



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 99 OF 2020

NEHEMIAH OCHIENGI MOGUSU.....PLAINTIFF

=VERSUS=

MWIHAKI MBOGO.....DEFENDANT

RULING

The plaintiff brought this suit on 15th June, 2020 by way of a plaint dated 31st May, 2020. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 31st May, 2020 seeking among others, a temporary injunction restraining the defendant from entering, collecting and/or receiving rent from and/or in any way interfering with the plaintiff's quiet possession of all that parcel of land known as L.R No. Dagoretti/Riruta/S.954 ("the suit property") pending the hearing and determination of the suit. The application was brought on the grounds that the plaintiff was the registered owner of the suit property and that the defendant had forcefully entered into the property and rented the same out to tenants from whom she was collecting rent. The plaintiff contended that the defendant had deprived him of the right to peacefully use and enjoy the suit property.

The plaintiff's application was fixed for hearing on 22nd September, 2020 by the court and the plaintiff's advocates were directed to serve the same upon the defendant. The defendant entered appearance on 10th September, 2020 through the firm of Sheila Mugo & Company Advocates. When the plaintiff's application came up for hearing on 22nd September, 2020, the defendant's advocates did not appear in court that was being conducted virtually. The said advocates had also not responded to the application. The court after satisfying itself that the defendant had been served and that she had not opposed the application, allowed the application in terms of prayer 3 thereof. The orders granted by the court on 22nd September, 2020 restrained the defendant from entering, collecting and/or receiving rent from the suit property and from in any way interfering with the plaintiff's quiet possession and enjoyment of the suit property pending the hearing and determination of the suit.

What is now before me is the defendant's Notice of Motion application dated 24th September, 2020 seeking the setting aside of the orders that were made by the court on 22nd September, 2020 aforesaid. The defendant's application was brought on the grounds that the orders that were made on 22nd September, 2020 in the absence of the defendant were highly prejudicial to the defendant. The defendant who swore an affidavit in support of the application contended that she had occupied the suit property since 1970s and that she was the one who had constructed the houses on the property from which she was receiving rent. The defendant contended that it was the plaintiff and not her who was a trespasser on the suit property and that failure on the part of her advocate to attend court on 22nd September, 2020 was inadvertent as she was unable to attend the virtual court due to technical challenges. The defendant contended that she was still in the process of preparing her response to the plaintiff's application and that her advocate intended to appear in court on 22nd September, 2020 and ask for more time to enable her put in her response to the application.

In her affidavit sworn on 24th September, 2020 also filed in support of the application, the defendant's advocate Ms. Sheila Murugi Mugo stated that as soon as she was instructed by the defendant to act for her in this suit, she started investigating the root of the plaintiff's title which the plaintiff allegedly acquired from Seventh Day Adventist Church (E. A) Limited. She stated that as at 22nd September, 2020 when the suit came up for the hearing of the plaintiff's application for injunction, she had not obtained substantive response from Seventh Day Adventist Church (E.A) Limited on whether plaintiff had acquired the suit property from it. She stated that she intended to apply for adjournment on 22nd September, 2020 to give her time to respond to the plaintiff's application. She stated further that, on 22nd September, 2020 she made several attempts to join the virtual court but all were unsuccessful. She stated that when she ultimately succeeded in joining the virtual court, the plaintiff's application had been dealt with. She stated that after the court was through with the days' cause list, she was informed of the orders that had been made in favour of the plaintiff. She stated that the defendant's application had been brought without unreasonable delay and that the defendant should be given an opportunity to defend the plaintiff's application.

The application was opposed by the plaintiff through a replying affidavit sworn on 16th October, 2020. The plaintiff averred that he was a bona fide purchaser of the suit property and that he had been registered as the owner thereof. The plaintiff averred that the defendant's advocate had not given sufficient reason why she did not attend the virtual court. The plaintiff averred further that the defendant was served in good time and had not responded to the application as at 22nd September, 2020 when the same came up for hearing which was evidence of

indolence. The plaintiff averred further that the defendant's claim that she was allocated the suit property by the Government had no basis since the property was registered in the name of the plaintiff and that a certificate of lease had been issued to him. The plaintiff averred that the defendant's alleged letter of allotment could not override the plaintiff's title. The plaintiff contended further that the source and authenticity of the said letter of allotment in favour of the defendant was questionable. The plaintiff contended that the defendant's application was an abuse of the process of the court and that the defendant had not met the threshold for granting the orders sought.

The defendant's application was argued on 19th October, 2020. I have considered the application together with the two (2) affidavits filed in support thereof. I have also considered the replying affidavit and the submissions that were made before me by the respective advocates for the parties. The issue that I have been called upon to determine is whether the plaintiff has put forward sufficient reasons to warrant the setting aside of the orders that were made herein on 22nd September, 2020. Order 51 Rule 15 of the Civil Procedure Rules gives this court discretionary power to set aside an order made ex-parte.

It is settled law 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 by the Court of Appeal in the case of 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 applied by the court in applications for setting aside ex parte orders 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 inclined to exercise my discretion in favour of defendant. I am satisfied that a case has been made out for the grant of the orders sought by the defendant. The defendant has demonstrated that as soon as she was served with the summons to enter appearance and the application for injunction, she instructed an advocate to act on her behalf. The defendant has also demonstrated that the said advocate took steps to gather information necessary to defend the plaintiff's claim and application for injunction. The defendant has also demonstrated that although her advocate was late in joining the virtual court session on 22nd September, 2020, she nevertheless joined the session and inquired of the order that had been made in the matter. The court is satisfied that the defendant was at all material times keen on defending the plaintiff's application and that her advocate failed to attend the virtual court due to circumstances beyond her control. The court is also satisfied that the defendant has an arguable response to the plaintiff's application that she should be given an opportunity to put forward. The court has also noted that the orders granted on 22nd September, 2020 have the effect of evicting the defendant from the suit property before the hearing of the suit. The orders are in the circumstances highly prejudicial to the defendant and justice would demand that the defendant be heard before the orders are granted.

For the foregoing reasons, I find merit in the defendant's application dated 24th September, 2020. The application is allowed in terms of prayers 3 and 4 thereof. The costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 19th Day of November 2020

S. OKONG'O

JUDGE

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

Mr. Nyandieka for the Plaintiff

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant