



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 441 OF 2009

MUCHANGI NDUATI NGINGO

T/A MUCHANGI NDUATI & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

MBO-I-KAMITI FARMERS CO. LIMITED.....2ND DEFENDANT

SAMIA PROPERTIES LIMITED.....3RD DEFENDANT

RULING

This suit was initially brought against the 1st defendant only. The plaint was amended on 30th April, 2010 to add the 2nd and 3rd defendants to the suit. The 1st defendant entered appearance on 16th May, 2010 but did not file a defence to the suit. The 2nd defendant neither entered appearance nor filed a defence. The 3rd defendant entered appearance on 5th August, 2011 through the firm of S. M. Chege & Company Advocates and filed a statement of defence on 22nd August, 2011 through the same firm of advocates. Prior to the filing of the said memorandum of appearance, the firm of S. M. Chege & Company Advocates had filed a notice of appointment of advocates on 28th June, 2011.

At the hearing of the suit, both the 1st and 3rd defendants were represented by advocates. After the close of the plaintiff's case, the 1st and 3rd defendants chose to close their respective cases without calling evidence. They however made closing submissions in reply to the plaintiff's submissions. The court after considering the pleadings, the evidence tendered and the submissions by the advocates for the parties delivered a judgment in the mater in favour of the plaintiff against the defendants jointly and severally on 27th September, 2018. In the judgment, the court declared among others that the transfer of LR. No. Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012 and 2041 by the 2nd defendant to the 3rd defendant was illegal, null and void. The court cancelled the said titles and directed the 1st defendant to process and issue new titles for the said properties to the plaintiff.

What is now before the court are two applications. The first application has been filed by the 3rd defendant. The 3rd defendant's application was brought on 19th June, 2019 by way of a Notice of Motion dated 18th June, 2019. In the application, the 3rd defendant sought an order for the setting aside of the judgment that was made herein on 27th September, 2018 and the decree extracted therefrom on 25th October, 2018. The application that was supported by the affidavit and supplementary affidavit sworn by Nancy Wanjiku Kimani on 18th June, 2019 and 28th February, 2020 respectively was brought on the grounds that the 3rd defendant learnt of this suit for the first time on 14th June,

2019 and that it did not appoint any firm of advocates to act for it in the suit. The 3rd defendant contended that it was a stranger to the proceedings that had taken place in this suit and that it was not served with any pleading. The 3rd defendant averred further that it was not aware of the judgment of the court and the decree that was issued herein. The 3rd defendant averred that it was on the verge of losing its properties to the plaintiff and that it was fair and just in the circumstances for the court to grant the orders sought.

The 3rd defendant's application was opposed by the plaintiff through a replying affidavit sworn on 28th August, 2019. Steven Muregi Chege advocate from the firm of S. M. Chege & Company Advocates who acted for the 3rd defendant up to the time judgment was entered in this suit also filed a replying affidavit on 2nd October, 2019 in response to the 3rd defendant's application. In his affidavit, the plaintiff stated that the 3rd defendant was served with summons to enter appearance through the firm of S. M. Chege Company Advocates who had instructions to act for the 3rd defendant and that the said firm of advocates entered appearance, filed a defence and participated in the suit on behalf of the

3rd defendant to conclusion. The plaintiff termed the 3rd defendant's application a red-herring intended to delay the expeditious closure of the dispute between the parties.

In his affidavit, Steven Muregi Chege Advocate stated that his firm, S. M. Chege & Company Advocates was instructed by the 3rd defendant to act for it in this suit and that it filed a notice of appointment of advocates and subsequently a defence on behalf of the 3rd defendant. Mr. Chege stated that the 3rd defendant paid his firm a deposit of Kshs. 60,000/= for his services. He stated that his firm appeared on behalf of the 3rd defendant in court in all occasions when the matter came up and that he kept the 3rd defendant informed of all the court proceedings including the entry of judgment. Mr. Chege denied that his firm acted on behalf of the 3rd defendant in this matter without instructions.

The second application before the court was brought by the plaintiff through a Notice of Motion dated 28th August, 2019. In the application, the plaintiff sought an order for the eviction of the 3rd defendant, its agents, servants and all those claiming under it in enforcement of the decree of the court issued on 25th October, 2018 pursuant to the judgment of 27th September, 2018. The application that was supported by the affidavit of the plaintiff sworn on 28th August, 2019 was brought on the grounds that there was a regular judgment entered by the court in favour of the plaintiff which had not been challenged by the 1st and 2nd defendants and that the 3rd defendant, its agents, servants or tenants had refused to give vacant possession willingly.

The two applications were heard together by way of written submissions. The plaintiff filed his submissions on 24th January, 2020 while the 3rd defendant filed its submissions on 2nd March, 2020. I will consider the two applications one after the other starting with the 3rd defendant's application which was the first in time. I have considered the 3rd defendant's application together with the affidavits filed in support thereof. The issue that I have been called upon to determine is whether the 3rd defendant has put forward sufficient grounds to warrant the setting aside of the judgment entered herein on 27th September, 2018. Order 12 Rule 7 of the Civil Procedure Rules gives the court a discretionary power to set aside judgment entered in the absence of a party.

It is trite that the court's discretionary powers must always be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

The principles to be considered by the court in applications for setting aside of ex parte judgments were set out in the case of Shah v Mbogo [1967] E.A 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

Applying the said principles to this case, I am not inclined to exercise my discretion in favour of 3rd defendant. The 3rd defendant's application was brought on the sole ground that the 3rd defendant was not served with the summons to enter appearance and as such the suit proceeded to hearing and judgment was entered without its participation or knowledge. The evidence placed before the court by the plaintiff and the firm of S. M. Chege & Company Advocates leaves no doubt that the firm of S. M. Chege & Company Advocates was duly instructed to act for 3rd defendant in this suit and that pursuant to those instructions, the firm represented the 3rd defendant throughout the life of the suit until judgment was entered in the matter. I am not persuaded that that the said firm acted in the matter without instructions. I am also not convinced that the 3rd defendant only became aware of the suit on 14th June, 2019 as claimed in the affidavit for Nancy Wanjiku Kimani. The evidence before the court shows that the 3rd defendant was all along aware of the suit and even tried in 2015 to move their file from the firm of S. M. Chege & Company Advocates to Ngure Mbugua & Company Advocates. I am also satisfied that the sum of Kshs.60,000/= that was paid to the firm of S. M. Chege & Co. Advocates was paid on behalf of the 3rd defendant for the services that the said firm rendered to the 3rd defendant in this suit.

I am satisfied from the material on record that the 3rd defendant was given an opportunity to defend itself and that it did so. I find no reason to disturb a regular judgment that was delivered herein on 27th September, 2018. The authorities relied on by the 3rd defendant in its submissions are distinguishable. The 3rd defendant has not relied on mistake or blunder on its part or on the part of the advocates that were acting for it as a basis for its application. The 3rd defendant has disowned the advocates who acted for it and claimed in my view falsely that the said advocates acted without instructions. The 3rd defendant's application cannot therefore be considered on the ground of mistake. I am of the view that the 3rd defendant is out to delay the court of justice. This court cannot assist it in that endeavor. Due to the foregoing, the 3rd defendant's application is not for granting.

With regard to the plaintiff's application, again I find no merit in the same. The application seeks the enforcement of the decree issued on 25th October, 2018. In his amended plaint dated 30th April, 2010 which was the basis of the reliefs granted by the court, the plaintiff did not seek eviction orders. In the judgment delivered on 27th September, 2018, the court did not give an order for the eviction of any of the defendants from the suit properties. The decree sought to be enforced by the plaintiff does not contain an eviction order. In the circumstances, the orders sought cannot be granted. The court cannot enforce a nonexistent order. In case it has become necessary for those in occupation of the suit properties to be evicted, the plaintiff may have to take out fresh proceedings for that purpose and obtain express

orders in that regard that can be enforced by the court.

Conclusion:

In conclusion, I find no merit in the two applications before me. The plaintiff's application dated 28th August, 2019 is dismissed. The 3rd defendant's application dated 18th June, 2019 is also dismissed save for the order seeking leave for the firm of Kinyanjui Kirimi & Company Advocates to come on record for the 3rd defendant that was granted on 18th September, 2019. Each party shall bear its own costs of the two applications.

Dated and Delivered at Nairobi this 8th Day of October 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyantika h/b for Mr. Muchangi Nduati for the Plaintiffs

N/A for the 1st Defendant

Mr. Kamau for the 2nd and 3rd Defendants

Ms. Wanjala h/b for Mr. Kirimi for the 3rd Defendant

Ms. C. Nyokabi-Court Assistant