



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 334 OF 2013

JOSEPH OMBAIRE ISABOKE PLAINTIFF

VERSUS

EVANS ONKOBA 1ST DEFENDANT

KEMUMA ORURE 2ND DEFENDANT

LINET ONKOBA 3RD DEFENDANT

AND

PETERSON ORURE ABUTA INTERESTED PARTY

RULING

1. The plaintiff brought this suit against the defendants on 31st July 2013 seeking; a permanent injunction to restrain the defendants from entering onto, cultivating, digging, erecting structures on and/or in any manner interfering with all that parcel of land known as LR No. Central Kitutu/Bogetaorio/2342 (hereinafter referred to as “the suit property”) and, an order for the eviction of the defendants from the suit property. In his plaint dated 30th July 2013, the plaintiff averred that he is and was at all material times the registered proprietor of the suit property which he purchased from the 1st defendant sometimes in the year 2008. The plaintiff averred that on or about 26th July 2013 the defendants jointly and severally entered the suit property without his consent or permission and started ploughing the same with the intention of planting bananas and other crops thereon.
2. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 30th July, 2013 under certificate of urgency seeking a temporary injunction to restrain the defendants from entering onto, cultivating, tilling, erecting any structures on and/or in any manner interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit of the plaintiff sworn on 30th July, 2013 in which he reiterated the contents of the plaint which I have highlighted above. The plaintiff annexed to the said affidavit, a copy of an agreement for sale that he is said to have entered into with the 1st defendant with respect to the suit property and a copy of the title deed for the suit property in his name.
3. The application came up for hearing ex parte on 31st July 2013 when the same was certified as urgent and fixed for hearing inter partes on 14th August 2013. When the application came up for hearing on 14th August 2013, only the plaintiff’s advocate appeared in court. After satisfying myself that the defendants were duly served with the application, I allowed the plaintiff’s advocate

to argue the application the absence of the defendants notwithstanding. The plaintiff's application for injunction was allowed in a ruling that was delivered on the same day. The plaintiff extracted the order that was endorsed with a penal notice and sealed with the seal of the court on the same day.

4. All went quiet until 3rd October 2013 when the plaintiff moved the court with yet another application this time round, seeking an order to cite the defendants for contempt of court and to have them committed to civil jail for a period not exceeding six (6) months for disobeying the order that was made herein on 14th August 2013. The plaintiff's application that was dated 30th September 2013 was brought on the grounds that this court issued a valid and lawful order on 14th August 2013, the said order was extracted and endorsed with a penal notice, the order was served upon the defendants personally and that the defendants disobeyed the said order on 23rd August 2013 when they entered the suit property and uprooted the plaintiff's maize plants and cut down tea plants that were grown by the plaintiff thereon. The application was supported by the affidavit of the plaintiff sworn on 30th September 2013 on which he annexed; a copy of the order that was issued by the court on 14th August 2013, an affidavit of service of the said order upon the defendants and a photograph said to have been taken on the suit property showing the tea bushes which were cut down by the defendants. This application also came up for hearing ex parte on 7th October 2013 when I certified the same as urgent and fixed it for hearing inter partes on 31st October 2013.
5. This application jolted the defendants who had not taken any action in the suit into action. On 24th October 2013, the defendants brought on application by way of Notice of Motion dated 24th October 2014 seeking the stay of the proceedings relating to the plaintiff's application dated 30th September 2013 that sought their committal to civil jail for contempt of court, the setting aside of the order issued on 14th August 2013, leave to join one, Peterson Orure Abuta, the interested party as a party in the suit and leave to file statement of defence out of time. The defendants' application was brought on the grounds that the orders of 14th August 2013 were obtained by the plaintiff ex parte and as such the defendants were condemned unheard. The defendants contended that they indeed attended court on 14th August 2013 when the said order was issued but could not make representations because they were told that the court was on August vacation and as such was not sitting on that day. The defendants contended that they only got to learn later on that the plaintiff's application was heard in chambers and not in open court where they were waiting for the court on the material day. The defendant's application was supported by the affidavit of the 2nd defendant sworn on 24th October 2013 in which she deposed that the suit property is a portion of land parcel number Central Kitutu/Bogetaorio/1434 ("Plot No. 1434") that was at all material times registered in the name of her husband one, Peterson Orure Abuta who is sought to be joined in this suit as a defendant. The 2nd defendant deposed that the said Peterson Orure Abuta ("the interested party") has denied ever selling a portion of Plot No. 1434 to the plaintiff. She deposed that Plot No. 1434 was fraudulently sub-divided and a portion thereof transferred to the plaintiff. The 2nd defendant deposed further that her matrimonial home is situated on the suit property and as such, the order that was issued on 14th August 2013 had the effect of barring her from accessing her residence. The 2nd defendant contended that the suit property was sold and transferred to the plaintiff by a person who had no proprietary interest in the same. The 2nd defendant reiterated that upon being served with summons to enter appearance and the plaintiff's application dated 30th July 2013, they attended court for the hearing of the said application but were informed that the court was not sitting as it was on August vacation. The 2nd defendant has deposed that they were not aware that the court was sitting in chambers. The 2nd defendant has contended that it would serve the interest of justice if the orders of 14th August 2013 are set aside and they are given opportunity to defend the application dated 30th July 2013. The 2nd defendant annexed to her affidavit among others, a draft statement of defence and counter-claim.
6. Together with the said application, the defendant filed an affidavit that was also sworn by the 2nd defendant in reply to the plaintiff's application dated 30th September 2013 that sought their committal to civil jail for disobeying the said court order that was issued on 14th August 2013. In

the affidavit that the 2nd defendant swore on her own behalf and on behalf of the 1st and 3rd defendants, the 2nd defendant denied that they were served with the order that was issued herein on 14th August 2015. The 2nd defendant contended that the affidavit of service sworn by Isaiah Miruka on 29th August 2013 to the effect that they were personally served with the said court order is false. The 2nd defendant deposed that their advocate will seek leave when the plaintiff's application dated 30th September 2013 comes up for hearing to cross-examine the said process server on his affidavit of service. The 2nd defendant termed the plaintiff's application as an attempt to frustrate their endeavor to challenge the illegal acquisition of the suit property by the plaintiff.

7. When the defendants application dated 24th October, 2013 came up for hearing ex parte on the same day, I certified the same as urgent and issued an interim order varying the order of 14th August 2013 to allow the defendants to access their home which they claimed was situated on the suit property. The defendants' application was opposed by the plaintiff through a replying affidavit sworn on 12th May 2014. In his affidavit, the plaintiff deposed that the defendants' application is defective for having been brought under the wrong provisions of the law. The plaintiff contended further that the application has no basis. The plaintiff deposed that he had been in possession of the suit property all along until July, 2013 when the defendants entered thereon and started planting bananas and other crops thereon.
8. On 9th February 2015, the advocates for the parties agreed that the plaintiff's application dated 30th September 2013 and the defendants and interested party's application dated 24th October 2013 be heard together by way of written submissions. The defendant and the interested party filed their submissions on 27th April 2015 while the plaintiff filed his submissions on 8th May 2015. I have considered the two applications together with the affidavits filed in support of and in opposition thereto. I have also considered the written submissions by the parties' respective advocates. I would consider the two applications one after the other starting with the plaintiff's application dated 30th September 2013 which was first in time.
9. There is no dispute that on 14th August 2013 this court issued an order restraining the defendants by themselves or through their agents from entering onto, cultivating, tilling, erecting structures on and/or in any other manner interfering with the suit property pending the hearing and determination of this suit. The said order was extracted and endorsed a penal notice warning any party served therewith that the disobedience of the same would render him/her liable to be cited for contempt and committed to civil jail for a term not exceeding six (6) months or to be fined or punished in any other manner deemed fit by the court. What is in dispute is whether the said order was served upon the defendants or not.
10. In his affidavit in support of application dated 30th September 2013, the plaintiff has annexed an affidavit of service sworn by one Isaiah Miruka on 29th August 2013 in which the said process server has stated that he served all the defendants with the court order that was issued on 14th August 2013, on 15th August 2015 at 10.30a.m at Omogonchoro Market, Moitunya sub-location, Nyamira County and that the defendants received the same but declined to acknowledge such receipt. He has stated that he was accompanied by the plaintiff when he effected service. The defendants have merely denied service of the said court order. Although they have termed the process server's affidavit of service as false, they have not challenged the affidavit on any material particular. They have not denied that they live at Omogonchoro market within Moitunya sub-location, Nyamira County. They have not denied that they were at their residences on 15th August 2015 at around 10.30am when they are said to have been served. The defendants herein were not strangers to this particular process server. He had served them at the same place earlier on 5th August 2013 with Summons to Enter Appearance and the Notice of Motion application dated 30th July 2013 that gave rise to the order of 14th August 2013 which service the defendants have admitted. I see no reason why the same process server could have failed to serve the defendants with the order of the court having served them earlier with the other documents. I am unable also to see any advantage that either the plaintiff or the process server could have gained in swearing a false affidavit.
11. In the case of **Miruka –vs- Abok & Another [1990] KLR 541**, it was held that there is a

rebuttable presumption in favour of the process server that what he has stated in the affidavit of service is correct. The onus is on the person contesting service to rebut this presumption. Although the defendants had indicated that they would seek leave of the court to cross-examine the process server on his affidavit of service, that was just a wish. No application was made to court for such leave. It is my finding in the circumstances that the presumption that the contents of the affidavit of service of Isaiah Miruka sworn on 29th August, 2013 are correct has not been rebutted. The defendants must be taken to have been served with the court order of 14th August 2013 personally on 15th August 2013 as stated in the said affidavit of Isaiah Miruka.

12. Upon being served with the said order, the defendants had no alternative but to obey the same whether they felt that it was unfair, oppressive or irregular until it was varied or set aside. See, the case of **Hadkinson –vs- Hadkinson [1952] ALL ER 567** at page 569. The plaintiff has claimed that after being served with the said court order, the defendants entered the suit property on 23rd August 2013 and uprooted the maize plants that the plaintiff had planted thereon. They also cut down some tea bushes that were on the suit property. The defendants have not denied in their replying affidavit these claims by the plaintiff. The activities which, the defendants are accused of having engaged in are contrary to and in breach of the order of 14th August 2013. The defendants having engaged in the said activities after being served with the said court order did so in defiance of the said order. This amounts to contempt of court. Due to the foregoing, I am satisfied that the plaintiff has proved that the defendants committed acts of contempt of court and a such are liable to be punished by the court. I therefore find merit in the plaintiff's application dated 30th September 2013. I would at the conclusion of this ruling call upon the defendants to appear before this court and show cause why they should not be punished for disobeying this court's order that was issued on 14th August 2013.
13. Having disposed of the plaintiff's application, I now turn to the defendants' and the interested party's application dated 24th October 2013. This application has three (3) main limbs that I will deal with one after the other. The first limb seeks the setting aside of the proceedings which were conducted on 14th August 2013 together with all consequential orders. This order is sought on the grounds that the proceedings of 14th August 2013 were conducted ex parte and that the defendants were prevented by reasonable cause from appearing in court. The defendants have admitted that they were duly served with the plaintiff's application dated 30th July 2013 that came up for hearing on 14th August 2013. They have admitted also that they were aware of the hearing date. They have contended however that although they appeared in court on 14th August 2013 for the hearing of the said application they were unable to make any representation because the court was on August vacation and the proceedings of that day were conducted in chambers a fact that was not within their knowledge. When they learnt that the court was on vacation, they left the court premises assuming that the application would not proceed.
14. Order 51 rule 15 gives this court power to set aside an order made ex parte. The power is discretionary. In the case of **Shah –vs- Mbogo and Another [1967] E. A 116**, it was held that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
15. It is not disputed that the plaintiff's application dated 30th July 2013 came up for hearing on 14th August 2013 when the court was on August vacation. It is also not in dispute that the application was heard in chambers. It is a well-established practice that if matters are to be heard in chambers, the court assistants normally go to the open court and inform all who have cases on the particular day that their cases would be heard in chambers. It is not clear whether that hackneyed practice was employed in this particular case. Anyway, the defendants have contended that they attended court on that day but were not informed that the application would be heard in chambers. That contention has not been contested by the plaintiff. That means that the defendants were prevented by circumstances which were not of their own making from appearing in court on 14th August 2013 when the plaintiff's application was heard and the orders complained of made. I am satisfied in the circumstances that this is an appropriate case in which the court should exercise its discretion to set aside the ex parte orders that were made against the defendants. It has not been suggested by the plaintiff that the defendants have conducted themselves in a manner that do not

deserve the exercise of this court's discretion. The issue of the defendants' contempt of the order in question has been dealt with elsewhere and cannot in my view deny the defendants a relief which they otherwise deserve.

16. The other limb of the defendants' and interested party's application concerns leave to join the interested party Peterson Orure Abuta as a party to this suit. Order 1 rule 10 (2) of the Civil Procedure Rules gives the court power at any stage of the proceedings either upon or without application by either party to order that the name of any party improperly joined in the suit whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit be added. I am of the view that the presence of the interested party in these proceedings may assist this court in adjudicating and settling all the questions or issues which have arisen in this case. It is not disputed that the interested party was the registered owner of Plot No. 1434 which gave rise to the suit property. I have noted that the name of the interested party is mentioned in the agreement for sale that the plaintiff entered into with the 1st defendant. It has been contended that the interested party was not a party to the said agreement and did not consent to the sale of the suit property to the plaintiff. The 1st defendant in this suit is said to have been the seller of the suit property to the plaintiff while the 2nd defendant is the wife of the interested party. The 2nd defendant has contended that her matrimonial home is on the suit property and that there is no way the interested party could have sold land on which the said home is situated to the plaintiff. I am of the view that the interested party is a necessary party in this suit and should be joined as a defendant to shed some light on the contested transaction. In the circumstances, I find the application for leave to join the interested party in this suit meritorious.

17. The determination of that issue leaves me with the last limb of the defendants' application in which they are seeking the extension of time within which to file their statement of defence. I have noted that the defendants entered appearance on 26th August 2013. They should have filed their statement of defence within 14 days from that date. The defendants have not given any explanation in their affidavit in support of the application as to why they did not file their defence in time after entering appearance. This court has the discretion to extend time to file a statement of defence. The discretion must however be exercised judicially. I am in agreement with the plaintiff's submission that the defendants have not placed any material before the court on the basis of which the court can exercise discretion in their favour with regard to this limb of their application. That notwithstanding, I have noted that the plaintiff has not requested for interlocutory judgment against the defendants in default of defence. The plaintiff would not therefore be prejudiced if the extension of time sought is granted. I am inclined therefore to allow the application for the extension of time within which the defendants should file their statement of defence.

18. In conclusion, I hereby make the following orders on the two applications before me;

- i. The defendants are guilty of contempt of court for disobeying the order that was made herein on 14th August 2013.
- ii. The defendants shall appear before this court on a date to be fixed to show cause why they should not be punished by the court for the said contempt.
- iii. The orders granted herein on 14th August 2013 are set aside. Consequently, the plaintiff's application dated 30th July 2013 shall be heard afresh on a date to be taken at the registry.
- iv. Pending the hearing of the application dated 30th July 2013 as aforesaid, the status quo prevailing as at the date hereof (save for the contemptuous acts) as relates to the title, use and occupation of the suit property shall be maintained by the parties.
- v. PETERSON ORURE ABUTA is joined in this suit as 4th defendant.
- vi. The plaintiff shall amend the plaint within 30 days from the date hereof to effect the joinder of the said PETERSON ORURE ABUTA in the suit.
- vii. The time within which the defendants were supposed to file their statement of defence is extended upto the 21st day after service by the plaintiff of the amended plaint pursuant to the order given in (vi) above.

viii. The plaintiff shall have the costs of the application dated 30th September 2013 while the cost of the defendants' application dated 24th October 2013 shall be in the cause.

Delivered, Dated and Signed at Kisii this 3rd day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Soire for the plaintiff

Mr. Ayienda h/b for Nyambati for the defendants

N/A for the interested party

Milcent Court Assistant

S.OKONG'O

JUDGE