



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 140 OF 2009

THE PRESBYTERIAN FOUNDATION *suing for and on behalf of*

P.C.E.A AYUB KINYUA PARISH.....PLAINTIFF

VERSUS

JOHN EKAI ACHWAA & 10 OTHERS.....DEFENDANTS

RULING

1. The 2nd and 4th defendants pray that the *ex parte* judgment and decree be set aside. The judgment was delivered on 31st March 2010. The court granted a permanent injunction restraining the defendants from occupying the suit land; and, an order for their eviction and costs.

2. The 2nd and 4th defendants have presented a notice of motion dated 26th September 2013. There are three key prayers. First, that there be stay of execution of the decree and all consequential orders; secondly, that the decree be set aside in its entirety; and, lastly, that the defendants be granted unconditional leave to defend the suit. In that regard, the defendants crave that their *statement of defence and counter-claim* filed in the suit be deemed as being properly on the record subject only to payment of court fees.

3. The motion is predicated upon a deposition of the 1st and 4th defendants sworn on even date. At paragraphs 2 to 4 of the affidavit they aver that on 31st August 2013, they were shocked when auctioneers accompanied by police officers “invaded their land known as I.R 3738 formerly K.M.C. Eldoret Municipality Slaughter Houses Boma”. The auctioneers claimed to be executing the decree in this suit. The defendants sought assistance of the provincial administration. They persuaded the auctioneers and police not to evict them for three reasons. First, that the defendants were never served with summons to enter appearance or any other legal process; secondly, that they were unaware of the existence of the suit; and, lastly, that the decree did not contain particulars of the land.

4. The motion is contested. The case for the decree holder is that there was proper and effective service of the summons and plaint upon all the defendants. Reliance was placed on the *affidavit of service* of Pella Tsisaga sworn on 12th August 2009. There is also a replying affidavit sworn by Julius Manuthu, the Session Clerk of the plaintiff. At paragraphs 4, 6, 7 and 8, he deposes as follows-

4. *That Paragraph 4 and 6 of the supporting affidavit are not true since the defendants were duly served but never appeared to defend the suit. The defendants were fully aware of the existence of the suit but they simply chose to ignore the existence of the suit. The stopping of the execution of*

the eviction order occurred when the Eldoret Governor Jackson Mandago intervened and ordered the police to stop the execution and leave the suit land. This in effect left the auctioneers with no security hence they stopped the execution of the court order in fear of their security.

6. *That paragraph 5 of the supporting affidavit is denied and we assert that the service to the defendants was proper and within the requirements of the law and is not fatally defective as alleged by the defendants.*
7. *That the fact that the plaintiff has not filed the party to party bill of costs, served a notice of entry of judgment and indicated the particulars of the suit land is not fatally defective but simply a technicality which should not be used to deny the plaintiff the benefits of a legally acquired judgment.*
8. *That the applicants have not demonstrated any lawful and sufficient reason to make this court to set aside the judgment. The defendants cannot claim an interest on the suit land by virtue of adverse possession since from their own confession they entered and occupied the suit land with the permission of the Kenya Meat Commission (KMC) who was their employer who was then the legal owner of the parcel of land. It is a requirement that one must enter the land of another without his permission for him to claim adverse possession. The plaintiffs lawfully bought the suit land from the legal owner of the land and acquired its right to the land thereafter.*

5. The same deponent has filed a further affidavit sworn on 10th June 2014. If I understood it correctly, the plaintiff was reiterating that the service was effective; that the trial court must have been satisfied with the service; and, that the defendants were well aware of the proceedings. I will set out at length paragraphs 5 to 9 of the deposition-

“5. That on various other dates as shown in a bundle of letters which I have enclosed herewith the church involved the Provincial Administration to prevail upon the Applicants to move out of the land but the Applicants to move out of the land but the Applicants remained adamant in vacating the land until the Respondents were forced to file this case. The contents of the D.O's letter dated 16/3/2004 and the churches reply thereto dated 17/3/2004 demonstrate that the Provincial Administration tried to intervene several times to remove the Applicants from the land.

6. That the Church tried to involve the Municipal Council of Eldoret while trying to fence off the plot way back on 5/11/2003 by writing a letter seeking the authority to fence off the plot and the Municipal Council did not have any objection to the fencing of the plot vide their letter dated 9th December 2003.

7. That on 5/11/2003 and 18th August 2004 the church wrote to the D.O. Of Uasin Gishu District complaining that despite several meetings with the Provincial Administration the Provincial Administration had not helped to get the Applicants out of the land.

8. That the affidavit of service which the Applicants are seeking to challenge dated 12th August 2009 sworn by Pella Amugune Tsisaga was accepted by court when it granted an ex parte judgment against the Applicants for failure to respond to service of summons and the plaint and I enclose herewith the affidavit of service dated 12th August 2009 filed together with copies of the court proceedings where the ex parte judgment was granted clearly showing that the court was satisfied with the service done against the Applicants.”

6. The plaintiff filed submissions on 17th November 2014. The 2nd and 4th defendants' submissions were filed on 12th November 2014. On 26th May 2015, I heard learned counsel for the parties. I have considered the application, depositions, and the rival submissions. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion to set aside an ex-parte order. As stated in *Shah v Mbogo* [1967] E.A 116, the discretion “*is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice*”. That decision by Harris J was affirmed by the Court of Appeal in *Mbogo and another*

v Shah [1968] E.A 93. See also *Kimani v Mc Connell* [1966] E.A 547, *Patel v E. A. Cargo Handling services* [1974] E.A. 75, *Joseph Ngunje Waweru v Joel Ndiga* [1983] 1 KAR 210, *City Service Station v Njuguna* [1990] KLR 163.

7. This motion revolves around one question: whether there was effective service of the summons, plaint and verifying affidavit upon the defendants. I will thus set out paragraphs 2 to 8 of the the *affidavit of service* of Pella Tsisaga sworn on 12th August 2009 *in extenso*-

2. “That on 7th August 2009 I received summonses to enter appearance, Plaints and verifying affidavits from Mutitu, Thiongo & Co. Advocates with instructions to effect service of the same upon John Ekai Achwaa, Simon Ereng Nameya, Peter Longore, Sarah Lemuya Ereng, Benard Nachuro, Linet Ewoi Zawadi, Samwel Amatuka, Tuya Lokoel Muya, Petro Muya, Sammy Muya, and Kaloli Muya sued as the 1st – 11th defendants respectively.
3. That on 10th August 2009 I proceeded to the said defendant's Estate situated at Ayub Kinyua Parish Area opposite the Eldoret Law Courts where I met the area Assistant Chief one David who introduced me to the 1st defendant on John Ekai Achwaa who is also the Village Elder.
4. That I thereupon explained the nature of my visit to the said 1st defendant after which he accepted the service by retaining his copies in acknowledgement.
5. That the said 1st defendant also retained copies on behalf of the 6th defendant one Linet Ewoi Zawadi who he informed me that she is deceased.
6. That I thereafter tendered service upon the other defendants who were pointed out to me by the 1st defendant.
7. That each and every defendant except Linet Ewoi Zawadi retained the documents in acknowledgement but they all declined to sign on the Principle copies which I hereby return duly served.
8. That I was accompanied by my colleague one Wilson Ngaira who witnessed the process.”

8. A number of matters arise from the affidavit of service. First it is not contested that the deponent was a registered process server of the court. From paragraph 2 of the affidavit, legal process was to be effected upon all the defendants. Order 5 rule 7 of the Civil Procedure Rules 2010 requires that where there is *more* than one defendant, the summons shall be served on *each* defendant. Under rule 8 service should be personal unless there be an agent authorized to accept service on behalf of a defendant. See *City Service Station v Njuguna* [1990] KLR 163.

9. In the instant case, the process server was introduced to *John Ekai Achwaa, who is also the Village Elder*. He was introduced to him by the area Chief, David. The defendants' counsel has said that the full names of the chief should have been provided. It would have been preferable but it is not fatal to the service. It is not the chief who was being served but *John Ekai Achwaa*. The latter has not denied he was served on 10th August 2009. He also accepted service on behalf of *Linet Ewoi Zawadi* who was deceased. At paragraph 6 of the affidavit, the process server confirms he thereafter tendered service upon the *other* defendants who were pointed out to him by the 1st defendant. He also avers that *each* and *every* defendant except Linet Ewoi Zawadi (deceased) retained the documents in acknowledgement but they all declined to sign on the principal copy which he returned duly served to the court.

10. One matter of interest is that the process server was accompanied by his colleague one Wilson Ngaira who witnessed the process. Learned counsel for the defendants was of the view that Ngaira should have sworn an affidavit to confirm those matters. I disagree. Ngaira was not the process server. The defendants also failed to make an application to *cross-examine* the process server. The credibility of the process server is thus unchallenged. It is not lost on me either that John Ekai Achwaa, the 1st defendant, perhaps *conveniently*, avoided to swear the affidavit in support of this motion. I have reached the inescapable conclusion that all the defendants, save for Linet Ewoi Zawadi (deceased) were personally served with the summons, plaint and verifying affidavit on 10th August 2009. I am unable to find any grave violation of order 5 of the Civil Procedure Rules 2010.

11. I am also fortified in the finding by the averments at paragraphs 4, 6, 7 and 8 of the affidavit of Julius

Manuthu, the Session Clerk of the plaintiff, filed on 14th October 2013. When I consider his further affidavit of 10th June 2014 I am left in little doubt that the defendants were served; that they were well aware of the court case; and that they tried to use the office of the Governor Uasin Gishu to stop their eviction. It must follow as a corollary that the defendants chose not to defend the proceedings. It cannot now fall from their lips that that land is an emotive matter; or that they will suffer some losses. I commiserate with them. But to the extent that they failed to defend the cause, they are the authors of the misfortune that has now befallen them.

12. I have then considered the proposed *defence and counterclaim* dated 26th September 2013. At paragraph 4, the defendants assert ownership by prescription of the law or adverse possession. They claim to have occupied the land for over fifty years. They claim that the land was not available for allocation to the plaintiff and that consequently, the plaintiff does not hold a valid instrument of title. The defendants counterclaim for a declaration that they are the bona fide owners of the land; and for cancellation of the title to the plaintiff.

13. The defence is a red herring. The defendants *concede* that they entered and occupied the suit land with the *permission* of the Kenya Meat Commission (KMC). The latter was their employer and the legal owner of the parcel of land. The plaintiff *bought* the land from the legal owners. Prescription rights or the doctrine of *adverse possession* applies when a person enters the land of another *without* the owner's permission. The occupation must be *adverse* for a period of *not less* than twelve years. To that extent, the proposed defence does *not* raise a *triable* issue capable of going to trial.

14. Whether or not the plaintiff is executing the decree before taxation of its fees or serving a further notice does not invalidate the decree *per se*. It can only affect the *process* of execution of the decree; or, in a best case scenario *postpone* execution. True, the impugned judgment does not mention the suit land by land reference number. It only refers to "*the suit land*". That omission found its way into the decree. But it was curable. There was clear reference in the *plaint* to the *suit land* as Eldoret Municipality Block 10/8 New Parcel Number 1143. That was the *suit land* before the court (Mwilu J, as she then was). It does not then invalidate the decree.

15. Granted those circumstances I am hard pressed to exercise my discretion in favour of the defendants. The upshot is that the 2nd and 4th defendants' notice of motion dated 26th September 2013 is devoid of merit. I order that it be dismissed. In the interests of justice; and, considering the plight of the defendants, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by the plaintiff.

Ms Ruto for Mr. J.N. Njuguna for the defendants instructed by Njuguna Kathili & Company Advocates.

Mr. J. Kemboi, Court clerk.