



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE 14 OF 2008

CYPRIAN MBURUGU KITHINJI.....PLAINTIFF

VERSUS

PATRICK KIBUNJA MUGUONGO.....DEFENDANT

RULING

This application is dated 26th March, 2015 and seeks Orders:-

1. ***THAT this Honourable Court be pleased to certify this application as urgent and dispense with service in the first instance.***
2. ***THAT this Honourable Court be pleased to set aside the ex parte Judgement herein dated 28/10/2008 and grant leave to the defendant applicant to defend the suit unconditionally and file a Counterclaim with the other siblings as per the annexed draft Defence and Counterclaim.***
3. ***That the costs of this application be provided for:-***

The application is supported by the affidavit of the applicant and the following grounds:-

- a) ***THAT the subject herein L.R ABOTHUGUCHI/IGANE/1686 is a subdivision of the original L.R ABOTHUGUCHI/IGANE 383 which is ancestral land originally registered in the names of the father of the defendant/applicant .***
- b) ***THAT the Plaintiff who is a nephew of the defendant fraudulently and illegally against customary trust caused the subdivision and transferred the subject matter to himself against the birthrights of the defendant/applicant together with his other siblings.***
- c) ***THAT the defendant was not served as required in Law and the affidavit of service filed together with the alleged defence is another fraud and forgery of the highest Order.***
- d) ***THAT the application is brought in good faith and the same shall not at all prejudice the Plaintiffs, claim, if any.***

The applicant's case is that he was not aware that formal proof proceedings had been conducted way back on 03/07/2008 and that a Judgement had been delivered on 28/10/2008. For this primary reason he seeks that there be an order of stay of execution of the Judgement delivered by the Hon. Justice William Ouko, Judge , as he then was, and now a Court of Appeal Judge , on 28/10/2008. He claims that the affidavit of

service and a defence purported to have been filed by him were forgeries and that they were fraudulently filed.

The Respondent's case is that he is the registered owner of Land Parcel No. ABOTHUGUCHI/IGANE/1682, having obtained it regularly and legally. He says that he obtained a judgement on 28/10/2015 and on 23/08/2010 warrants were issued to the O.C.S Kariene Police Station and Quickline Auctioneers as a result of which the Plaintiff was evicted and vacant possession was given to him. However, in 2014, 4 years later, the plaintiff and others trespassed onto his land. He reported the matter to the Police and the trespassers, including the applicant were arrested and charged at Nkubu Law Courts. The Respondent later on applied for fresh warrants which were re-issued and the applicants and those other trespassers were removed from the suit land.

I have carefully considered the pleadings and the submissions proffered by the parties.

I do find that the applicant is being untruthful in saying that he was not aware of the suit which had spawned this application. I find as a fact that in the implementation of orders issued by a Judge in this suit, the applicant and others claiming under him were evicted from Land Parcel NO. ABOTHUGUCHI/IGANE/1682 in the year 2010. He cannot, therefore, by any stretch of imagination claim ignorance of previous proceedings in this suit.

I note that on 03/07/2008, the Hon. Willian Ouko, Judge, as he then was, made a finding that the defendant had been duly served. This is a finding that I can not set aside having been made by a Judge who had horizontal Jurisdiction similar to mine. This finding formed the basis for formal proof proceedings which culminated in the delivery of the Court's judgement delivered on 28/10/2008. As a result of this judgement, the defendant was evicted from the suit land. He seems to deny his eviction from the suit land when he claims that he was unaware of the suit which led to his eviction . There is ample evidence that he was evicted from the suit land in 2010. He is being untruthful.

In the circumstances, I find that the applicant's application dated 26/05/2015 veritably lacks merit. It is therefore, dismissed.

Costs are awarded to the Respondent.

It is so ordered.

Delivered in Open Court at Meru this 8th day of July, 2015

in the presence of:-

Cc. Lilian/Daniel

Parties not in Court

P.M.NJOROGE

JUDGE