



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 824 OF 2017

(FORMELY MILIMANI ELC NO. 380 OF 2010)

KASAMA KIMANI.....PLAINTIFF/RESPONDENT

VERSUS

JANE WANGECHI KIMANI.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated 3rd December 2018, by the Defendant seeking for orders that;

- 1. THAT this Honourable Court be pleased to set aside the interlocutory Judgment entered herein and the Judgment delivered on 7th November 2018, and all consequential orders thereto.**
- 2. THAT this Honourable Court be pleased to vary the Judgment entered on 7th November 2018, and substitute the order for transfer of land parcel No. Sigona 932 with land Parcel No. Sigona 946**
- 3. THAT the Defendant/ Applicant be served with the plaint or pleadings and any other document in relation to this case**
- 4. THAT the Defendant/ Applicant be granted leave to file her appearance and Defence and or the draft defence filed herein be deemed as dully filed and served for the matter to be heard on merits.**
- 5. THAT the Court process servers be summoned for purpose of cross examination.**
- 6. THAT the costs of this Application be provided for.**

The Application is premised on the grounds that the Defendant/ Applicant was never served with any pleadings relating to the instant suit. Further that the Defendant/ Applicant has a prima facie defence. It was contended that the Defendant/ Applicant was never served with the **Notice** of entry of judgment, and was therefore not aware of the matter until **27th November 2018**, when the Plaintiff/ Respondent bragged to her son that a Judgment had been entered against her and furnished them with the case number. She denied meeting with the process servers and that she was served with any court papers. She further averred that the process servers should be subjected to verification. It was contended that the Applicant had entered into a sale agreement with the Plaintiff/ Respondent on **30th April 2009**, for sale of part of subdivision of **L.R No. 934**, for a consideration of **Kshs. 700,000/=** and not parcel **No. 932**, and that the sale agreement erroneously indicated **934**, instead of portion of subdivision **934**.

Further that the Defendant/ Applicant executed all necessary transfer documents and delivered it to the Plaintiff/Respondent to effect transfer. That the Applicant has never had the intention of selling land parcel **No. 932**, as it is a family ancestral homestead fully developed and valued at **Kshs. 18 million**, but instead was selling **L.R 946**, which is part of subdivision of land **Sigona 934**. Further that the Defendant/ Applicant was acquitted of charges in a **Criminal Case** wherein Judgment was delivered on **22nd March 2018**, with Court acknowledging that the Defendant made a genuine mistake as **934**, had already been subdivided.

In her supporting Affidavit, the Defendant/Applicant averred that on **27th November 2018**, her son informed her that the Plaintiff/ Respondent, had informed her of the Judgment in the instant case and given that she was no aware of any Court case, she went to Court and got the copy of the Judgment and upon consulting her lawyers, they informed her that upon perusal of the Court file the contents were to the effect that she had been served with the court papers. It was her contention that had she been served, she would have defended the suit.

She further averred that she was always ready and willing to effect transfer and registration of **L.R Sigona 946**, to the Plaintiff/ Respondent and she had executed all necessary documents to transfer the same into his name. It was her contention that she entered into a sale agreement with the Plaintiff/Respondent on **30th April 2009**, for the sale of the undeveloped land which she had shown him and he had identified with a view of him looking for a buyer as she had intended to sell a portion of **934** for a consideration of **Kshs. 700,000/=**. That at the time they were writing the agreement, they were at **Equity Bank, Nairobi** and that she had not carried the title and as she could not remember it off head, they agreed to indicate a portion of **L.R 934**, as they needed the agreement before the Plaintiff/ Respondent could pay the purchase price of **Kshs. 700,000/=**. She further averred that when she went home, she gave the Plaintiff/ Respondent an envelope containing title deeds for **Sigona 946 and 932** instead of the one for **Sigona 946**. That when she later discovered the error, she asked the Plaintiff/ Respondent to return which he kept on promising to do but failed to do the same. She contended that when they were advised to procure a search of the property before transfer, the Plaintiff/ Respondent agreed to release the original title for **Sigona 946**, and they attended the **Land Control Board** meeting on **4th June 2009**, and consent was issued for land parcel **No. 946**, and transfer forms were filled by **Seneti & Company Advocates**, but she did not have some other documents which the Plaintiff/ Respondent was to pick from her.

It was her contention that she uses land **Sigona 932**, which measures **0.0532 hectares**, with her family and tenants and a school. She denied having intentions to sell **Sigona 932**, and that the Plaintiff/ Respondent tried all ways to coerce her into selling and even instituting a criminal case and though she had offered to refund him the money or take possession of **946**, which is part of subdivision of **Sigona 934**, he refused. She further averred that the Plaintiff/ Respondent had previously purchased **Sigona 346**, measuring 0.25 hectares in **March 2009** at **Kshs. 2,420,000/=** from her husband and it could not be possible to purchase **0.532 hectares** which is fully developed in the same locality for **Ksh.700,000/=**. She further averred that she was ready to file and serve the Defence together with all the necessary documents. She denied ever meeting **Ambrose Muthama** or being served with the suit papers and further denied ever meeting the said **Lucas Maingi Kimani** who alleges to have served her on **8th March 2017**. She denied ever meeting the process servers and stated that unless her orders are granted, she stands to be highly prejudiced and suffer irreparable loss.

The Application is opposed and the Plaintiff/ Respondent filed a **Replying Affidavit** and averred that the Defendant/ Applicant was at all times aware of the proceedings as confirmed by the Court records showing that she was duly served with summons to enter appearance and further pleadings as evidenced by various Affidavits of service marked as **annexture K.K 1**. It was his contention that the Defendant/ Applicant is known to him and that he is the one who directed the Court process servers to her residence to serve her. That further the Defendant/ Applicant has not denied that the process servers were duly licensed, they ever visited her home, the residence as described is hers and service of the last hearing notice and as such the cross examination of the process servers would not achieve anything. He further averred that the Defendant/Applicant offered him for sale **L.R 932**, which was erroneously described by the Defendant as **L.R 934**, and he paid the entire consideration by cash and that it is therefore clear that the Defendant/ Applicant intended to defraud him. He contended that he had been advised by his Advocates that the Defendant/ Applicant has not satisfied the Court that she deserves leave to defend the suit as the Draft statement of Defence is a sham and entertaining the same will be a breach of his constitution rights. He denied that the suit property is a matrimonial property and averred that it is an afterthought claim by the Defendant/ Applicant and that the dignity of this Court will be eroded should the Application be allowed.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered together with the affidavits and the annexures thereto. The Court renders itself as follows;

The issues for determination are;

- 1. Whether exparte Judgment should be set aside.**
- 2. Whether the Defendant/ Applicant is entitled to the orders sought**

1. Whether exparte Judgment should be set aside.

The Defendant/ Applicant denies being served with the summons to enter appearance together with all the suit papers thereto. It is her contention that the process servers ought to be subjected to cross examination.

Having perused the annexures and the Court file, this Court notes that there are various affidavits of service that indicate that indeed Defendant/ Applicant was served with the suit papers. Though the Defendant/ Applicant has denied the said service, it would seem that at that point the Court was satisfied that indeed service had properly been effected and proceeded with case **ex parte**.

The Affidavits of service, in this Court's considered view satisfactorily explained the service through which the Defendant was served as to whether or not the same is true this Court finds that the same would need thorough investigation. However it is the Court's considered view that that even though service may or may not have been proper, there are other factors that can be considered by the Court in deciding whether or not the Judgment ought to be set aside.

In order to allow the Application to set aside the ex parte judgment the 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 [2019]eKLR** 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 Mburu Vs... - 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 Defendant/ Applicant is deserving of the orders sought of **setting aside**, the *ex parte* Judgment. In her supporting affidavit, the Defendant/ Applicant averred that she learnt of the suit on **27th November 2018**, when the Plaintiff/ Respondent bragged to her son that he had obtained Judgment against them. Judgment on this matter was entered on the **7th November 2018**, and the instant Application was filed on **4th December 2018**. It is therefore, this Court's considered view that there could not have been inordinate delay from the time the Applicant may have found out about the entry of Judgement to the date that the instant Application was filed.

It is the Applicant's allegation that the reason why she could not file the Defence was because she was never served with the suit property. Though the Court takes cognizance of the fact that the Affidavits of service as filed seem to put a picture of proper service, having the process servers come to Court and be subjected to cross examination, will continue to prolong the period within which this matter will remain unresolved. It is therefore this Court considered view that it in the interest of justice and equity interrogates whether or not the Defendant/Applicant has met the threshold for setting aside **ex parte Judgment**. As already held above there was no inordinate delay in bringing the instant Application.

The next step is that the Court will now interrogate whether the Defence on record raises triable issues. In her draft statement of Defence, the Defendant / Applicant has denied selling the suit property and has averred that the property that was for sale was a different one and further denied refusing to execute the transfer documents. It is therefore clear that the suit herein hinges on specific performance. The question that begs for answers therefore is whether the Plaintiff/Respondent is entitled to orders of specific performance and if so over what suit property. This question would only be answered by calling of evidence. Therefore the court finds and holds that the draft defence as filed by Defendant raises triable issues. Further this is a Court of **justice and equity** and consequently the Court finds that in the interest of justice, it is proper to afford the Defendant/ Applicant her day in Court. Therefore, it is proper for the court to exercise its discretion and sets aside the **ex parte Judgment** entered on **7th November 2018**, and all the consequential orders thereof.

2. Whether the Defendant/ Applicant is entitle to the orders sought

The Applicant had sought for the substitution of transfer of **L.R Sigona 932**, with the transfer of **Sigona L.R 946**. However the court finds that the said order cannot be granted at this stage as the same has to be subjected to the main hearing and evidence adduced during trial. Further the Court has dispensed with the requirement to avail the process servers having set aside the *ex parte* Judgment. Therefore, the court finds that the Defendant is only entitled to the orders of setting aside the *ex parte* Judgment and consequential orders thereof.

Having carefully considered the facts of this case, the affidavits filed by both parties, the rival submissions herein and the relevant provisions of law, and authorities cited, this Court finds that this is a proper case for exercise of its discretion in favour of the applicant. Accordingly, the Court hereby **sets aside** the *ex parte judgement*, delivered on **7th November 2018**, 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 Defendant/Applicant is granted leave of 14 days from the date hereof to file her defence.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **14th June 2019**, is found partially merited and is allowed in terms of prayers **No. 3, 5 and 6 only** with costs being in the cause.

It is so ordered.

Dated, signed and Delivered at Thika this 8th Day of April 2020

L. GACHERU

JUDGE

Lucy-Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

Mwaniki Kariuki for the Plaintiff/Respondent

Gicheha Kamau for the Defendant/Applicant

L. GACHERU

JUDGE