



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 260 OF 2015

SIMON MULAHA KWEYU.....APPLICANT

VERSUS

GABRIEL AURA YADI (DECEASED) ASISA AUMA ODHIAMBO...RESPONDENTS

RULING

The first application is dated 7th August 2018 and is brought under order 22 Rule 29 of the Civil Procedure Rules seeking the following orders;

1. This honourable court be pleased to issue orders for the demolition of the structures recently or being constructed on the suit parcel of land No. N. Wanga/Koyonzo/1477 and an eviction order be issued for the forceful ejection forth with of the defendant, his agents, employees, servants and or anybody claiming through him from the said suit parcel of land.
2. The OCS Mumias Police Station be ordered to effect the eviction and demolition order aforesaid.
3. Costs of this application be borne by the defendant/respondent.

It is based on the affidavit of Simon Mulaha Kweyu, grounds that by the judgment delivered herein on 26th June, 2018 the defendant and his relatives or agents were restrained by way of injunction from inter alia laying claim to, trespassing onto, carrying out any works on, constructing on or in any other manner dealing with any portion of the suit land parcel No. N. Wanga/Koyonzo/1477. That in breach of the judgment and decree herein the defendant/respondent has invaded a portion of the suit land parcel No. N. Wanga/Koyonzo/1477 and commenced construction of houses and or structures thereon the plaintiff's protests notwithstanding. That it is imperative and necessary that the orders sought herein be granted in order to safeguard the dignity of this honourable court and enable the plaintiff/applicant enjoy the fruits of his success in litigation.

The second application is dated 21st September 2018 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act, CAP 21 Laws of Kenya and Order 22 Rule 25, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this honourable court be pleased to certify this application urgent and the same be heard ex-parte in the first instance.
2. That upon 1 above, an ex parte interim order of stay of execution be granted pending inter parties hearing of the application herein.
3. That upon inter parties hearing hereof, this honourable court be pleased to grant a stay of execution of judgment and decree issued on 26th June, 2018 and that the same decree and all consequential orders entered against the defendant be set aside.
4. That subsequent to the ex-parte judgment entered against the defendant being set aside the defence on record be deemed validly filed upon payment of requisite court fees.
5. That the costs of this application be in the cause.

It is premised on the affidavit of Gabriel Aura Yabi grounds that default judgment was entered on 26th June, 2018 in favour of the plaintiff without the knowledge of the defendant as to the existence of this suit. That he was neither served nor did he receive any summons or court papers in relation to this suit. That unless the orders sought are granted, execution shall ensue and this application shall be rendered nugatory occasioning substantial loss on the defendant/applicant. That the defendant/applicant's failure to enter appearance and file defence within the

requisite time was neither intentional nor deliberate. That the defendant/applicant has an arguable defence which raises triable issues that needs to be canvassed on merits and which draft defence is annexed hereto. That it would not be in the interest of natural justice if the defendant/applicant is condemned unheard.

The third application is dated 8th July 2010 and seeks the following orders;

1. That this matter be certified as urgent.
2. That the respondent Andrew Wetoto Aura alias Andrea be enjoined in this suit.
3. That pending the inter partes hearing and determination of the instant application the respondents, their family, agents and or servants be restrained by temporary injunction from interfering with and or dealing with land parcel No. N/Wanga/Koyonzo/1477.
4. That this honourable court be pleased to issue an order for exhumation of the body of Gabriel Aura Yadi buried on suit parcel of land No. N/Wanga/Koyonzo/1477.
5. That this honourable court be pleased to issue orders for demolition of illegal structures construed on the suit parcel of land No. N/Wanga/Koyonzo/1477 and an order of eviction be issued for forceful ejection of the respondent from the said suit land.
6. That the officer commanding Matungu Police Station to effect the exhumation, demolition and eviction orders aforesaid.
7. That the costs of this application be provided for.

It is based on the annexed affidavit of Simon Mulaha Kweyu and grounds that the respondent herein Andrew Wetoto Aura alias Andrea is son to Gabriel Aura Yadi (Deceased). That by judgment delivered herein on 26th October, 2018 the defendant and his relatives or agents were restrained by way of injunction laying claim to, trespassing onto, carrying out any works on, constructing on, or in any other manner dealing with any portion of the suit land parcel No. N/Wanga/Koyonzo/1477. That in breach of the judgment and decree herein, the respondent has invaded a portion of the suit land parcel No. N/Wanga/Koyonzo/1477 and forcefully buried the body of Gabriel Aura Yadi the plaintiff's protest notwithstanding. That it is imperative and necessary that the orders sought herein be granted in order to safe guard the dignity of this honourable court and enable the applicant enjoy the fruits of his success in litigation.

This court has considered the applications and the submissions therein. On the second application dated 21st September 2018, the applicant submitted that default judgment was entered on 26th June, 2018 in favour of the plaintiff without the knowledge of the defendant as to the existence of this suit. That was neither served nor did he receive any summons or court papers in relation to this suit. In the case of *Mohamed & Another vs Shoka (1990) KLR* the appellants applied to court to set aside ex parte judgment claiming that service of summons was not properly done. On appeal the Court of Appeal held as follows:-

- (a) The test for the correct approach in an application to set aside default judgment are firstly whether the defence has merit, whether there will be prejudice and what the explanation for delay is.
- (b) It was for the appellant to establish on a balance of probabilities that even with the irregular return of service, they were never served.
- (c) Considering the lapse of time and taking into account that the final judgment had been satisfied and in view of the absence of plausible explanation for the inordinate delay, the trial judge could not have exercised his discretion in favour of the appellant without prejudice to the respondent.

The principles for setting aside exparte judgements can also be found in the cases of **Patel vs Cargo Handling Services Ltd (1974) E A 75** and **Shah vs Mbogo (1968) E A 93**. In **Chemwolo & Another vs Kubende (1986) KLR 492**, the Court of Appeal held that Order IXA rule 10 confers upon the Court an unlimited discretion to set aside or vary judgement entered in default of appearance upon such terms as are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, or error but not exercised to assist a person who has deliberately sought to obstruct or delay the cause of justice. Be that as it may, I have perused the court file and find that the applicant was properly and duly served on the 30th October 2015, on the 24th March 2017 and on the 10th January 2018 by a process server named Francis L. Omire at Etete Villange of Koyonzo Location within Matungu Sub - Country. The applicant was aware of the case all through but chose to ignore the same. I find that he is now deliberately trying to obstruct and/or delay the cause of justice. I find this application is not merited and I dismiss it with costs.

On the first application is dated 7th August 2018 the applicant submitted that in breach of the judgment and decree herein the defendant/respondent has invaded a portion of the suit land parcel No. N. Wanga/Koyonzo/1477 and commenced construction of houses and or structures thereon the plaintiff's protests notwithstanding. I find that the there is no stay of the said judgement and court orders must be obeyed. I find that said application is merited and I grant it with costs.

The third application is dated 8th July 2010 seeks to enjoin one Andrew Wetoto Aura alias Andrea is son to Gabriel Aura Yadi (Deceased) who in breach of the judgment and decree herein, the respondents family has invaded a portion of the suit land parcel No. N/Wanga/Koyonzo/1477 and forcefully buried the body of Gabriel Aura Yadi the plaintiff's protest notwithstanding and for the body to be exhumed. This court noted that by consent the application dated 30th September 2020 the late Gabriel Aura Yadi was substituted by one Asisa Auma Adhiambo. This means that Andrew Wetoto Aura is not the legal representative of the deceased in this matter and cannot therefore be enjoined. I find this application is not merited and cannot be granted. The same is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 25TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE