



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 169 OF 2013

FLORA CHERONORESPONDENT

VERSUS

MARY NJIHIA1st APPLICANT

GRACE ABENI2nd APPLICANT

HAMISI SUMBA.....3rd RESPONDENT

WAWERU NYAGA4TH APPLICANT

JOSEPH BARASA NYONGESA5TH APPLICANT

THE LAND REGISTRAR TRANS NZOIA.....6TH RESPONDENT

ABUBAKAR TEMBULA CHANGE7TH RESPONDENT

KESOGON MOSQUE COMMITTEE.....8TH RESPONDENT

RULING

1. The application dated **12/2/2020** and filed in court on the same date has been brought by the defendants/applicants seeking the following orders:

(1) ...spent

(2) ...spent

(3) That the judgment entered herein on 31/7/2019, proceedings leading to the same and all consequential orders be set aside.

1. (4) That costs of this application be in cause.

2. The application is brought under **Order 10 rule 11 of the Civil Procedure Rules (2010), Sections 1A, 1B, 3 & 3A of the Civil Procedure Act.**

3. 2. The application is supported by the affidavit of the 5th defendant, sworn on his own behalf and on behalf of 1st, 2nd and 4th defendants sworn on **12/2/2020**. The grounds on the face of the application are that the 1st 2nd 4th and 5th defendants were not served with summons and they were condemned unheard. They aver that they live on the land with their families and have titles to their respective portions of land and have nowhere else to stay. They maintain that they have a good defence raising triable issues. They aver that they learnt of the instant suit recently from the plaintiff's threats that she would evict them. The 5th applicant's affidavit largely reiterates the grounds at the foot of the application.

4. The plaintiff filed a replying affidavit sworn on **26/2/2020**. Her response is that the application is an afterthought meant to deny her the fruits of her judgment; that the applicants, having been served with summons in the matter by one Jackson Nyongesa Simiyu on **27th October 2015** under the watch of the village elder called Josephat Mutori who pointed them out to the process server, have been aware of the suit all along; that after the applicants failed to enter appearance and file defence, and service having been deemed proper by court, judgment

was entered against them. The request for judgment dated **18/4/2018** and the affidavit of service are exhibited in the replying affidavit. The plaintiff further depones she has personal knowledge that the 2nd defendant (who is the 2nd applicant is the wife of Hamisi Sumba the 3rd defendant who participated in the hearing and who has preferred an appeal; that the 3rd defendant has acknowledged in his defence that some of the land is registered in the joint names of himself and his wife; she states that the draft defence does not raise any triable issues. No further affidavit was filed to controvert the matters in the replying affidavit.

5. A court has unfettered discretion to set aside its judgment. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75**:

“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. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

6. I have perused the affidavit of service of Jackson Nyongesa Simiyu exhibited by the plaintiff. The original is in the court record and the court stamp thereon shows that it was filed on **19th April 2016**. I am satisfied that the applicants were all served with summons and plaint in this matter.

7. Since the allegation of marriage between Grace Abeni and Hamisi Sumba, the 1st applicant has not been disputed, I find it improbable that the said Grace Abeni was not aware of the suit and the process server has indeed expressly stated that she was served though at another location away from her husband. The latter filed a memorandum of appearance as early as **24/2/2014** and participated in the proceedings.

8. I have already stated that the applicants have not responded to the averments in the replying affidavit of the plaintiff which are quite strong. A perusal of the affidavit of service also confirms that all the other applicants were served. Want of service formed an integral part of the grounds for the instant application and the applicants have failed to establish non-service.

9. This is a court of justice and must consider whether there are other grounds upon which the impugned judgment may be set aside. The presence of a defence on the merits on is essential and the applicants have exhibited what they deem an appropriate defence to the suit.

10. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the court observed that a defence on the merits does not mean defence that must succeed, but one that in my understanding raises a triable issue.

11. It must be noted that the applicant's titles were the products of an irregular subdivision that was found by this court to have robbed the plaintiff of her land and, these mother titles having been cancelled on the basis of the evidence adduced at the hearing, there is no magic that the defendants can work to escape the condemnation apportioned to that subdivision. For clarity, the applicant's titles were included in the cancellation order simply because they descended from the illegal subdivision and are consequently also irregular and illegal. The proposed defence of the applicants therefore raises no triable issues any different than those that were on trial at the hearing and there is no need to use it as a basis for setting aside the judgment in this suit.

12. Consequently, this court find no basis for granting the application dated **12/2/2020**. The same is without merit and it is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, Signed and Delivered via electronic mail at Kitale on this 21st day of July, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE