



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE 149 OF 2017 (O.S)

WILBUR EARL HIGHTOWER JR.....APPLICANT

VERSUS

MARK KITHINJI MBATIAH.....RESPONDENT

RULING

1. This is a ruling on a notice of motion dated 3.1.2020 brought under section 1A, 1B and 3A of the Civil Procedure Rules, Order 12 Rule 7, Order 42 rule 6 of the Civil Procedure Rules and Section 68 (1) of the Land Registration Act seeking the following orders

- i. That this application be certified as urgent and service be dispensed with in the first instance and the same be heard exparte.
- ii. That the firm of Charles Kimati & Co. Advocates be allowed to come on record.
- iii. That pending hearing and determination of this application, the honorable court be pleased to issue temporary inhibition orders inhibiting any transactions relating to land parcel NTIMA/IGOKI/1496 registered in favour of WILBUR EARL HIGHTOWER JR.
- iv. That pending hearing and determination of this application, this honorable court be pleased to stay execution of exparte Judgment delivered on 17.10.2018 and a ruling delivered on 13.11.2019.
- v. That pending hearing and determination of this application, this honorable court be pleased to issue an order of status quo in respect to NTIMA/IGOKI/1496 registered in favour of WILBUR EARL HIGHTOWER JR.
- vi. That pending hearing and determination of this application, the court be pleased to set aside exparte judgement delivered on 17th October 2018 and the ruling delivered on 13/11/2019.
- vii. That upon granting the above prayer no 6, that the matter be heard afresh and the court do direct that the applicant is served and allowed to file a defence.
- viii. That costs of this application be provided for.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Charles Kimathi Ncooro an advocate for the applicant who stated that the applicant is not in Kenya presently as he is still undergoing medication in the USA. That there is already a board sitting on 4/2/2020 where the respondent is seeking approval for the substitution of the title in respect of NTIMA/IGOKI/1496. The said parcel of land was originally owned by Edward Itonga the father of Nathan Kinoti who adopted the applicant as his son who took possession of the land and registered it in his favour on 8/11/1977.

3. The applicant left Kenya in 1984 and proceeded to California to seek medical attention as he suffered from kidney failure and left the land under the care of Edward Itonga who took care of the land until 2011 when he died. The respondent knew that the applicant was undergoing treatment and intentionally misled the court which led to it giving an order for substituted service. The applicant will suffer irreparable loss if this application is not allowed.

4. The application was opposed vide the replying affidavit of Mark Kithinji dated 21/2/2020 where he contended that he is the one who has been in possession of the suit land since 1984 and has done extensive development on the land without interference. This court delivered its judgement, issued a decree and it has been more than a year since. He has since planted trees and seasonal crops and will be prejudiced if the orders sought are granted. He further disputes that the application has been made with instructions from the applicant.

5. The application was argued orally on 26.2.2020 and on 27.2.2020. Mr. Kimathi C, advocate for the applicant reiterated what was contained in his affidavit and added that the respondent herein is not in possession of the land. He was of the opinion that the applicant's case has a probability of success and that the defendant has the capacity to compensate the plaintiff. He also alleged that the plaintiff has never constructed anything on the suit land and has not met the criteria of an averse possessor. It was submitted that an *ex parte* judgement can be set aside by the courts discretion to avoid injustice and inadvertence or mistake. It was finally submitted that the wife of the defendant will be coming to court and that Nathan and Celina should be enjoined in this suit as interested party.

6. In support of the application the following cases were cited; **Joel Kipkuru Koech vs. Alice Wambui Magandi & 3 Others (2018) eKLR**, **Giella vs. Cassman Brown (1973) EA**, **Mrao vs. First American Bank Ltd (2003)**, **Hosea Kiplagat & 6 Others vs. National Environment Management Authority (NEMA) & 2 Others (2015) eKLR**, **Joseph Ngunje Waweru vs. Joel Wilfred Ngiga (1983) eKLR**, **Pithon W. Maina vs. Mugira (1982-88) 1KAR171**, **Celina Muthoni Kithinji vs. Sofiya Binti Swaleh & 8 Others (2018) eKLR**, **Wambugu vs. Njuguna (1983) KLR**, **Mbira vs. Gachuhi (2002) 1EALR 137**, **Jandu vs. Kirplal & Another (1975) EA**, **Mtana Lewa vs. Kahindi Ngala Mwangandi, M'mbaoni M'thaara vs. James Mbaka (2017) eKLR**, and **Kweyu vs. Omutu (1990) KLR**.

7. On the other hand Mr. Rimita counsel for the respondent argued that the court is *functus officio* so far as the prayers of inhibition are concerned. That this court pronounced itself and cannot therefore consider if the applicant has a *prima facie* case. On stay of execution, the overwhelming reason to make such an order is if the applicant has filed an appeal which he has not done, and no other valid reasons have been presented to do so. Furthermore there is no demonstration that the defendant intends to remain present should the suit go to hearing. On the issue of setting aside, he argued that the court should consider firstly whether the defendant was properly served with summons and in this case the plaintiff was not aware that the defendant was not in the country and moved the court to serve through substituted service as provided under the law. Secondly, the court should consider that the defendant has failed to demonstrate sufficient cause to warrant discretion in his favour.

8. The main issue for determination is whether to set aside the judgment of this court and consequential orders and to allow the defendant to defend the suit, whether to grant the stay of the aforementioned judgment and whether to grant the prayer of inhibition and whether to enjoin Nathan Kinoti and Celina Kinoti as interested parties in this suit. The court has no reason to decline the request for the counsel for the applicant to come on record.

9. It has been argued for the applicant that he left the country in the year 1984 to California hence service ought to have been effected under order 5 rule 21 of the Civil Procedure Rules. None of the documents availed by the applicant indicate that he left the country in 1984 or that the respondent was aware of this move. Apart from the title documents, the others are annexure 3 which is a letter of 23.1.2020, annexure 4 is a letter of 4.9.2012, while annexure 5 is a letter of 10.9.2019. The allegation that the substituted service was not proper is therefore unfounded.

10. Despite this conclusion on service, this court finds that the right to be heard is jealously guarded in the Kenyan constitution as enshrined under Article 50 (1) of the constitution. In the case of **CMC HOLDINGS LTD v NZIOKI (2004) KLR 173** the court set out the guiding principle the courts should bear in mind when faced by such an application as the one to set aside judgment. The Court stated that;

“In law the discretion that a court of law has, in deciding whether or not to set aside ex parte orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.....The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence whichraises triable issues.”

11. Further the Court in the case of **Southern Credit Banking Corporation Ltd V Johah Stephen Nganga (2006) eKLR** held that;

“Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is regular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If judgment entered is found to be irregular it ought to be set aside ex debito justitiae.” - Also see, **Joseph Njunge Waweru vs. Joel Wilfred Ndiga (supra)**.

12. The question which begs for an answer is; Is the defendant ready to defend the suit in the event that judgment is set aside. If so, how will he participate in the trial? This is a case where by though defendant is incapacitated by illness, he is able to communicate and give instructions to his lawyer and relatives. None of the documents however contain information on how defendant will participate in the trial. The defendant has not sworn a solemn affirmation to state that he will be available during the trial. Though he has been ill since 1984, he has not given any one a power of Attorney to act on his behalf and no one has applied to be his guardian or intends to be such a guardian in these proceedings. This is despite the submissions that his daughter is around, and so are his close relatives, Nathan and Celina. It was not enough for the applicants counsel to submit that the wife of the defendant can be attending the proceedings. After all she is not a party to this suit. I am therefore in agreement with respondent's submissions that the applicant has not demonstrated that he intends to remain present either in person or through a legal representative throughout the trial. In the circumstances, the prayer for setting aside the judgment and consequential orders fail. The prayer for stay of execution and inhibition were anchored on the judgment being set aside, hence these two prayers fail.

13. On the issue of joinder of Nathan Kinoti and Celina, I find that this prayer was not sought for in the application. It was only put forth during the submissions. Submissions are meant to be persuasive arguments to buttress the claim of a litigant hence substantive prayers ought not to be sought during submissions. In any event, the two Nathan and Celina have not sworn any affidavits expressing their desire to be enjoined in these proceedings.

14. In light of the foregoing, the application fails and the same is dismissed with costs to the respondent save that counsel for the applicant is allowed to come on record.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE