



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 975 of 2001

WAMUITA KAMAU..... PLAINTIFF

VERSUS

MILKA WANJIRU MATHUDEFENDANT

R U L I N G

1. In this application (by **chamber summons dated 8th August 2006**) the Defendant seeks the main order that the judgment entered on 28th July 2005 by Aluoch, J (as she then was) be set aside, and the Defendant be granted leave to defend the suit. The said judgment followed a hearing *inter partes* that commenced on 31st January 2005. The Plaintiff testified and closed her case. On the day reserved for hearing of the Defendant's case (7th February 2005) after one adjournment, the Defendant did not attend court, and her counsel had no evidence to offer. Both learned counsels then filed written submissions.

2. In the judgment the Plaintiff was granted the declaration that she had sought in the originating summons, that she is

“...entitled to be registered as proprietor of the whole land Ref Number GITHUNGURI/GITHIGA/T.370 in place of the currently registered owner MILKA WANJIRU MATHU...”

The court also directed the -

“...relevant land registrar to register the plaintiff, WAMUITA KAMAU, as the proprietor of L.R. No GITHUNGURI/GITHIGA/T. 370 in place of the defendant, MILKA WANJIRU MATHU...”.

The Plaintiff was also awarded costs of the originating summons.

3. The application is made upon the grounds –

- (i) That the Defendant was not informed by her advocates of the hearing of the suit, and that that was why she did not attend court at hearing.
- (ii) That she has a good defence to the Plaintiff's claim.
- (iii) That the mistakes of her former counsels should not be visited upon her.
- (iv) That she should not be condemned unheard.

4. The application was brought under **Order IXB, rule 8** of the then **Civil Procedure Rules** (the Rules) that gave the court an unfettered discretion subject only to the dictates of justice. The inherent power of the court as saved by **section 3A** of the **Civil Procedure Act, Cap 21** (the Act) was also invoked. There is a supporting affidavit sworn by the Defendant which provides the factual grounding of the application.
5. The Plaintiff has opposed the application by here replying affidavit sworn on 4th and filed on 5th September 2006.
6. The grounds of opposition include –
 - (i) That the judgment entered for the Plaintiff on 8th August 2005 was not *ex parte* and the Defendant was all along represented in court by counsel who informed the court on several occasions that they had lost contact with the Defendant.
 - (ii) That the Defendant’s previous advocates are blameless, and it was the Defendant who was indolent.
 - (iii) That there has been delay in applying, the Defendant having known about the judgment as early as 24th April 2006.
 - (iv) That the decree of the court was executed and the Plaintiff issued with a title deed.
7. The application was canvassed by way of written submissions. Those of the Defendant were filed on 30th January 2007 and those of the Plaintiff on 22nd January 2002. I have considered those submissions, including the cases cited. I have also perused the record of the court.
8. The Plaintiff’s claim was in adverse possession. There was evidence before the court that she and her family had been in possession of the suit land since 1959, soon after her husband bought the land from the Defendant’s husband. Both husband subsequently died, and have been long dead. The Defendant became the registered proprietor upon succession proceedings. There have been various litigation between the Plaintiff and the Defendant over the land. It is a very small piece of land meaning approximately 0.096 Ha (0.237 Acres). The same appears to have been developed by the Plaintiff.
9. The judgment sought to be set aside was entered on 28th July 2005. The Plaintiff was registered proprietor of the land on 23rd March 2006, and a title deed was issued to her on 7th July 2006. Both parties are now elderly ladies.
10. This background is necessary so that the court can know what it is dealing with.
11. Hearing of the case was not *ex parte* as such as the Defendant’s learned counsel participated fully at the trial. But he was unable to call any witness as the Defendant did not attend court at the hearing, despite her counsel being granted adjournment for a week to secure her attendance in court. The counsel informed the court that they had been unable to contact their client.
12. Though the Defendant states in her supporting affidavit generally that “after failing to hear from my then advocates, Messrs Gichigi Bungu & Co. Advocates I visited their premises in early July 2006 wherein I was informed that this matter proceeded in my absence and judgment was entered against me on 8th August 2005”, she does not state that she was never informed of the hearing date on both occasions the case came up for hearing (31st January 2005 and 7th February 2005). Though she states that she never received the letter dated 9th August 2005 addressed to her by her advocates informing her that judgment had been entered against her, she does not disown the address to which the letter was addressed.
13. The Defendant has also not responded to the allegation contained in the replying affidavit to the

effect that she must have known of the judgment by at least 24th April 2006 when she was summoned before the Chief to produce the original title deed for surrender so that a new title deed could be issued in the Plaintiff's name in accordance with the judgment entered on 8th August 2005.

14. The present application was filed on 9th August 2006, over three months later. In the circumstances of this case this was inordinate delay that has not been explained.

15. Having considered all matters placed before the court, I hold that justice of the matter demands that the judgment entered on 28th July 2005 be left undisturbed. I find no merit in the application by chamber summons dated 8th August 2006. The same is dismissed with costs. It is so ordered.

16. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have fully recovered my health.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2012