



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 108 OF 2013

JANE WAMBOI MWANGI.....PLAINTIFF

VERSUS

DAVID K. MUGE.....DEFENDANT

RULING

1. Judgment was delivered in favour of the plaintiff in this matter on **11/7/2018**. Vide an application dated **27th October 2018** the defendant sought a stay of execution and a review of the judgment of this court on the grounds that there was no evidence that the plaintiff was never chased from her portion of land; that new evidence shows that the plaintiff is in occupation of the land; that the new purchasers of **Kwanza Namanjalala Block 4/Kapsitwet /303** never resold the land to the plaintiff as she alleged; that this evidence was not within the defendant's reach as at the time of filing a defence; that had that fact been disclosed to this court it would have arrived at a different judgment; that non-attendance on the part of the defendant was due to non-service with a hearing notice; that the defendant lives at a different place other than that mentioned in the affidavit of service; that the signature at the back of the summons signifying service is forged; that the defendant has a good defence on the record and that it is proper that the court do vacate the judgment to prevent the perpetuation of an illegality.
2. The application is supported by the sworn affidavit of the defendant which reiterates the above grounds. The supplementary affidavit of the defendant filed on **16/11/2018** was also filed. It denies that the plaintiff was ever forced to buy the land at an auction. It further states that the land was purchased by **8** people who the defendant advised not to chase away the plaintiff and that they never asked the plaintiff for money for her portion. He annexes the sworn affidavit of one Joab K. Sang to his supplementary affidavit to support that statement. He takes issue with the fact that the affidavit of service dated **31/1/2018** has two dates indicated in paragraphs **4** and **5** respectively.
3. The plaintiff filed her sworn replying affidavit on **9/11/2018**. She deponed therein that the defendant was served; that interlocutory judgment was entered against the defendant on **9/9/2013**; that subsequently the defendant applied for setting aside of the interlocutory judgment; that by consent the said judgment was set aside; that his advocate later applied to cease acting for him; that on **4/2/2016** the defendant sought time to engage anew advocate; that the defendant was served for the hearing on **31/8/2018** but he failed to appear; that the defendant stayed for 3 years without appointing a counsel; that the defendant is well known to the process server who has served him before with other notices and that the indication that the defendant resides at Chepsargei instead of Chepsalei is inadvertent; and that there is no new evidence to warrant a review. In her further replying affidavit filed on **28/11/2018** the plaintiff depones that she and others indeed purchased the suit land through a public auction and reiterates that the defendant was served. She annexes a further replying affidavit of Joash Mageto Otachi the process server in which the latter maintains that he knows the defendant very well, having served him more than five times at his home in Chepsalei.
4. The issue arising in this application is whether there is sufficient evidence to warrant the setting aside of the judgment on record.
5. The defendant was aware of this suit by virtue of previous service upon him of the process. He had an advocate on the record. He differed with him and he ceased acting. Thereafter the defendant acted in person till judgment was entered against him.
6. The defendant appears not to have been anxious to apply for cross examination of the process server who swears an affidavit stating that he knows the defendant and that he served him and who denies having forged his signature.
7. I have anxiously considered the evidence regarding service in the application before me and I find that the claims that the defendant was not served are weak. They are not supported by any evidence. Besides the record of his conduct as per this court's record does not bespeak of a person ready to have this litigation concluded with expedition. From evidence on record I find that the defendant was served with a hearing notice for the hearing that took place on 31/1/2018.
8. Having found that service was effected the court must examine whether there is any other ground that may warrant setting side of its judgment.
9. There is an allegation that there is new evidence that was not within the reach of the defendant at the time that he was filing his defence.

10. This court summarized the plaintiff's case as follows in its judgment:

“The plaintiff's case was that on the 31/1/2011 the defendant entered into a written agreement whereby the defendant sold to the plaintiff 50ft x 100ft (Plot No. 15) in the proposed sub-division out of Title No. Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303 which was by then registered in the name of the defendant. The agreed purchase price between the defendant and the plaintiff was Kshs.140,000/= (One hundred and forty thousand only) which the plaintiff paid on the date of the signing of the sale agreement.

The plaintiff states that two months after the aforesaid sale agreement, the Agricultural Finance Corporation hereinafter called the (AFC) auctioned the land comprised in the title deed Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303 for loan of over Kshs.1,000,000/= hence frustrating the sale agreement.

11. It is the plaintiff's contention that at all times prior to the sale agreement the defendant was aware that he owned A.F.C. an outstanding loan and that he failed to disclose the indebtedness to the plaintiff when she entered in a sale of land agreement herein. The plaintiff's claim against the defendant is refund of Kshs.140,000/= being the purchase price of the land measuring 50ft x 100ft (Plot No. 15 on the proposed sub-division) which land was part of title deed No. Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303, being the land that Agricultural Finance Corporation sold to recover its loan secured by the plaintiff's land”.

12. The court noted that the defendant filed his written statement of defence dated 3/2/2014 on 4/2/2014, denied the claim and averred that prior to the execution of the agreement the plaintiff was duly informed of the proper position as regarding all the encumbrances on the land sold and that she agreed to the terms and conditions and took up possession of the land and that she is in occupation thereof to date. The defendant stated that the loan was his obligation and the plaintiff was not under any obligation to repay it. He averred that the loan had so far been substantially repaid and thus the plaintiff could continue to peacefully occupy the land she had purchased. The court observed that he did not give any further details as to who paid the loan and when.

13. In her reply to the defendants statement of defence the plaintiff averred that her taking up of possession and occupation of the land was temporary and that the land in question was sold by a public auction by the AFC after the defendant failed to pay the loan arrears and that now it belongs to a person other than the plaintiff the chances of obtaining title thereto are slim. She averred that she is residing outside the plot following directions by the new owner.

14. I have considered the fact that since 4/2/2014 when the defendant filed his defence, the defendant, being aware of all that the plaintiff had pleaded had ample time till 2018 to file his own statement and a statement by **Joab K Sang** whose affidavit he now annexes to his supplementary affidavit. It is noteworthy that the plaintiff never presented this affidavit of Sang with his first affidavit in support of the motion. It is inconceivable that the plaintiff can take 5 years to obtain such evidence if he considered it crucial for his case.

15. In brief, I find that the plaintiff has not convinced this court that there is any new evidence or any other ground upon which the judgment of this court can be set aside.

16 The plaintiff appears to have been playing a game of hide and seek in this matter and has only come to court when he has found that there are adverse orders against him. This conduct can not be encouraged of any litigant as litigation must be taken seriously, however frivolous one conceives it to be, until the final judgment is delivered.

17. I therefore dismiss the motion dated 27/10/2018 with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale on this 5th day of February, 2019.

MWANGI NJOROGE

JUDGE

5/02/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the defendant

Ms. Kibet holding brief for Kaosa for plaintiff

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

5/02/2019