



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 326 OF 2017

KALEWA KIMEU MASAKA.....1ST PLAINTIFF
ALFONCE MUEMA KIMEU (*Suing as the administrators Ad-litem of the*
Estate of the late KIMEU MASAKA KAVUTA).....2ND PLAINTIFF

VERSUS

KATHANZU NGUNZI.....1ST DEFENDANT
KIOKO NGUNZI.....2ND DEFENDANT
NTHUSI NGUNZI.....3RD DEFENDANT

RULING

1. In the Amended Notice of Motion dated 20th March, 2019, the Defendants have sought for the following orders:

a) That the proceedings in this matter interlocutory Judgment, final Judgment and any other consequential orders issued herein be set aside.

b) That the Defendants/Applicants be granted leave to file Defence and Counter-claim out of time.

c) That costs of this Application be provided for.

2. The Application is premised on the grounds that the Defendants were served with Summons to Enter Appearance in the year 2017; that a Memorandum of Appearance was filed by the Defendants on 24th August, 2017 and that the Defendants were never served with a mention or hearing notice by the Plaintiffs.

3. The 2nd Defendant deponed that after filing the Memorandum of Appearance, by inadvertent mistake, they did not file the Defence and that the action of the Plaintiffs to proceed with the hearing of the matter without notifying them is against the letter and spirit of Article 50 of the Constitution and the rules of natural justice.

4. The Defendants finally deponed that they have a Defence and Counter-claim that raises triable issues and that they be granted leave to file the Defence and Counter-claim out of time.

5. In response, the 2nd Plaintiff deponed that the court process-server visited the physical address mentioned in the Memorandum of Appearance on 21st November, 2017 but did not find the Defendants; that the process-server then physically traced the Defendants, who were known to him and served them with hearing and mention notices.

6. The 2nd Plaintiff finally deponed that the Defendants assertion that they failed to file their Defence by an inadvertent mistake is not a sufficient reason; that equity aids the vigilant and not the indolent and that the Defendants live and their own land bordering the Plaintiffs' land.

7. The 2nd Plaintiff finally deponed that the annexed draft Defence does not raise a plausible Defence; that the Defence is a mere denial and

that the present Application has been filed in bad faith to frustrate the Plaintiffs from enjoying the fruits of their Judgment.

8. The process-server, Charles Ndambuki Nthiwa, also filed an Affidavit in reply to the Application. The process-server deponed that he visited every room of Kitanga House indicated in the Memorandum of Appearance with a view of serving the Defendant with court process and that after failing to trace the Defendants in Kitanga House, he personally served them with court process in Kituluni village at their place of residence.

9. Both the Plaintiffs' and the Defendants' advocates filed their respective submissions and authorities. I have considered the said submissions and authorities.

10. This suit was commenced by way of a Complaint dated 25th July, 2017. In the Complaint, the Plaintiffs averred that the late Kimeu Masaka Kavuta is the registered proprietor of land known as Kinyaata/Ikombe A/824 while the Defendants are the proprietors of parcel number 823; that the Defendants have trespassed on parcel of land number 824 and that they should be evicted from the said land.

11. The Defendants have admitted in their Affidavit that they were served with Summons to Enter Appearance in this matter "*sometimes in August, 2017.*" After the said service, the Defendants filed a Memorandum of Appearance dated 22nd August, 2017 which was duly served on the Plaintiffs' advocate on 25th August, 2017.

12. The Memorandum of Appearance shows the Defendants' place of business as "*Kitanga House, 2nd Floor, P.O. Box 2383-90100 Machakos (Land Plan Consultants).*"

13. According to the Defendants, after filing the said Memorandum of Appearance in August, 2017, they inadvertently did not file a Defence and that in any event, they were never served with the subsequent mention or hearing notices.

14. The process-server has filed an Affidavit deponing that after failing to trace the Defendants at Kitanga House, he personally served the Defendants with the hearing notices at their home in Kituluni; that the Defendants were well known to him before the said services and that the Defendants are a mother and her sons.

15. Indeed, there are Affidavits of Service showing that the Defendants were served with the hearing notice for 30th July, 2018 and a mention notice for 15th May, 2018 when the matter came up for directions. The said Affidavits of Service shows that the Defendants were served with the mention and hearing notices at Kituluni village, Kinyaata Sub-location, where their home is located.

16. The Defendants have not denied that indeed their home is at a place mentioned in the Affidavits of Service. In fact, the Defendants did not summon the process-server to cross-examine him on his Affidavits of Service. I am therefore convinced that the Defendants were served with the hearing notice of 30th July, 2018, which is the day that the matter came up for hearing.

17. While the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the cause of justice (*See Mbogo vs. Shah (1968) E.A 93*). When the Defendants gave an address with a view of misleading the process-server on where they can be found for purposes of service, their intention was to deliberately obstruct or delay the cause of justice. This was further exhibited when the Defendants deliberately declined to file a Defence even after being served with a mention notice and a hearing notice. In the circumstances, the Defendants do not deserve the discretion of the court to be exercised in their favour.

18. In any event, I have perused the Defendants draft Defence and Counter-claim. The Defendants have not denied that they are the registered proprietors of parcel of land known as Kinyaata/Ikombe A/823 while the Plaintiffs are the owners of land known as Kinyaata/Ikombe 824. If indeed the Plaintiffs misrepresented themselves to the Land Adjudication Officer to be registered as the owners of parcel number 824, then the issue should have been taken up during the adjudication.

19. Considering that the Defendants have not annexed on their Affidavit even a single document to prove that the Plaintiffs had the suit property fraudulently registered in their favour, I find the draft Defence and Counter-claim to be a mere sham.

20. For those reasons, I dismiss the Application dated 20th March, 2019 with costs.

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

O.A. ANGOTE

JUDGE