



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 215 OF 2017 (OS)

EUNICE KAHINDI GUTU.....APPLICANT

VERSUS

MOHAMED AJAZ MIRZA.....RESPONDENT

IN THE MATTER OF: LAND REFERENCE KILIFI/MTONDIA/165

AND

IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE APPLICANT HAS OBTAINED TITLE OVER THE SAID LAND REFERENCE NO. KILIFI/MTONDIA/165

RULING

1. By her Originating Summons dated 24th October 2017 and filed herein on 23rd November 2017, Eunice Kahindi Gutu (the Applicant) had sought to be declared as the one entitled to be the proprietor of LR No. Kilifi/Mtondia/165 on the basis that she had acquired the same and dispossessed Mohamed Ajaz Mirza (the Respondent) under the doctrine of adverse possession.

2. The Applicant also sought to be registered and issued with a Certificate of Title over the same in place of the Respondent. As it turned out, the Respondent did not enter appearance or file a response to the claim and on 18th January 2019, Judgment was entered for the Applicant as prayed in the Originating Summons.

3. By the instant Notice of Motion application before me dated 8th May 2019 the said Respondent now prays:-

2. That the Judgment delivered herein on 18th January 2019 be set aside and the Respondent be given leave to defend this case;

3. That the (Applicant in the Originating Summons) by herself, servants and/or agents be restrained from alienating, selling, transferring, registering, leasing, charging or in any other manner dealing with LR No. Kilifi/Mtondia/165 pending the hearing and determination of the suit;

4.

5. That directions be given for the service of the Orders made herein on the Applicant and the Kilifi Land Registrar and for all other necessary steps herein; and

6. That the costs of this application be provided for.

4. The Respondent's application which is supported by an affidavit sworn by himself is premised on the grounds:-

i) That the Respondent had no knowledge of the existence of this case until 1st May 2019;

ii) That this case is an abuse of the Court process in that the matters in issue are substantially and directly in issue in Malindi ELC Case No. 95 of 2015(OS) filed by the husband of the Applicant also claiming ownership of the suit property by adverse possession and the same is pending hearing and determination.

iii) That the Respondent has a good defence to the claim made by the Applicant in this case;

iv) That unless orders in terms of the Prayer No. 4 hereof are made forthwith, irreparable damage will be caused to the Respondent; and

v) That the Respondent is prepared to give appropriate security for the suit property by depositing its original title deed with this Honourable Court.

5. The Applicant is however opposed to the Respondent's application. In a Replying Affidavit sworn and filed herein on 21st May 2019 she avers that her family and herself are in actual possession and occupation of the suit property. The Applicant further avers that the Judgment herein was delivered in her favour after following all laid down procedures and that this Court proceeded with the matter after being satisfied that service of pleadings was duly effected.

6. The Applicant further avers that her husband separated with her and left the entire family in the suit property and she was not aware that her husband had similarly instituted a claim for adverse possession over the same property in **Malindi ELC Case No. 95 of 2015 (OS)**. She asserts that she instituted this matter in her personal capacity after occupying the land for some 27 years.

7. I have perused and considered the application and the response thereto. I have equally considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

8. The application before me is brought pursuant to Order 10 Rule 11 of the Civil Procedure Rules. That Rule provides as follows:-

“Where Judgment has been entered under this Order the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

9. A clear reading of that provision reveals that the Court's power in considering an application to set aside Judgment is discretionary. As was held in **Patel –vs- EA Cargo Handling Services Ltd(1974)EA 75:-**

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

10. However as was stated earlier on in **Shah –vs- Mbogo (1967) EA 166:-**

“This discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

11. In the matter before me, the Respondent avers that he was unaware of the proceedings herein until sometime on 1st May 2019 when by chance he happened to be searching his name on the Google Website only to come across a reference of the Judgment delivered against himself by this Court on 18th January 2019.

12. From the record, it is evident that about a month after the Originating Summons was filed, Mr. Michira, Learned Counsel for the Applicant appeared before this Court and sought orders to serve the Summons by way of an advertisement in a newspaper on the ground that they were unaware of the whereabouts of the registered owner. On 4th December 2017, this Court declined the request as there was nothing placed before the Court to demonstrate that any efforts had been made to trace the Respondent.

13. Subsequently on 26th February 2018, the Applicant filed an Affidavit of Non-Service sworn by one Samson B. Kimbeja a Process Server, indicating that on a number of dates in November 2017, he had made several attempts to trace the Respondent including tracing his former neighbours but none of them knew where the Respondent could be found.

14. On account of that Affidavit, this Court granted leave to the Applicant on the same day to serve the Originating Summons by way of substituted service by advertising through one of the local daily newspapers. Such an advertisement was subsequently published in the Standard Newspaper of 9th March 2018 and the Respondent was required to enter appearance within 21 days but he failed to do so and this matter therefore proceeded ex-parte.

15. From the material placed before me, there was nothing to show that the Respondent read the advertisement and or in anyway got wind of these proceedings. It was however interesting to note that prior to the institution of these proceedings by the Applicant on 23rd November 2017, the Applicant's husband Kahindi Kaku Biryra had two years earlier instituted similar proceedings in **Malindi ELC Case No. 95 of 2015 (OS)** against the same Respondent seeking to be adjudged the proprietor of the same suit property by way of adverse possession. These proceedings remain pending for determination before this Court.

16. According to the Applicant her said husband had since separated with her and left her and “her entire family” in the suit property. While

she claims she was unaware her husband had instituted the said proceedings and that she has filed this one as of her own right, I note at paragraph 21 of the Replying Affidavit that she avers that her former husband may have lost interest in prosecuting the matter after he vacated the suit property.

17. As it were, the Applicant does not indicate when her said former husband vacated the suit property. From the record, I note that she never made any reference to the suit filed by her former husband and this Court did not think she was being candid in her averment that she was unaware her husband had filed a similar suit.

18. As it turned out, the said husband had already served the Respondent herein and the Respondent had in turn filed appearance and responded to the earlier Originating Summons. In the premises, it was clear to me that the Respondent could have easily been traced with some diligence and the claim that he could not be found and hence the publication of the summons in the Newspaper was actuated by bad faith. It was also clear to me that having entered appearance in the matter filed by the Applicant's husband, the Respondent would have similarly entered appearance and defended the Applicant's Originating Summons if the same had come to his notice.

19. In the circumstances and given the existence of a suit filed earlier by a third party raising the same issues over the same subject matter, I am persuaded that there is merit in the Respondent's Notice of Motion dated 8th May 2019.

20. The application is accordingly allowed and the Judgment delivered on 18th January 2019 is hereby set aside. The Respondent has 21 days within which to file a response to the Applicants Originating Summons dated 24th October 2017.

21. The parties are further hereby directed to take steps within 45 days hereof to have this matter mentioned together with ***Malindi ELC Case No. 95 of 2015 (O.S); Kahindi Kaku Birya –vs- Mohamed Ajaz Mirza*** for purposes of consolidation.

22. The Costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE