



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 604 OF 2017

MARY NYAMBURA KINYANJUI.....1ST PLAINTIFF/RESPONDENT

ANNA WANGARI.....2ND PLAINTIFF/RESPONDENT

VERSUS

TERESIA WANJIRU NJUGUNA1ST DEFENDANT/APPLICANT

THE NATIONAL LAND COMMISSION2ND DEFENDANT

RULING

There are two Applications herein for determination. The first one is the **Notice of Motion Application**, dated **14th June 2019**, by the 1st Defendant/ Applicant who has sought for the following Orders;

- 1. That the Honourable Court be pleased to order stay of execution of the Judgment delivered on 3rd May 2019, and any subsequent decree thereof pending hearing and determination of this suit.**
- 2. The Exparte Judgment entered on 3rd May 2019, and any subsequent decree therein together with all consequential orders be set aside and the Defendant/ Applicant be given leave to file and serve her statement of Defence and defend the suit.**
- 3. This Honourable Court be please to issue an order to set aside the proceedings in this matter and allow the suit to begin de novo.**
- 4. The costs of this Application be provided for.**

The Application is premised on the grounds that the Defendant/ Applicant is the Administratrix of the Estate of **Patrick Ndungu Njuguna**. That she learnt of the suit after she visited the suit land and saw a stone indicated **not for sale** to which she reported to the **DCIO, Ruiru**, and upon investigations, she learnt from the **Plaintiffs/ Respondents**, that there was a Judgment giving them rights over the suit land. Further that the **1st Defendant/Applicant** perused the pleadings through her Advocates and realized that **service of Summons to enter appearance** was effected by way of **substituted service**, through the **Daily Nation Newspaper** of **21st March 2019**. That before the order for **substituted service** was made, she had never been served with summons to enter appearance as required by **Order 5 of the Civil Procedure Rules**. Further that in an affidavit of service dated **15th December 2017**, the deponent indicated that it became impossible to trace the applicant without attaching any proof of attempted service upon the Applicant. That the 1st Defendant/Applicant is ready to defend the matter by having it heard on merit.

Further she contended that the subject matter of the suit herein is **L.R No. Ruiru East/Juja East Block2/1667**, and from the pleadings it appears that there are two title deeds for the same property. That it would be imperative that the **District Land Registrar** and the **Attorney General**, be enjoined to the suit to render an explanation on how a single parcel of land had two title deeds.

In her supporting affidavit the Applicant **Teresia Wanjiru Njuguna**, reiterated the contents of the grounds on the face of the Application and averred that the Application has been made without unreasonable delay and that no prejudice shall be occasioned to the Plaintiffs/ Respondents.

The Application is opposed and the **1st Plaintiff/ Respondent**, filed a Replying Affidavit and averred that the issue of who was the owner of

the suit property started way before filing of the instant suit and that despite the 1st Defendant/Applicant being summoned by the **Police**, she made promises to appear but she never did. Further that after filing of the suit, several attempts to serve her personally were made including trying to locate her at her known place and calling her through her phone number **0721451528**, with her agreeing to meet at designated places, but she never showed up leaving her Advocates with no option but to serve her through substituted service.

It was her contention that the 1st **Defendant/ Applicant**, all along was aware of the suit and evaded service deliberately and thus the instant Application is an afterthought. She further averred that the Court has already pronounced itself on the core issues revolving around the case and it would therefore be a wastage of **judicial time** and engaging on an academic exercise. She averred that there are no merits to warrant the setting aside of the regular judgment.

In his Supporting Affidavit, **Mathew W.Wakaba** a Court clerk in the Law Firm of the Plaintiffs' Counsel on record averred that on **17th July 2017**, he received a copy of **Summons** to enter appearance dated **10th July 2017**, copy of the **Plaint** and list of documents and on the material day accompanied by one **Kimani**, they proceeded to **University of Nairobi**, and on their arrival they called **0721451528**, to which a lady answered and inquired on the details of the case. The said lady then confirmed that the land had a dispute between herself and the Plaintiffs, but she refused to avail herself and switched off her phone and never answered his call again.

The 1st **Defendant/ Applicant**, filed Supplementary Affidavit and averred that the issue of who was the lawful owner of the suit property would only be determined if her Application is allowed and that the Application only seeks the Courts determination on the issue of service of summons and whether she was personally served with summons to enter appearance. She confirmed that the issue of ownership is under investigation by the **DCIO** office in **Ruiru**, where she had recorded her statement and averred that the **Plaintiffs/ Respondents** got her mobile phone number from the said offices after she lodged a complaint with the police after the Plaintiffs erected '**Not for sale Notice board**' on the property. She further contended that the Plaintiffs/ Respondents did not demonstrate the several attempts to serve her as she has never worked at the **University of Nairobi**. She also averred that the Plaintiffs failed to state from which number she had called her and the date so that she could confirm from her record. She further contended that she had been advised by her Advocates that personal service of summons is the best way and substituted service could only suffice if one could demonstrate attempts to personally serve were futile and that the Plaintiffs have not explained what efforts they took to serve the summons and that allowing the Application is not tantamount to wastage of judicial time.

The 2nd Application is the one dated **29th July 2019**, by the 1st Defendant/Applicant, seeking for orders that;

1. This Court be pleased to order stay of further transfer, charge or sale of RUIRU EAST/JUJA EAST BLOCK 2/1667 by the Plaintiffs/ Respondents or their agents pending the hearing and determination of the Defendants/ Applicant Notice of Motion Application dated 14th June 2019.

2. An order be made for the Plaintiffs/ Respondents to deposit the new title for RUIRU EAST/JUJA ESAT BLOCK 2/1667, in Court pending hearing and determination of this suit.

The Application is premised on the grounds that the 1st Defendant/ Applicant's Advocate wrote a letter dated **11th July 2019**, to the **Land Registrar, Thika**, and copied it to the Deputy Registrar of this Honourable Court notifying the Land Registrar of the instant proceedings and inquiring whether the said Land Registrar was in receipt of any application seeking to enforce the ex parte Judgment and Decree issued on 3rd May 2019. That the said letter was delivered on **23rd July 2019**. That on the same date, the **Land Registrar** confirmed that his office had received the judgment and decree and proceeded to cancel the title in the name **Patrick Njuguna Ndungu**, and therefore the action by the **Land Registrar**, defeats the entire application dated **14th June 2019**.

In his supporting Affidavit **Victor Odhiambo Ayieko**, Counsel for the 1st Defendant/Applicant reiterated the grounds on the face of the Application and further averred that the cancellation of the title in the name of **Patrick Ndungu Njuguna**, defeats the whole essence of the 1st Defendant's/ Applicant's Notice of Motion Application dated **14th June 2019**, which was still pending before the Court.

In opposing the Application the Plaintiffs/ Applicants filed grounds of opposition dated **24th October 2019**, and averred that the Application is misconceived, frivolous and vexatious and that the issue of depositing the new title is unnecessary in the circumstances of the instant case and as such the Application is an abuse of the Court process

On the **1st October 2019**, the Court directed that the Application dated **29th July 2019**, be canvassed by way of written submissions and in compliance with the said directive, the 1st Defendant/Applicant through the Law Firm of **Ayieko Kangethe & Company Advocates**, filed her written submissions on **24th October 2019**, and submitted that the Applicant has a **meritorious defence** which she would like the court to ventilate. It was submitted that substantial loss can be envisaged if the subject matter of the review is liable to be destroyed and render it nugatory as there is a likelihood that a further transfer can be done. It was further submitted that the balance lies in preserving the subject matter of the judgment as in land cases, the land needs to be preserved in a state which a successful litigant will not find that it no longer exists.

The Plaintiffs/ Respondents through the **Law Firm of Muchangi Nduati & Company Advocates**, filed their written submissions on **24th October 2019**, and averred that the prayer for deposit of the title is being overzealous as the Plaintiffs have been keeping the title in safe custody. It was further submitted that should the Application dated **14th June 2019**, succeeds, the net effect would be to stop all the transactions in connection with the said title and prayer no. 4 cannot be obtained until the Application is heard and determined. It was their submissions that no evidence has been tendered to show that they are transferring or charging the said property as alleged.

Both Applications were canvassed by way of written submissions which this Court has carefully read and considered. The Court renders itself as follows;

The issues for determination are;

1. Whether ex parte Judgment should be set aside.

2. Whether the Plaintiff's/ Respondents should deposit the new title in Court

1. Whether ex parte Judgment should be set aside.

Before deciding on the issue of whether or not the title document ought to be deposited in Court, the Court will first determine whether the **ex parte Judgment** should be set aside. At the core of this Application is the issue of service of summons to enter appearance. It is the 1st Defendant's/ Applicant's allegation that personal service which is the first and most important form of service was not afforded to her as the Plaintiffs/Applicants purported to effect service by way of substituted service without showing efforts to which they had made in trying to serve her with the suit papers. The Court has perused the Court file and in their Application to be allowed to effect service by way of substituted service dated **15th December 2017**, the Plaintiffs/ Respondent sought for leave to serve **Summons to enter appearance** through an advertisement in the Newspaper. The said Application was allowed on the **8th March 2018**. Further, that advertisement was placed in the **Daily Nation Newspaper** on the **21st March 2018**.

Order 5 of the Civil procedure Rules, requires the Court to be satisfied that for any reason the summons cannot be served. In her ruling on the said Application the Deputy Registrar seems to have been satisfied as she allowed the Application. It is therefore on the strength of the said Court order that the Plaintiffs / Respondents served the 1st Defendant/ Respondent by way of **Substituted Service**. This service was well within the law. However, this Court takes **Judicial Notice** of the fact that it may be possible that the 1st Defendant/ Applicant may have not seen the said Advertisement as it is possible that she may not have bought the **Daily Nation Newspaper** on that day. At the end of the day this remains a mystery. See the case of **Haile Menkerios ...Vs... Francis Mureithi & another [2019] eKLR** where the Court stated:-

“In the matter before Court, the 1st Defendant says that he did not see the advertisement that was put out. That may be believable because not all Kenyans read every edition of the Daily Nation on the very day of publication. Neither do they all read each page of the paper including the page or pages that carry classified advertisement. Yet again, the 1st Defendant may actually have seen the advertisement. It is therefore the word of one person against the other.”

Further the Plaintiffs/ Respondents have averred that the 1st Defendant/Applicant knew about the case way before as they had called her through her number. However having gone through the Supporting Affidavit of the Plaintiffs/ Respondents when seeking leave to serve the Defendants by way of substituted service, this Court notes that no such information was availed to the Court as there were no clear details that were set forth on the attempts that were made to serve the Defendant/ Applicant.

It is therefore this Court considered view that as the it has been determined that there was proper service, in order to allow the Application to set aside the ex parte judgment the 1st Defendant/ Applicant needs to satisfy the Court that it acted without inordinate delay in bringing the said application. See the case of **Haile Menkerios ...Vs...Francis Mureithi & another (supra)** where the Court held that;

“This Court is keenly aware that where there is no proper service of summons on a Defendant, then the Defendant would be entitled to setting aside of a default judgement as a matter of right. Where however the service of summons is proper then the Defendant must demonstrate that his or her failure to file defence on time was caused by reason which is excusable and further that it has an arguable answer to the claim that is an arguable defence. The discretion of the Court is wide but must not be exercised in a way that causes undue hardship or prejudice to the Plaintiff.

No doubt the service of summons herein was done in conformity with the Court order of 31st July 2018. It was duly published in the classified page of The Daily Nation of 7th August 2018. As the order for service in this way is yet to be set aside or impugned, it may be a plausible argument by the Plaintiff that the service effected on 7th August 2018 was good service.

Yet unlike personal service where there can be actual proof that the Defendant received process, it may not be so easy in the case of substituted service. The reason why a Defendant who has been personally served must do more to extricate himself/herself from a default judgment is because having actually become aware of the existence of a suit against him, the Defendant must explain why s[he] failed to act within the time prescribed by law.

In the circumstances like this, where the manner of service was authorized by Court but there is denial by the Defendant that he saw the advertisement, the Defendant bears the duty to demonstrate that he or she acted with agility upon discovery of the suit and that there is an arguable defence to the claim.”

Order 12 Rule 7 of the Civil Procedure Rules provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

In Wachira Karani ...Vs... Bildad Wachira (2016) Eklr, in allowing an application to set aside an *ex parte* judgment, the Court held that:-

"The rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."

Further in the case of John Mukuha MburuVs... - Charles Mwenga Mburu (2019) Eklr, the Court held that:-

"It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [1990] 1KLR 463

The Court must then interrogate whether the 1st Defendant/ Applicant is deserving of the orders sought of **setting aside**, the *ex parte* Judgment. In her supporting affidavit, the 1st Defendant/ Respondent averred that she learnt of the suit when she visited the Suit property and found a stone written '**Not for sale**'. However, she did not indicate when that was. But it is clear that on the **6th of June 2019**, her Advocates sought clarification from this Court and on the **14th of June 2019**, the instant Application was filed. The Court further takes notice though the **Judgment** on this issue was delivered on the **3rd of May 2019**, there could not have been inordinate delay from the time the Applicant may have found out on the entry of Judgement to the date that the instant Application was filed.

As already noted above, the reasons for not filing a defence on time is due to the fact that the 1st Defendant/ Applicant did not see the advertisement of service as alleged. The next step is that the Court will now interrogate whether the Defence on record raises triable issues.

A look at the Defence shows that it mostly contains mere denials and apart from stating the date on which the said **Patrick Ndungu Njuguna** was issued with a certificate of title, therefore the only triable issue would be whether the **National Lands Commission** is the one who issues titles or the **Land Registry**. However this is a Court in of **justice and equity**. Consequently, the Court finds that in the interest of justice and in order to afford the 1st Defendant/ Applicant her day in Court, then it is inclined to exercise its discretion and sets aside the **ex parte Judgment** entered on **3rd May 2019**, and all the consequential orders thereof.

2. Whether the Plaintiff's/ Respondents should deposit the new title in Court

The 1st Defendant/ Applicant has sought to have the Plaintiffs/ Applicants deposit the new certificate of title in Court in order to preserve the suit property. It is important to state that the Plaintiffs/ Respondents acquired the title to the suit property in accordance with the *ex parte* Court judgment delivered on **3rd May 2019** and a decree thereof. As already held by the Court above, the said Judgment has now been set aside and all consequential orders thereto. Though there is no evidence to show that the Plaintiffs/Applicants have intention to use the said title in a way that is detrimental to the interest of the 1st Defendant/ Applicant, it is evident that the certificate of title in their names was issued following the Decree emanating from the *ex parte* judgment has been set aside, the Court finds that the said prayer is merited and for the above reasons, the said prayer is allowed in its entirety. For avoidance of any doubt this Court notes that prayer 3 of the Application dated **29th July 2019**, was until the Application dated **14th June 2019**, was heard and determined thereby making the said prayer spent, since the application has been determined. However the suit property needs to be preserved and the court finds that it is necessary to have the new title protected by allowing prayer No. 4 of the application dated **29th July 2019**.

It is the Courts considered view therefore that the Application dated **29th July 2019**, is merited only in terms of **prayer No. 4**.

In conclusion, having considered the facts of this case, the affidavits filed by both parties, the rival submissions by both counsels and the relevant provisions of law, and authorities cited, this Court finds that this is a proper case for exercise of the Court's discretion in favour of the applicant. Accordingly the Court hereby **sets aside** the **ex parte judgement**, delivered on **3rd May 2019** and all the consequential orders thereof. The defendant/Applicant is granted an opportunity to defend the suit and the matter be heard interparties expeditiously and be determined on merit. For the above reasons, the 1st Defendant/Applicant is granted leave to file her defence within a period of **14 days** from the date hereof.

The Upshot of the above foregoing is that the **Notice of Motion Application** dated **14th June 2019**, is found merited and is allowed in terms of prayers **No.1, 2, and 3** with costs being the cause. Further the **Notice of Motion Application** dated **29th July 2019**, is found merited in terms of prayer **No. 4** only and the said prayer is allowed with costs being the cause.

It is so ordered

Dated, Signed and Delivered at Thika this 12th day of March 2020

L. GACHERU

JUDGE

12.3.2020

In the presence of

Mr. Matunda holding brief for Mr. Oyieko for the 1st Defendant/Applicant

Mr. Ndonga holding brief for Mr. Nduati for the Plaintiffs/Respondents

Lucy - Court Assistant

L. GACHERU

JUDGE

12.3.2020