



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 638 OF 2017

PETER KARANJA.....PLAINTIFF/RESPONDENT

VERSUS

MARIAM MAGDALINE KINYURU.....DEFENDANT/APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **28th October 2019**, by the Defendant/ Applicant seeking for orders that;

- 1. That pending the hearing and determination of this Application the Plaintiff/Respondent be restrained by an order of this Honourable Court either by himself, his agents and servants or any persons claiming under him from entering into, taking possession, trespassing, leasing, selling, alienating or in any other way whatsoever interfering with land parcel No. L.R Karai/Gikambura/T.500.***
- 2. That upon the hearing of this Application, the order above be confirmed.***
- 3. The Court to set aside the proceedings, Decree given on 16th November 2018 and all consequential Orders of the Court made pursuant to the decree.***
- 4. The Honourable Court to grant leave to the Defendant/ Applicant to file her Defence according to the draft attached hereto.***
- 5. Cost of their Application be awarded to the Applicant.***

The Application is premised on the grounds that the Applicant is the wife of **Kanyaru Ng'ang'a(deceased)** an allottee of **Plot No. Nachu/ Ndacha/903/70**, vide an allotment letter Reference **No. KCC/C/ LND / VOL VIII/79**, minute No **MPSC/3/85/79**, made by the defacto County Council of Kiambu on **5th December 1995**. That the Respondent alleges to have bought the plot from one **Njaaga Karanja**, and that the said **Njaaga Karanja** must have obtained the title to her deceased husband's plot fraudulently as his plot is **L.R No. Karai/Gikambura/ T.477**.

It was contended that the Applicant is a Tanzanian by birth but a Kenyan by marriage to the allottee and has lived on the suit property with her husband and their two daughters until he passed on. That she continues to reside on the said suit property as beneficial owners. Further that the eviction has rendered the Applicant and her family destitutes and being of alien origin, she has been betrayed by her husband's family. Further that the Applicant has not been served with any processes of the Court either at the beginning or an eviction Order of her family from the suit property.

In her Supporting Affidavit the Defendant/ Applicant averred that she lives on the suit property that belonged to her late husband, who died on **21st March 2003**. Further, that she has never been served with the pleadings before Judgment was entered against her and she was **not** served with orders of the Court until the Plaintiff/ Respondent went to demolish their home on **25th October 2019**. It was her contention that the Process Server who swore an Affidavit on **8th January 2019** one **Willy Odhiambo** should appear in Court to be cross examined on the false allegation of service of the decree.

She contended that she had moved the **National Land Commission** and served all the notices of the Commission to the Plaintiff/ Respondent and his accomplice and she had no reason not to respond to the processes of the Court had the same been served upon her.

The Application is opposed and the Plaintiff/ Respondent swore a Replying Affidavit on **12th November 2019**, and averred that he was the one who pointed out the Defendant/ Applicant to the process server during the service of the court documents. He contended that the Defendant/ Applicant has always been aware of the suit and has always claimed that he would do nothing to her to leave her land. Further that the Defendant/ Applicant has not obtained letters of Administration to the Estate of **Kinyuru Ng'ang'a** although she claims to be his

Widow. It was his contention that the late **Kinyuru Ng'ang'a** had another wife by the name **Mama Thuo** who is not claiming his land .

He averred that he bought the land from **Njaaga Karanja** and he was issued with a title deed after following the due process. That the Defendant/ Applicant had not developed nor lived on the land in issue as she had built a temporary shed, where she used to visit regularly and farm. He contended that he has entered the land and fenced it and built a temporary structure as he embarks to build a permanent house. He contended that the annexures annexed to the Defendant's/ Applicant's Application defeat her cause as the receipt is for payment of L.R **Nachu/Ndacha/903/79**, and the allotment letter shows that, was the land allotted to her husband and there is no document showing that the land belongs to her. He urged the Court to transfer the suit to Kikuyu as the property is worth **Kshs. 4,000,000/=**.

The Defendant/ Applicant filed a further affidavit sworn on **28th November 2019** and averred that by a letter dated **7th November 2019**, the Office of **County Executive, County Government of Kiambu** stated that the suit property was allocated to her late husband. That there are no titles issued to people at Gikambura area to date . It was her contention that title to **L.R 477** is the one that belonged to **Njaaga Karanja**, and not the suit property and that she had built their matrimonial home on the suit property where she lived with her late husband since **1951**. It was her contention that the said property was never available for sale and the Plaintiff/ Respondent fenced the suit property after demolishing her home that was a complete countryside home, with a family house and a business container.

That **Njaaga Karanja** claimed to have the suit property since 1959, but that he did not use it until he transferred the same to a third party. She averred that the dispute over the suit property started when **Njaaga Karanja** sought to sell the said property, but she pursued the matter through the County Commissioner's office who warned the said **Njaaga Karanja** against interfering. That she personally took summons from the **National Land Commission** to **Njaaga** in Thika through the area chief. She contended that the correct title document is **LR Karai/Gikambura/T.500**, that has been indicated in the allotment letter

The Plaintiff/ Respondent filed a further affidavit sworn on **18th January 2020**, and averred that he bought the land from one **Njaga Karanja** who had been issued with the title for the suit property in 1973. He further averred that the **National Land Commission** had already ruled that the land was private. He contended that the process server's affidavit is clear that the Applicant was served.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Defendant/ Applicant has sought for setting aside of the Judgment and subsequent Decree on the basis that she was never served with the pleadings of the case. However, the Plaintiff/ Respondent has averred that the Defendant/ Applicant was served with the suit papers and that he is the one that pointed out the Defendant/ Applicant to the process server. The issues for determination are;

1. Whether the Defendant/ Applicant was served with Summons to Enter Appearance and Pleadings

2. Whether the Defendant/ Applicant is entitled to the orders sought

1. Whether the Defendant/ Applicant was served with Summons to Enter Appearance and Pleadings

While the Defendant/ Applicant has denied that she was ever served with the pleadings in the instant suit, It is the Plaintiff's/ Respondent's contention that the Defendant/ Applicant was indeed served and he was the one who identified her to the process server.

The Court has perused the Affidavit of Service sworn by **Benson Odhiambo Onuonga** sworn on **20th July 2017**, in which he depones that he served the Defendant/ Applicant with the suit papers.

The provision relevant with regards to Affidavit of service is to be found in **Order 5, Rule 15** of the **Civil Procedure Rules** which provide;

"(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require."

It is not in doubt that the Plaintiff/ Applicant has averred that he was the one who identified the Defendant/ Applicant for purposes of service. The Court having peruse the Affidavit of Service dated **20th July 2017**, by the said Process Server notes that the Process Server did not indicate who identified the Defendant/ Applicant to him. He only stated that he met a lady whom he introduced himself to and she also introduced herself. He does not state how he knew that the lady he met was the Defendant/ Applicant. Further, the Process Server did not state the name of the person who identified the Defendant/ Applicant and therefore after a thorough look into the Affidavit of Service, the Court is not satisfied that the Plaintiff/Respondent did effect proper service as the Affidavit of Service being relied on to show that service was effected does not comply with the law.

It is the Court's considered view that there was **no** valid service of the Pleadings to the Defendant/ Applicant.

2. Whether the Defendant/ Applicant is entitled to the orders sought

The Defendant/ Applicant has sought for the setting aside of the Judgment and Decree and that she be allowed to file her Defence as per the draft Defence. **Order 12 Rule 7 of the Civil Procedure Rules** provides: -

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides: -

"The court may set aside an order made ex parte"

From the above provisions of law, it is very clear that the court has discretion to set aside or not to set aside an *ex parte* judgment. Such discretion must be exercised judiciously. In deciding the same, the Court is guided by the decision of the Court of Appeal in the case of James Kanyita Nderitu & Another [2016] eKLR, where the court of Appeal stated thus:-

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.

*In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."*

The Court has already held that the Defendant/ Applicant was not served with the **Summons to enter appearance**, as the Affidavit of Service purporting to have evidenced her service is **null and void**. Therefore, it follows that an irregular Judgment was thus entered and the said Judgment must be set aside as a matter of right and the Defendant/ Applicant be allowed to file her Defence and Defend the suit.

The Defendant/ Applicant had also sought for interlocutory injunctive orders restraining the Plaintiff/ Applicant from taking possession of the suit property and further from leasing and or selling the suit property.

The conditions for consideration in granting an injunction is now well settled in the case of **Giella ...Vs... Cassman Brown & Company Limited (1973) E A 358** where the Court held that;

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

The Court must then determine whether the Defendant/ Applicant has established a **Prima facie** case in **Mrao Ltd ...Vs... First American Bank of Kenya and 2 others, (2003) KLR 125** the Court of Appeal defined a *prima facie* case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

It is the Defendant's/ Applicant's contention that the suit property belongs to her late husband and that her family has been living on the suit property all along. A **prima facie** case requires that a person shows that he has an arguable case and that his/her right may have been infringed upon.

The Court has seen documentations by the County Government of Kiambu alleging that the Defendant's/ Applicant's husband is the owner of the suit property having been allotted the same. There is no doubt that the Defendant/ Applicant has been evicted from the suit property. If indeed the Defendant/ Applicant is the owner of the suit property, then it follows that her right has been infringed and that calls for a rebuttal. The Court finds and holds that the Defendant/Applicant has established a *prima facie* case with probability of success at this trial.

The second limb is whether the Applicant will suffer irreparable loss. '**Irreparable loss**' was described in the case of Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, as *simply injury or harm that cannot be compensated by damages and would be continuous*.

In the case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that: -

"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case."

These considerations alone would entitle the Applicant to the grant of the orders sought”.

From the above case law, it is clear that given that the Plaintiff/ Respondent is the registered owner of the suit property, if an injunction is not granted against selling and or leasing of the suit property, then the Plaintiff/ Respondent may deal with the suit property in any way including but not limited to selling that may prove difficult for the Defendant/ Applicant to recover if she turns out to be the successful litigant.

The third limb is: - If the Court is in doubt, it should decide on a balance of convenience. It is not in doubt that the balance of convenience always tilts in favour of maintaining the status quo and in this case the status quo is that though the Plaintiff/ Respondent has already taken possession, he ought not to be allowed to alienate the suit property. Therefore, the Court finds and holds that the Defendant/ Applicant is entitled to the orders sought.

The Upshot of the foregoing is that the Notice of Motion Application dated **28th October 2019** is merited and the same is allowed.

However, the Injunction is allowed in so far as the Plaintiff/ Respondent is ***restrained by an order of this Honourable Court either by himself, his agents and servants or any persons claiming under him from leasing, selling, alienating or in any other way whatsoever interfering with land parcel No. L.R Karai/Gikambura/T.500.***

The Costs of the Application shall be in cause.

In a nutshell, the court allows the **Notice of Motion Application** dated **28th October, 2019**, in terms of prayers No. 4, 5 with costs being in Cause.

As per payer No. 3, the Plaintiff/Respondent is hereby restrained by an Order of this Court either by himself, his agents and servants and any person claiming under him for selling, alienating, leasing or dealing in any other way that would interfere with the current status of the suit property pending the hearing and determination of the suit.

It is so Ordered.

Dated, signed and Delivered at Thika this 14th day of December 2020.

L. GACHERU

JUDGE

14/12/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Respondent

No appearance for the Defendant/Applicant.

L. GACHERU

JUDGE

14/12/2020