suit property. The Plaintiff prayed for the eviction of the Defendant.

12. Although the Defendant was served with Summons to Enter Appearance, she neither entered appearance nor filed a Defence. Indeed, the suit proceeded ex-parte and Judgment was entered in the favour of the Plaintiff by this court on 23rd February, 2018. In the Judgment, the court ordered for the eviction of the Defendant from the suit property. Indeed, the import of the Judgment is that the suit land belongs to the Plaintiff to the exclusion of anyone else.

13. The Applicant has deponed that she is the owner of plot number 757, which she has sub-divided into four portions, to wit, plot numbers 757A-757D. The Applicant has produced in evidence copies of letters from the Society dated 19th October, 1998; 8th October, 2013 and 16th January, 2017 in which the Society stated that plot number 757 belongs to the Applicant.

14. In the letter dated 14th September, 2018, the Society has stated that the Applicant has since sub-divided plot number 757 into four portions and sold plot numbers 757A to Fredrick Musau Mwaniki and plot numbers 757C and 757D to Muthesya Self Help Group.

15. Although the Plaintiff's case is that he bought Plot No. 757 from one Peter Kivanga, the Applicant has produced a letter dated 16th January, 2017 indicating that the said J. Peter Kivanga had been allocated an alternative plot.

16. The documents produced by the Applicant shows, *prima facie*, that she has an interest in plot number 757. That being the case, she should have been sued or joined in the suit. However, that did not happen.

17. The grounds for setting aside ex-parte Judgment have now been settled. As was held by the Court of Appeal in the case of *Pithon Waweru Maina vs. Thuka Mugiria (1983) KLR 78*, there are no limits or restrictions on the Judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. The Court of Appeal further held that the discretion 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 course of justice.

18. There is no evidence before me to show that the Applicant was aware of the suit. Considering that the Applicant has, *prima facie*, shown that she has an interest in plot number 757, she ought to be heard on the issue of the legitimate ownership of the land.

19. The right to hearing being fundamental in nature, it does not matter that a Judgment has already been entered, or that the said Judgment has been executed. This court has the unfettered jurisdiction to set aside the said Judgment to enable the Applicant to be joined in the suit and be heard.

20. For those reasons, I allow the Applicant's Application dated 28th January, 2019 as follows:

- a. **The Judgment delivered on 23rd February, 2018 be and is hereby set aside.**
- b. **The Applicant be and is hereby enjoined in this suit as the 2nd Defendant.**
- c. **The Applicant to file and serve her Defence within fourteen (14) days of the date of this Ruling.**
- d. **The costs of the Application be in the cause.**

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O. A. ANGOTE

JUDGE