



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 74 OF 2014

JENIFFER KATHUKU MATHIU.....PLAINTIFF

VERSUS

FRANCIS MUBICHI MUKIIRA.....DEFENDANT

RULING

1. Vide the notice of motion filed on 31.1.2018, defendant applicant prays for the following orders:

(i) That this honourable court be pleased to issue an order of temporary injunction restraining the plaintiff her agents, servants, employee or any other person working at her behest from sub-dividing, occupying or dealing in any way with the defendant's land parcel L.R No. Ntima/Ntakira/1577 pending the inter-parties hearing of this application or until further orders are given by this court.

(ii) That this honourable court be pleased to issue an order of stay of the decree issued on 19th day of May 2016 pending the inter-partes hearing application or further orders of this court.

(iii) That this honourable court be pleased to issue an order of stay of execution of the decree issued on 19th day of May 2016 pending the hearing and determination of this application.

(iv) That this honourable court be pleased to set aside the interlocutory judgment, judgment, decree and other consequential orders herein and allow the defendant to defend this suit

2. The grounds in support of this application are:

(i) That the plaintiff is a half-brother to the defendant who is the registered owner of land parcel L.R No. NTIMA/NTAKIRA/1577 wherein he has established his home and developed extensively.

(ii) That the plaintiff instituted this suit, failed to serve the defendant who only came to know about this suit after the district surveyor visited the defendant's land parcel NTIMA/NTAKIRA/1577 and sub-divided the same pursuant to the orders and decree issued on 19.5.2016 to the surprise of the defendant.

(iii) That the parties herein have a pending **Meru High Court Civil suit no. 109 of 1996** which the plaintiff had instituted and which suit is still pending before this honorable court and the defendant is surprised as to how the plaintiff instituted another suit in total disregard of the other pending suit.

(iv) That the plaintiff does not reside on the defendant's land as she is married miles away and she has now laid down all the logistics to sub-divide and excise a portion of land measuring 1 acre from defendant's land parcel L.R No. NTIMA/NTAKIRA/1577 and which portion the defendant has realized that she wishes to dispose off to the detriment of the defendant.

(v) That unless the orders sought are granted the defendant will be condemned unheard which will culminate to him being deprived of his land and developments thus occasioning him irreparable damages.

3. Applicant has also filed a supporting affidavit where he has reiterated the contents in the grounds in support of the application.

4. The application has been opposed through the replying affidavit of the plaintiff. She avers that defendant was well aware of the suit as he was served with summons to enter appearance and the judgment and that the application is brought to frustrate execution of the judgment.

5. The application was canvassed by way of written submissions. I have considered the arguments raised herein and the rival submissions of the parties. The issues to determine is whether defendant was aware of this suit and whether there are any triable issues.

6. **Order 10 rule 11 of the Civil Procedure Rules** provides that;

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just”

7. In the present case, the bone of contention is service. I have perused the entire file and I find that defendant/applicant was apparently served on three different occasions. The initial service for summons to enter appearance was effected on 24.5.2014 (see return of service filed on 9.2.2015). The second one was on 10.3.2016 (see return of service of 14.3.2016) and the third one on 15.4.2016 (see return of service of 5.5.2016).

8. In paragraph 7 of the applicant’s affidavit, he avers that he would seek a chance to cross examine the process server who purportedly served him with the court process. He (applicant) has not clarified as to which service he is disputing, neither did he make good the request to cross examine any of the process servers.

9. I note that the case proceeded on 19.5.2016 after the court was satisfied that defendant had been served, as per return of service filed on 5.5.2016. This Return of Service indicates that defendant’s son one Anthony received the documents. Applicant has not rebutted that averment. I am inclined to believe that defendant was aware of the suit.

10. Should the judgment be set aside despite the finding that judgment was regularly entered?

11. In the case of **Maina vs Mugira court of Appeal case no. 27/1982**, it was held that;

“There are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties.....”. Also see **Sameer Africa LTD vs Aggorwal & sons Ltd H.C.C No. 40/2013 Nairobi**.

12. In the present case applicant avers that a suit is pending, the same being Meru H.C.C No. 109 of 1996 where parties are the same and the subject matter is the same, and that defendant doesn’t know under what circumstances the plaintiff came to file the present suit. In her replying affidavit, plaintiff is mute on this issue, and in her submissions still nothing much has been said about the older suit.

13. A perusal of annexure FMM 4 reveals particulars of a suit **Meru H.C.C. no. 109 of 1996** where indeed the parties are the same as in the present suit. The suit land is the same Ntima/Ntakira/1577. This court would therefore be interested in knowing the fate of this suit and the basis upon which the suit no. **74/14 ELC Meru** was filed.

14. I therefore allow the application in the following terms:

(i) An order is hereby issued setting aside the interlocutory judgment entered on 24.2.2015, the substantive judgment delivered on 19.5.2016, the decree thereof and any consequential orders.

(ii) The defendant is ordered to file and serve his pleadings within 14 days from the date of delivery of this ruling failure to which the order issued in point (1) shall lapse.

(iii) Defendant/applicant is hereby condemned to pay the costs of this application.

(iv) Parties to take a date for pre-trial conference in order to fast tract the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Gatari for plaintiff

H. Gitonga holding brief for Kithinji for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE