



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 119 OF 2008**

**KILONZO KALIMU NTHONGOI *alias***

**KILONZO KALIMU .....1<sup>ST</sup> PLAINTIFF**

**KALUKI MUSAU .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUTISYA MBWII KALIMU *alias***

**MUTISYA MBWII.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 23<sup>rd</sup> August, 2019, the Defendant is seeking for the following orders:

***a. That this Honourable Court be pleased to grant an injunctive order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/their agents and or servants from selling/dealing, alienating or interfering in any manner with all that property known as Mbiuni/Ulaani/886 pending the hearing and determination of main suit.***

***b. That pending the hearing and determination of this Application and main suit, this Honourable Court directs that the proceedings in Kithimani Senior Resident Magistrate's Court, Case No. 14 of 2019 be stayed.***

***c. That this Honourable Court be pleased to discharge and/or set aside the ex-parte proceedings and consequent orders of the Mwala Land Disputes Tribunal and adopted at the Machakos Chief Magistrate's court being Miscellaneous Cause No. 20 of 2003.***

***d. That this Honourable Court be pleased to discharge and/or set aside the ex-parte proceedings and consequent Judgment and Decree of this Honourable Court made on 13<sup>th</sup> February, 2018, enlarges time and the Defendant be granted unconditional leave to defend the suit.***

***e. That the draft Defence and Counter-claim attached to this Application be deemed as properly filed.***

***f. That the caution placed on property known as Mbiuni/Ulaani/886 on 20<sup>th</sup> January, 2009 by the 1<sup>st</sup> Plaintiff be removed.***

***g. That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Defendant who has deponed that he is the registered proprietor of land known as Mbiuni/ Ulaani/886 (*the suit property*); that he purchased the suit property from Ndeto Kalimu, a beneficiary of the Estate of the late Daniel Mutinda and that the suit property was transferred to him.

3. According to the Defendant, he has lived on the suit property since he purchased it; that the ex-parte Judgment obtained by the Plaintiffs was fraudulent and was obtained through material non-disclosure of relevant facts and evidence and that there was no proper service of summons on him in respect of the suit.

4. According to the Defendant, he only became aware of the ex-parte Judgment when he was sued in Kithimani SRMCC No. 14 of 2019; that the proceedings in Mwala Land Disputes Tribunal Case No. 71 of 2002 were never brought to his attention and that this suit should be heard on merit. The Application by the Defendant is not opposed.

5. This suit was commenced by way of a Plaint dated 4<sup>th</sup> June, 2008. In the Plaint, the 1<sup>st</sup> Plaintiff prayed for a declaratory order that through the 2<sup>nd</sup> Plaintiff, he is entitled to half share of the suit property.

6. In his Affidavit of Service, the process-server deponed that on 6<sup>th</sup> September, 2008, he served the Defendant with Summons to Enter Appearance, and that the person who pointed out the Defendant to him was the 1<sup>st</sup> Plaintiff. It is on the basis of the said Affidavit of Service that the court proceeded to hear the Plaintiffs' case ex-parte and delivered its Judgment on 13<sup>th</sup> February, 2018.

7. The Plaintiffs have not controverted the Defendant's deposition that he was not served with Summons to Enter Appearance. Indeed, the Application by the Defendant has not been opposed.

8. Considering that the Defendant has denied that he was served with Summons to Enter appearance, and in the absence of a response or a denial by the Plaintiffs, I find and hold that indeed the Defendant was never served with the Plaint and the Summons to Enter Appearance.

9. That being the case, the proceedings and the Judgment herein are set aside *ex debito justitiae*, and the Defendant is given leave to unconditionally defend the claim. The Application dated 23<sup>rd</sup> August, 2019 is therefore allowed as follows:

***a. The proceedings and Judgment dated 13<sup>th</sup> February, 2018 be and is hereby set aside.***

***b. The Defendant to file his Defence and Counter-claim within fourteen (14) days of this Ruling.***

***c. The Plaintiffs to pay the costs of the Application.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**