



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ENVIRONMENT AND LAND CASE NO. 186 OF 2008**

RIZIKI AHMED KIBWANA (Suing as administrator

of the estate of

AHMED KIBWANA JUMA.....PLAINTIFF/APPLICANT

-VERSUS-

PATRICK WANYAGI MURIUKI.....DEFENDANT/APPLICANT

**RULING**

1. By a notice of motion dated 1st August 2011 brought under Order 10 Rule 11, Order 22 rule 22, Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act the defendant/applicant sought the following orders :-

3) The Court be pleased to grant an order of stay of execution of the decree issued on 8th September 2010

4) This Court be pleased to set aside the judgement herein entered against the defendant on 13th May 2010 in default of appearance and all consequential orders thereof and the defendant be granted leave to defend the suit.

2. The application is supported by the grounds on the face of it and the supporting and supplementary affidavits all sworn by the applicant. One of the grounds put for setting aside is that the applicant purchased this property in 1986 and has invested on it, besides having sentimental attachment to it. He only became aware of the suit when a friend of his drew his attention to the gazette notice no 7367 calling for the cancellation of his title. He never saw the newspaper serving him as he was away in "remote" Maasai Mara. The defendant deposes that the plaintiff was required to notify him of the scheduled hearing dates which he failed to do nor issue him with 10 days notice of entry of judgement. He deposes he has a good defence as per the draft statement of defence annexed.

3. The application is opposed. The plaintiff/respondent deposed that he did not know the physical address of the defendant when he filed the suit and after endless efforts to trace him he had to serve him through advertisement in the newspaper. In reply to the documents annexed by the applicant to confirm he purchased the land, the plaintiff said they were not aware of the sale. The respondent also questioned the ID card numbers presented as belonging to his father. Lastly he stated that they have always been occupation of the suit property and averred that the alleged sale and process of transfer of the suit property are void, fraudulent and unconstitutional. He urged the Court to dismiss the application.

4. The parties filed written submissions to argue this motion. The defendant set out the principles for setting aside judgements as laid out by the Court of Appeal one of which is that there is a defence on merits. The defendant has submitted that he has laid the background on how he acquired this land in the supporting affidavit. He also cited the case of **Pithon Waweru Maina vs Thuka Mugiria (1983) eKLR** that a party should not be denied a hearing. The defendant submitted further that the overriding principles in section 1A, 1B & 3A obligates Courts to do substantive justice and not dwell on technicalities. The defendant continued that the plaintiff will not be prejudiced and he has given the explanation for the delay. Lastly he submits this Court has unlimited discretion to set aside default judgement. He urged the Court to grant prayers sought in his motion.

5. The plaintiff in rival submissions also set forth the principles of setting aside judgement and relied on the renowned cases of **Mbogo vs Shah (1968) E A** and **Patel vs E. A. Cargo Handling Services Ltd (1974) E A 75**. The plaintiff submits the judgement was regularly obtained. He avers that the defendant failed to explain where he lived when he worked in Maasai Mara. The plaintiff also avers that Maasai Mara is world renowned and they endeavour to keep guests upto date with events including supplying newspapers. The plaintiff continued that the draft defence does not raise any triable issues. For instance he states that the name of his father is recorded differently on page 1 and page 2 of the agreement. Further that the Land Control board consent was given before the agreement was drawn and that the ID numbers on the defendant's documents differs with the one they surrendered to Registrar of Persons. He relied on the case of **Nairobi Sameer Africa Ltd vs Aggarwal & Sons Ltd** where an application for setting aside was dismissed.

6. From the record, it is not denied that service was proper as a copy of the newspaper cutting was annexed to the replying affidavit. The only issue is that the defendant aver he did not see it hence the matter proceeded exparte. It is the defendant's case that he has a good defence to the plaintiff's claim and that he is entitled to be heard. The plaintiff holds a different view. From the submissions and case law cited by both parties, they are in agreement that for default judgement to be set aside, the defence placed before the Court must raise triable issues. The defendant went further to include being afforded an opportunity to be heard, given the explanation for the delay and stated there will be prejudice to the plaintiff. I will thus consider the first point – defence on merits. The plaintiff is the son of the late Ahmed Kibwana Juma. The defendant/applicant pleads in paragraph 4 of the draft defence that he acquired rights in the suit property in 1986 through a sale. The defendant in paragraph 7 states that he is the registered proprietor having acquired it for valuable consideration. The applicant continues that he obtained consent of the land board and indeed the documents mentioned in paragraph 8 (a) – (d) in the plaint do exist. A copy of the title deed in the name of the defendant was also annexed as “PWM – 7”. In paragraph 9 of the plaint, it is pleaded that the transfer of the suit property was null and void for reasons inter alia that the deceased never signed the documents and the difference in names of the deceased indicated in the agreement. I find this contention on whether there was a sale to constitute one of the triable issue as the results would be cancellation or otherwise of the registration of the defendant as the owner of the suit property. Secondly the defendant has a title in his name. Whether it was fraudulently or illegally acquired is a matter that that can only be determined through trial.

7. In both **Shah vs Mbogo & Patel vs E. A Cargo Handling**, the Court of Appeal held that where judgement was regularly obtained, the Court would not interfere unless there is defence on merits. In the circumstances of this case, I find there is defence on merit. The second issue I would consider is whether the delay in bringing this application has been explained. The interlocutory judgement was entered on 13th May 2010 and final judgement delivered on 8th September 2010. The application was filed one year later on 3rd August 2011. The decree has not been executed.

8. The applicant stated that he was away in Maasai Mara region between February – May 2010 where they were putting up a lodge for the Jacaranda Hotels Kenya. He continued that the area is remote and communication network poor. He annexed letters from Chairman of Jacaranda Hotels and an affidavit sworn by the group Finance Manager to confirm that indeed he was away. He was not thus able to see the advertisement notice in the newspaper. The plaintiff did not contest this explanation contained in the supporting affidavit. Instead his advocates through submissions stated that hotels in Maasai Mara are world renowned and they endeavour to keep guests upto date with events by supplying newspapers. This

may be true but the applicant deposes they were putting up a hotel. A hotel under construction cannot be renowned worldwide or supply non – existent guests with newspapers. There is no contrary evidence that no such hotel was being put up. I am therefore satisfied with the explanation for the delay.

9. Lastly since the decree has not been executed, any prejudice that is occasioned can be compensated by way of payment of costs. I find merit in the application and allow it. The costs incurred includes attempted service by a process server, service by advertisement in two newspapers and filing of a notice in the Kenya Gazette. Taking all these into account, I do assess thrown away costs payable to the plaintiff at Ksh 30,000= to compensate the plaintiff to be paid within 30 days of the delivery of this ruling. The costs of the application is also awarded to the plaintiff in the cause.

Ruling dated and delivered in Mombasa this **8th** day of **October, 2015**

**A. OMOLLO**

**JUDGE**