



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 604 OF 2010

SERAH WAMBUI KIRIIRA.....PLAINTIFF

VERSUS

- 1. CHRISTINE NJERI (sued as Mother and Next Friend of Susan Wambui Kamau**
2. JOHN MWENDIA KAMAU
3. STEPHEN NDUATI.....DEFENDANTS

RULING

The 1st, 2nd and 3rd Defendants/ applicants, hereinafter referred to as the applicants have filed a Notice of Motion dated 18th October, 2012. The application is brought under Order 22 rule 22 (1), (2) and (3), Order 51 rule 1, Order 42 rule 6 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A and 63(e) Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the law essentially seeking orders that; the ex-parte judgment which was entered herein against them on 28th September, 2012 together with the consequential orders thereto be set aside and that in the alternative but without prejudice to the foregoing, that this Court be pleased to re-open arguments in the suit herein and allow the Defendants to cross-examine the Plaintiff's witnesses.

The application is based on the following grounds;-

- i. This Court has jurisdiction to grant the prayers sought.
- ii. The said Orders were issued for non appearance of the defendants/applicants because they were never served.
- iii. That they came to know of the existence of this suit when they were served with the letter dated 4th October 2012 from the District surveyor Kiambu that he will be subdividing the defendants land to the plaintiff.
- iv. The Respondents shall not suffer any prejudice if the prayers sought are granted.
- v. It is in the interest of justice that this application be allowed and the suit be determined on its merits.
- vi. That the defendants/applicants conduct aforesaid is deserving of the Court's exercise of its discretion in its favor.
- vii. That no prejudice shall be occasioned upon the plaintiff by the setting aside of the judgment and an award of throw away costs shall suffice as recompense to the respondent for the resultant delay herein.
- viii. That the defendants/applicants shall suffer prejudice should this application be rejected as their right to defend this suit will occasion it irreparable harm.
- ix. That the defendants/applicants have reasonable defence which raises serious factual and legal

issues for consideration by this Honourable Court, and to be canvassed by the defendant/applicants advocates.

x. That the application has been made without unreasonable delay.

The application is supported by a supporting affidavit of John Mwendia Kamau dated 18/10/2012 and a supplementary affidavit dated 3rd December 2012. He depones as follows. That he knows of his own knowledge that he was not served with summons to enter appearance, plaint and the application dated 26th July 2012. That he came to know of the existence of this suit when he was served with a letter dated 4th October 2012 from the District land Surveyor Kiambu District that he will be sub dividing their land on 18th October 2012. That he know of his own knowledge and upon reading of proceedings from the Court file, that the orders that were granted were issued through a misrepresentation of facts by the plaintiff who did not disclose that:-

- a) Jane Wanjiru to whom the plaintiff wishes to have a portion of the suit property subdivided to her did not have an objection when the title deed was issued and she is married and has a big land in her matrimonial home
- b) The plaintiff herself is the one who allocated the defendant land and she is the one who signed the transfer forms when the defendant's father died; The plaintiff having been appointed the Administrator of the Estate of their late father in law did consent to the mode of distribution of the Estate more particularly that they were to get 0.53 hectares.
- c) That the 2nd defendant is the registered owner of the said parcel of land which he solely depend on and his siblings and they are meager means.

That he believes this is a case in which the Court's inherent discretion should be invoked in favour of the innocent defendants. That no prejudice shall be occasioned upon the plaintiff by the setting aside of the proceedings. Any delay or convenience suffered by the plaintiff can be adequately compensated for by an award of throw away costs. That defendants shall suffer prejudice as there is a judgment that has been already been entered against him on the basis of the unchallenged testimony by the plaintiff's witnesses and this will give rise to a situation where the defendant would have been condemned unheard contrary to the dictates of natural justice. That the defendant has brought this application with speed immediately upon discovering the facts and is therefore not guilty of any delay. That the interests of justice shall be better served by the granting of the prayers sought in this application. That the defendant's right to be heard has been prejudiced by the proceedings of 28th September 2012 and it is in the course of justice for the said proceedings to be set aside. That the defendants have a reasonable defence which raises triable issues and which this Court should consider whilst making its orders in respect of this application set aside.

Serah Wambui Kiriira the plaintiff/respondent filed a replying affidavit dated 29/10/2012. She depones as follows: That the applicants being the children of her deceased son, are her grandchildren. That as the registered owner of that parcel of land known as L.R No. Karai/Gikambura/549 she caused the same to be sub-divided amongst her sons and daughters and she particularly intended to give to her daughter Jane Wanjiku Muruga, the portion marked Shamba B in the sketch. That there was a mistake in the subdivisions and issuance of titles in that the portion intended for her daughter Jane Wanjiku Muruga measuring 0.17 ha was merged with that portion measuring 0.36 ha intended for the applicants and a title for L.R. No. Karai/Gikambura/2587 measuring 0.53 ha was issued to the applicants. That she filed this suit in the year 2010 seeking orders that the parcel of land measuring 0.53 ha and registered in the names of the applicant to be sub-divided into two parcels measuring 0.36 ha and 0.17 ha to be registered in the names of the applicants and her daughter Jane Wanjiku Muruga respectively. That she is advised by her advocates that the applicants were served with summons to enter appearance and the plaint dated 17th December 2010 as required by the Civil Procedure Rules but they failed to enter appearance or to file their defence within the stipulated period. That her advocates proceeded by formal proof hearing and obtained a judgment in her favour but the Land Registrar Kiambu District advised her advocates to move the Court to have the Deputy Registrar execute the Mutation Form, Application Land Control Board for consent and any other documents in place of the applicants for purposes of registration of the sub-

division. That her advocates moved the Court and were granted the orders sought and she manage to have the application Land Control Board for consent executed by the Deputy Registrar as required. That she is an elderly lady of very ill health and it will be highly prejudicial to her if the application is allowed since she is not even able to attend Court due to her condition of ill health and especially since she has put a lot of effort to ensure that her wish to have her daughter given the portion measuring 0.17 ha comes true while he is still alive and able to implement it. That she is not interested in the throw away costs that the applicants are offering for the inconvenience that she will be occasioned if this application is allowed essentially because her efforts to have this matter settled when she is still alive cannot be quantified into monetary value. That the applicants were properly served but chose to sit on their right to respond to the plaint and only chose to respond after she managed to get the orders that she sought, it is therefore apparent that this application was made with the crafty and ill motive to frustrate her efforts and wishes to have her daughter Jane Wanjiku Muruga given the portion that she, as the registered owner of that parcel of land known as L.R. No. Karai/Gikambura/549 intended for her to be given. That in view of the above, she urges the Court dismisses this application with costs to the respondents and that the District Land Registrar proceeds expeditiously to sub-divide the suit land as ordered in the orders dated 1st October 2012.

In response John Mwendia Kamau filed a supplementary affidavit dated 3/12/2012 where he states as follows: That the averment of the plaintiff of her intention to give a portion of the land to the daughter is suspect as the same is coming up after almost seven years from the time a title was issued to the defendants. That it is untrue that there was a mistake during subdivision as the same would have been corrected when the title was issued in 2003 while it is strange that the error was only realized after almost seven years when the plaintiff filed this suit in Court and after the demise of their father. That the plaintiff being their grandmother has sold off her parcel of land to third parties and upon realizing that she no longer has any more land to sell has opted to come to Court to try and dispossess their family just because their father is deceased. That he is advised by her advocates on record that the contents of paragraph 7 of the replying affidavit together with the annexure thereto cannot hold as there is nothing in law known as supplementary affidavit of services. Furthermore the averments contained in the affidavit of service filed on the 22.2.2011 are untrue as he is not so elderly, he stays with her son the 2nd defendant on the same parcel of land and same compound and it's untrue that he lives in an adjacent compound. That he is informed by his advocates on record that the affidavit of service filed on 22.2.2011, does not state who identified any of the defendants herein before service and how he got directions to their homestead. That he is advised by her advocates on record that it is not possible to have two sets of affidavits of service detailing different sets of fact as it seem the so called supplementary affidavit filed on 14.3.2011, seems to be an afterthought but the same cannot cancel issues of fact deponed in the first affidavit of service hence the issue of service was irregular. That as much as they concur that the plaintiff is elderly, the sue process should be followed and of concern to us and which they would urge the Court to consider before making its determination is whether a person once has transferred property to a third party can have the right to obtain an order for subdivision where the suit property is registered in the names of the defendants.

Counsels for the parties made oral submissions when the application was heard in court on the 6th December 2012. Mr. Ochieng for the applicant reiterated what was deponed by the applicants in his affidavits and emphasized the fact that there was no service on the defendants as the sets of affidavits of service are different. He also stated that in the defendants draft defence JMK3 there is a triable issue for determination between the parties on whether once a party has transferred an interest in land to a 3rd party is she estopped from seeking to negate the said registered interest where there is an averment of a mistake having occurred and which mistake is not in any way making of the new registered proprietor. M/s. Githaiga for the respondent in response reiterated what is deponed in the respondent's affidavit and submitted further that the defendants were served and judgment properly entered. That the defendants knew about the suit but failed to respond or file defence. On the proposed defence filed she submitted that it has no triable issue, that the defendants admit the land was subdivided and the plaintiff is the registered proprietor and that the defence is full of mere denials. She also submitted that there is no prayer that the said defence be deemed as filed. That this application has been made to frustrate the plaintiff, that the defendants have no say if she wants to subdivide the property and the application should be dismissed and the defence struck off to allow them execute the plaintiff's judgment. In response Mr. Ocheing stated that

the suit property is registered in the defendant's name and not the plaintiff and they have an extra copy of the title.

On perusal of the Court file this is what I find, on 7th December, 2010 the Plaintiff instituted a suit against the Defendants claiming that she is the registered owner of the suit property known as L.R. Karai/Gikambura/549 measuring 1.181 hectares. She stated that during the sub-division and distribution of property to her sons and daughters, the portion that was to go to her daughter Jane Wanjiku measuring 0.17 hectares was erroneously put together with the portion given to her deceased's son's children (the Defendants herein) with the effect that the Defendants were issued with a Title Deed No. L.R. Karai/Gikambura/2587 for a parcel measuring 0.53 hectares thereby disinheriting her said daughter. The plaint having been filed, summonses were issued against the three Defendants asking each of them to enter appearance within fifteen (15) days from the date of service of the summons. On 22nd February, 2011 a court process server by the name **Eric O. Osingo** filed a return of service averring that on 10th January, 2011 at around 10.30 am he served the summons and the plaint upon the three Defendants at Mai-ihii village in Kikuyu. He stated that the Defendants accepted service but declined to sign the summons in acknowledgement of the service. The process server subsequently filed a supplementary affidavit of service on 14th March, 2011 in which he added the fact that during service he was in company of the Plaintiff who identified the Defendants to him. The Defendants neither entered appearance nor filed defence. On 15th March, 2011 interlocutory judgment was entered and the matter herein proceeded for formal proof and ex-parte judgment entered against the Defendants on 28th September, 2012. It is that judgment that the Defendants now ask this court to set aside.

The defendants have taken issue with affidavits of service dated 3rd of January 2011 and 11th of March 2011. I have read them, the one of 11th of January 2011 states that the process server went to the 1st defendant's home who is a mother of 2nd and 3rd defendant and found an old grandmother the 1st defendant whom he served and she directed him to the home of the 2nd defendant where he also served him. Both declined to sign the copies of summons and plaint. At paragraph 6 the process server states that he was shown the home of the 2nd defendant by the 1st defendant. That he served the 3rd defendant at his home and he too refused to sign. At paragraph 8 he states that both defendants were known to him. In the supplementary affidavit of service sworn by Eric Osingo the same process server, he depones further that he was in the company of the plaintiff and they proceeded to the residence of the 1st defendant, 2nd and 3rd on the 10th January 2011 and that the plaintiff identified the 1st defendant and he served her. At paragraph 5 he states that the plaintiff and the 1st defendant directed him to the home of the 2nd defendant and that he was pointed out by his mother the 1st defendant and he was also served and the two thereafter directed him to the residence of the 3rd defendant. He finishes by stating that the defendants were well known to him after serving them. I agree with the defendants that there is a difference between the two affidavits. Why didn't the process server state in his 1st affidavit that he was accompanied by the plaintiff? In the absence of the said process server being called to clarify this fact I doubt whether he served the defendants as alleged. Service is something that is vital in any civil suit and any party who is sued must be properly served and be given a chance to be heard. The applicant has issues with the heading of the 2nd affidavit of service, in my view though it is not provided for in law it is an error that is cured by the provision of article of 159 (2) (d) of the Constitution. The proposed annexed defence raises issues at paragraphs 4, 5 and 6. It is evident from the copy of title deed attached that the suit property is in the name of the defendants that they be given a hearing.

This court has discretionary power to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. The discretion is a free one (**Patel v. E.A Cargo Handling Services [1974] E.A 75**). The discretion is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice (**Shah v. Mbogo [1967] E.A 116**). The discretion being a judicial one must be exercised upon facts not on whims or caprice (**Shabir Din v. Ram Parkash Anand 22 EACA 48**). Bearing this in mind the only just thing to do is to give the defendants a chance to be heard. I therefore find merit in the application dated 18th October 2012. I set aside this court's judgment delivered

on 26th June 2012 (the applicant cited 28th September 2012) and all consequential orders thereto issued. The plaintiff shall serve the defendants with the plaint within 14 days on the date of this ruling. Upon service the defendants shall their defence within 14 days from date of service. Parties shall proceed to comply with the provisions of order 11 of the Civil Procedure Rules and fix the suit for pretrial conference within 30 days from the date the reply to defence is filed if any. I heard this matter and I am aware that the plaintiff is a very old lady who had to be carried to Court to give evidence. Parties should proceed expeditiously to fix this matter for hearing. I also note that the parties are related and I shall not penalize any one of them to pay costs. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 7th day of May, 2013

R.OUGO

JUDGE

In the presence of:

.....1st 2nd 3rdDefendants/Applicants

.....Plaintiff/Respondent

.....Court Clerk