



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 106 OF 2009 (JR)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)

AND

IN THE MATTER OF LAND CONTROL ACT

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO. 18 OF 1990

AND

IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300 LAWS OF KENYA)

AND

IN THE MATTER OF BORABU DISTRICT LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN BORABU DISTRICT LAND DISPUTES TRIBUNAL1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT, KISII 2ND RESPONDENT

AND

ELKANAH MOTURI.....INTERESTED PARTY

EX PARTE

BARNABAS NYANGARESI OURO

RULING

1. On 29th October 2009, the ex parte applicant herein, **Barnabas Nyangaresi Ouro** (hereinafter referred to only as “**the applicant**”) brought an application for judicial review by way of Notice of Motion dated 27th October 2009 seeking; an order of certiorari to quash the proceedings and order made by the 1st respondent on 14th July 2009 by which the 1st respondent directed that a portion of all that parcel of land known as **LR No. Nyansiongo Settlement Scheme/2266** (“**the suit property**”) measuring 100 feet by 50 feet be transferred to the Interested Party, an order of certiorari to quash the proceedings and decision of the 2nd respondent made on 29th August 2009 in which the 2nd respondent adopted the said decision of the 1st respondent as a judgment of the court and, an order of prohibition to prohibit the 2nd respondent from executing the judgment referred to hereinabove arising from the said decision by the 1st respondent.
2. The applicant’s application was listed for hearing on 22nd September 2010. From the affidavits of service sworn by Lawrence O. Nyasunda on 22nd September 2010 and filed in court on the same day, all the respondents and the Interested Party were served with the application and a hearing notice for the hearing that was scheduled for 22nd September 2010. According to the said affidavits, the Interested Party was served at his residence situated near Gucha Nursing Home. When the matter came before Makhandia J. (as he then was) on 22nd September 2010, he allowed the applicant to proceed with the application in the absence of the respondents and the Interested Party after satisfying himself that they had been properly served. The court ordered on request by the applicant that the application be canvassed by way of written submissions and fixed the same for mention on 22nd October 2010 for a ruling date. The applicant was directed to serve a mention notice upon the respondents and the Interested Party. On 22nd October 2010 when the matter came up for mention, neither the respondents nor the Interested Party appeared in court. The applicant who had filed his submissions as directed by the court earlier informed the court that the Interested Party and the respondents had been served with a mention notice and prayed for a ruling date. The court having satisfied itself from the affidavit of service sworn by Lawrence O. Nyasunda on 21st October 2010 that the respondents and the Interested Party had been served set down the matter for ruling on 15th November 2010. According to the said affidavit of service, the Interested Party was served with a mention notice at Keroka Law Courts where he was said to have been attending to a civil matter on 6th July 2010.
3. On 15th November 2010, the court, Makhandia J. (as he then was) delivered a ruling on the matter by which he allowed the applicant's application with costs. In the ruling, the court held that the 1st respondent had no jurisdiction to issue a consent for a controlled transaction under the Land Control Act, Cap 302 Laws of Kenya or to rectify or cancel a title or to determine whether or not land should be registered in the joint names or not or to arbitrate on contracts for sale of land. The court found that the 1st respondent had acted without jurisdiction and as such its decision was a nullity. The court held further that the Interested Party’s claim was time barred and as such the same should not have been entertained by the 1st respondent pursuant to the provisions of section 13(3) of the Land Disputes Act, No. 18 of 1990 (now repealed).
4. On 27th March, 2012, the Interested Party moved the court with an application of the same date seeking an order for the setting aside the said ruling that was delivered by this court on 15th November 2010 on the ground that the Interested Party is the lawful owner of the suit property and that he was never served with any document concerning the application herein. In his affidavit sworn on 27th March 2012 in support of the application, the Interested Party deposed that he became aware of the application herein when he was told to vacate a portion of land that he had purchased from the applicant. The Interested party deposed further that the contents of the affidavits of service sworn on 22nd September 2010 and 21st

October 2010 that I have referred to herein above are untrue. The Interested Party contended that he was condemned unheard and that it would only be fair if he is given a chance to defend himself.

5. The Interested Party's application was opposed by the applicant through grounds of opposition dated 13th June 2012. The applicant termed the Interested Party's application frivolous, misconceived, bad in law and an abuse of the process of the court. The applicant contended that the Interested Party was served and the necessary affidavits of service filed in court. The applicant contended further that in any event, there is no doubt that the 1st respondent acted in excess of its jurisdiction and as such setting aside of the ruling made herein on 15th November 2010 would not serve any purpose. When the application came up for hearing before me on 23rd October 2013, Mrs. Obwocha appeared for the Interested Party while Mr. Bosire appeared for the applicant. In her submission in support of the application, Mrs. Obwocha reiterated the contents of the Interested Party's affidavit to the effect that the Interested Party was not served with the Notice of Motion application for judicial review that was filed herein. The Interested Party's advocate submitted further that the Interested Party only came to learn of the proceedings herein when he went to the suit property and was turned away by the applicant. Counsel submitted that the affidavits of service on the basis of which the applicant was allowed to proceed in this matter ex parte are unreliable as they are lacking in very important material particulars. Counsel submitted that it would serve the interest of justice if the Interested Party is allowed to defend the judicial review application that was filed herein by the applicant. In his submission in reply, Mr. Bosire argued that the interested party has not proved that he was not served. He submitted that an affidavit of service can only be challenged by cross-examining the process server and not otherwise. Counsel submitted further that the interested party having failed to summon the process server for cross-examination, his claim that he was not served in a mere allegation. The applicant's advocate submitted further that the Interested Party has not disclosed in his affidavit in support of the application herein the nature of the defence that he wishes to put forward to the judicial review application if the orders sought are granted. Counsel submitted that the court had held that the 1st respondent had acted without jurisdiction and to that finding, the Interested Party has no answer. Counsel urged the court to find that the Interested Party's application has no merit and to proceed to dismiss the same.

6. I have considered the Interested party's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the applicant in opposition to the application. Lastly, I have considered the respective submissions by the advocates for the parties. I doubt whether the provisions of Order 12 rule 7 which has been invoked by the Interested Party as the basis for the orders sought is applicable in the proceedings herein. I am sure however that the court has an inherent power to set aside its own order or decree made ex parte. The power is discretionary. Like any other judicial discretion, the discretion to set aside a decree or order made ex parte must be exercised judiciously and not arbitrarily. In the case of, **Maina vs. Mugiria [1983] KLR 78**, the court of appeal set out in detail the principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend a hearing. It was stated in that case that there are no limits or restrictions on the exercise of the discretion except that if it is exercised, it should be on such terms as may be just because the main concern of the court is to do justice to the parties and that the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but the same is not intended to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Some of the matters to be considered in an application to set aside an ex parte judgment were set out in that case to include, the facts and circumstances both prior and subsequent to the entry of judgment sought to be set aside, the nature of the action, the defence if any has been brought to the attention of the court, the question whether the respondent can be compensated by costs and whether or not it would be just and reasonable to set aside or vary the judgment. From the foregoing, it is clear that an applicant seeking to set aside an ex parte judgment must place before the court the necessary material to satisfy the court that it deserves the exercise of the court's discretion. This should include but is not limited in the case of the interested party herein, to giving a reasonable explanation why he failed to appear in court to defend the application and that he has a defence on merit to put forward to the application if the ruling and decree is set aside. In this case, the excuse that was given by the Interested Party as to why he did not appear in court to defend the application herein is that he was not served with the application. As I have stated above, the interested party termed the contents of the affidavits of service upon which the applicant relied on as a basis to proceed ex parte as untrue. I

don't think that it is sufficient just to claim that the contents of an affidavit of service are untrue. A party challenging the contents of an affidavit of service must give reasons why he claims that the process server has sworn to untrue facts. In this case, we have three affidavits of service which are relevant. There is the affidavit of service of the application for judicial review, the affidavit of service of a hearing notice of that application and an affidavit of service of a mention notice for the date when the court was to give a date for ruling. According to the said affidavits of service, the application for judicial review and the notice for the hearing of the same were served upon the Interested Party on 19th November 2009 and 18th December 2009 respectively at the Interested Party's residence near Gucha Nursing Home. The Interested Party has not denied that his home is near Gucha Nursing Home. He has also not denied that he was at home on the said dates when he is said to have been served. The other affidavit of service was the one for the service of the mention notice. According to this affidavit, the Interested Party was served at Keroka Law Courts where he is said to have gone to attend to a civil matter on 6th July 2010. Again, the Interested Party has not denied that he had a civil case at Keroka Law Court or that he was at Keroka Law Courts on the material day. The Interested Party's argument is that the process server had failed to disclose in the affidavit of service the particulars of the case he was attending at Keroka Law courts and how he came to know the interested party. I believe these are questions which can only arise after the Interested party has denied that he was at Keroka Law Courts on the material day and that he had no civil case in that court on that day or at all. Again as the applicant's advocate had submitted, these are questions which the applicant should have posed only to the process server during cross-examination. Due to the foregoing, I find that Interested Party is evasive in his affidavit as concerns service upon him. I am not satisfied therefore on the material before me that the Interested Party was not served with the judicial review application, the hearing notice and the mention notice. The Interested Party has therefore failed to give a reasonable excuse as to why he failed to defend himself in this matter.

7. This court as I have stated above has power to set aside ex parte judgment even where the applicant was served but failed to attend court. In fact, if serve has not been effected on the applicant, the court has no discretion but to set aside the order or decree. It is on account of the foregoing that the court is supposed to consider not only whether the service was effected and if it was the excuse for the failure to appear but also other factors such as the nature of the case and the defence if any that the applicant wants to put forward if the application is allowed. In this case, the Interested party has not made any attempt to demonstrate what kind of defence he intends to put forward to the judicial review application if his application herein is allowed. As I have stated at the beginning of this ruling the court had allowed the applicant's application for judicial review sought to be revived herein upon holding that the 1st respondent had no jurisdiction to deal with matters falling within the jurisdiction of the Land Control Act, Cap. 302 Laws of Kenya, disputes over contracts for sale of land and disputes over ownership of land. The court also held that the Interested Party's claim before the 1st respondent was time barred and as such the 1st respondent was barred under section 13 (3) of the Land Disputes Tribunal's Act No. 18 of 1990 from dealing with the same. All these are substantive issues of law and the Interested Party will have to meet them in case the Interested Party's application is allowed. The Interested Party has not indicated at all what his response would be to these findings by the court. On my part, having looked at the decision of the 1st respondent that was challenged in these proceedings, I doubt whether the Interested party would be able to have any answer to the foregoing issues of law that formed the basis of the judicial review application and which the court upheld in the ruling sought to be set aside herein. The Interested Party has therefore failed to demonstrate that he has a defence on merit to the applicant's application for judicial review which he should be given an opportunity to put forward. The setting aside of judgment entered ex parte is not done for the sake of it. Its purpose is to give a party a chance to put forward its defence and to be heard. The court would readily exercise its discretion in favour of a party who has demonstrated that he has a defence to put forward and that he was prevented by reasonable cause from putting up that defence. The position obtaining before me is that, I have the Interested Party who is seeking to set aside an ex parte order but has failed not only to give reasonable excuse for not defending himself but also to demonstrate that he has a reasonable defence to the applicant's application which he should be given an opportunity to put forward. Due to the foregoing, I am of the opinion that the Interested Party has failed to put sufficient material before the court on the basis of which this court can exercise its discretion in favour of the Interested Party. Since the court's discretion cannot be exercised in vacuum, the Interested party's application must fail.

8. In conclusion, I find the Interested Party's application dated 27th March 2012 unmerited. The same is dismissed accordingly with costs to the applicant.

Delivered, dated and signed at Kisii this 14th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mageto holding brief for Bosire for the Applicant

N/A for the Respondents

N/A for the Interested Party

Mobisa Court Clerk

S. OKONG'O

JUDGE