

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 1003 OF 2005 (OS)**

**MARION GATHONI MAINA .....**

**PLAINTIFF**

**VERSUS**

**FRANCIS MURIITHI MUNDIA ..... 1<sup>ST</sup>**

**DEFENDANT**

**GRACE WAITHERA GACHU**

Sued as the Administrator of the Estate of the Late

**GACHU MUCHEMA ..... 2<sup>ND</sup>**

**DEFENDANT**

**RULING**

1. Judgement was entered in this matter on 7<sup>th</sup> October 2014, which is over a decade ago. What is before Court for determination are two Notice of Motion applications dated the 18<sup>th</sup> September, 2024 and 16<sup>th</sup> December 2024, filed by

***ELC CASE NO.1003 OF 2005 (OS)***

***Ruling***

the Plaintiff and 2<sup>nd</sup> Defendant, respectively. In his application, the 2<sup>nd</sup> Defendant seeks the following Orders:

**a) Spent.**

**b) Spent.**

**c) The judgement entered herein and all subsequent orders thereto to be set aside and/or varied and the 2<sup>nd</sup> Defendant be granted unconditional leave to defend the suit herein.**

**d) The draft statement of defence annexed hereto be deemed as filed and served upon the Plaintiff.**

**e) That this suit be transferred to Engineer Law Courts.**

**f) The costs of this application be provided for.**

2. The application is premised on grounds on its face and on the supporting affidavit of Joseph Mbatia Gachu, administrator of the estate of Gachu Muchema. He avers that on 9<sup>th</sup> December 2024, his children were served with the application dated

18<sup>th</sup> September 2024 filed herein, following which he learnt that a judgment was entered in the matter, which he contends is an irregular judgment as it was obtained on material non-disclosure and concealment of facts as the 2<sup>nd</sup> Defendant was never served with pleadings and summons to enter appearance, in contravention of his constitutional right to be heard.

3. He contends that the 2<sup>nd</sup> Defendant was the registered owner of **Nyandarua/ Olaragwai /1951**, hereinafter referred to as the 'suit land', as per copy of title deed in favour of Gachu Mutema, which he annexed. Further, that he has lived on the suit land uninterrupted for over twenty (20) years. He reads mischief in that the Plaintiff pleaded in her Originating Summons that she has had open uninterrupted use of the suit land for more than twenty (20) years, yet she now seeks an eviction order. Further, that he is apprehensive that the Plaintiff may execute against the Defendants any time from

now and urges the Court to give him an opportunity to defend the suit.

4. The application is opposed by the Plaintiff who filed a replying affidavit. She contends that 2<sup>nd</sup> Defendant's application is unmerited since the 2<sup>nd</sup> Defendant was duly served with pleadings and they filed a replying affidavit but ignored to attend Court to give evidence. Further, that the application has been brought late and no credible explanation has been given. She objects to transfer of the matter to Engineer Law Courts for reasons that the suit was heard and determined in Nairobi where she resides. She also objects to the prayer for stay of execution on the basis that it shall delay the matter unnecessarily.
5. Vide her Notice of Motion dated 18<sup>th</sup> September 2024, the Plaintiff seeks the following Orders:

**a) Spent.**

**b) That the Court be pleased to issue an eviction order to evict the Defendants, their agents and**

**ELC CASE NO.1003 OF 2005 (OS)**

***Ruling***

**or any person encroaching on the suit land LR No. Nyandarua/Olragwai /1591.**

- c) That the OCS Murungaru police station and area chief Kambata location do oversee security in enforcing the Court order of eviction.**
- d) That any person resisting the eviction be arrested by the police.**
- e) That the cost of this application be paid by the Defendants.**

**6.** The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. She avers that pursuant to this Court's Decree issued on 23<sup>rd</sup> September 2016, the Chief Land Registrar was directed to rectify the register for the suit land to be in the name of Gibson G. Maina and the said Decree has not been appealed against. Further, pursuant thereto, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served with an eviction notice dated the 8<sup>th</sup> June 2023, under the Land Act but they have refused to vacate the suit land. To this end, she

annexed the process server's affidavit of service dated the 6<sup>th</sup> July 2023.

7. The application is opposed by the 2<sup>nd</sup> Defendant vide the replying affidavit of Joseph Mbatia Gachu, a co-administrator of the estate of the late Gachu Muchema. He avers that the Plaintiff has sued the wrong parties in a bid to defeat justice, thus judgment herein was fraudulently acquired as the Plaintiff failed to disclose the proper parties before the Court. Further, that the beneficiaries of the estate of Gachu Muchema (deceased) have been in continuous occupation of the suit land since 1964.
8. The two instant applications were jointly canvassed by way of written submissions.

### **Submissions**

9. With regard to the application dated 18<sup>th</sup> September 2024, the Plaintiff submits that she ought to be granted an eviction Order against the Defendants having obtained final judgment

and demonstrated their continued illegal occupation of the suit land, despite the Decree issued herein.

**10.** On the application dated 16<sup>th</sup> December 2024, the Plaintiff reiterates that judgement was entered after the Court satisfied itself that the Originating Summons herein had been properly served and that the 2<sup>nd</sup> Defendant, despite service of the hearing notice, failed to attend court. She also reiterates her objection to the granting of an Order of Stay of execution as well as transfer of this suit to Engineer Law Courts.

**11.** To buttress her averments, she relied on the following decisions: **Shah v Mbogo & another [1967]EA 116; Ivita v Kyumbu [1984] KLR 441; Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR; Esther Wamaitha Njihia & 2 others v Safaricom Ltd [2014] eKLR; James Kanyiita Nderitu & another v Marios Philota Ghikas & another [2016] eKLR; Kenya Power & Lighting Company Ltd v**

**Benzene Holdings Ltd t/a Wyco paints [2016] eKLR and Mbaki & others v Macharia & another [2005]2 EA 206.**

12. The 2<sup>nd</sup> Defendant submits that he is a stranger to the proceedings yet the attached Letters of Administration indicate that he was the legitimate administrator and ought to have been served with pleadings herein. Further, that setting aside the judgement entered herein would not prejudice the Plaintiff as the Defendants have a constitutional right to be heard. He also submits that his intended defence raises triable issues as their patriarch has lived on the suit land, since after independence. The 2<sup>nd</sup> Defendant also cites Section 12 of the Civil Procedures Act to submit that since the suit land is located at Murungaru location, Kinangop Constituency in Nyandarua County, access to justice demands that the case be transferred there.

13. To support his averments, he relied on the following decisions: **Pithon Waweru Mina v Thuka Mugiria [1983]**

**eKLR.Matex Hospital Supplies Limited v Kenya Ports Authority [2015] eKLR.**

**Analysis and Determination**

**14.** Upon consideration of the two instant Notice of Motion applications including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether judgement issued in the matter on 7<sup>th</sup> October 2014 should be set aside and the 2<sup>nd</sup> Defendant be allowed to defend the suit and if this suit should be transferred to Engineer Law Courts.**
- **Whether the Defendants' should be evicted from the suit land.**

**As to whether judgement issued in the matter on 7<sup>th</sup> October 2014 should be set aside and the 2<sup>nd</sup> Defendant be allowed to defend the suit and if this suit should be transferred to Engineer Law Courts.**

**15.** The 2<sup>nd</sup> Defendant urges this Court to set aside its judgement of 7<sup>th</sup> October 2014 on the basis that it is irregular, since service of summons to enter appearance was not effected upon them. The Plaintiff on the other hand insists that summons to enter appearance were served and that the 2<sup>nd</sup> Defendant filed a replying affidavit to the Originating Summons. For that reason, she seeks an eviction order against the 2<sup>nd</sup> Defendant.

**16.** The application to set aside judgement is filed by Joseph Mbatia Gachu, who claims to be a co-administrator of the estate of the late Gachu Muchema. In its judgment dated 7<sup>th</sup> October 2014, the Court noted that both Defendants had filed replying affidavits in the suit. The record indicates that **Grace Waithera Gachu** filed a replying affidavit sworn on 10<sup>th</sup> December 2009. Joseph Mbatia Gachu now claims that the said Grace Waithera Gachu was not a proper party thus judgement was irregularly entered.

17. On the description of an irregular judgement, the Court of Appeal in **James Kanyita Nderitu V Maries Philotas Ghika & Another [2016] eKLR** stated thus:

*“...in an irregular 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 justitiae, 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.”*

18. In **Anjeli Limited v Kenga Simba & 12 others; Chengo Omar & 19 others (Intended Interested Parties) [2021] eKLR**, it was held that:

*“If a party is properly served and opts not to come to court, he can have nobody but himself to blame when judgment is entered against him. Nobody*

***should shun a court proceeding thinking that they will automatically get an order for setting aside the judgment.”***

**19.** From the Court record, I note the 2<sup>nd</sup> Defendant in the replying affidavit of the 11<sup>th</sup> December, 2009, the deponent stated that Gachu Muchema (deceased) was her late husband. Further, she even explained that her late husband acquired the suit land from John Kamau Wainaina. She even admitted that her husband died on 22<sup>nd</sup> December, 2002 before judgement in Naivasha RMCC No. 107 of 1987 was quashed by High Court in High Court vide Misc Application No. 265 of 1994. Further, I note at that point the 2<sup>nd</sup> Defendant was even represented by messrs G. Kamonde Advocate.

**20.** It is trite that for a judgement to be set aside and the Defendant allowed to defend the suit, there has to be proof that there was no service and the Defence should raise triable issues. At this juncture, I find that the 2<sup>nd</sup> Defendant was properly served with summons to enter appearance and

filed a response and that the judgement entered herein was hence regular as the said suit was defended. I opine that the 2<sup>nd</sup> Defendant is not being candid as they chose to ignore the proceedings herein and now cry foul. Further, I note that the 2<sup>nd</sup> Defendant had even been served with eviction notices on 8<sup>th</sup> June, 2023 as per the Land Act, but chose to ignore it and now filed the instant application after an inordinate delay, without providing any credible explanation or sufficient cause for the said delay.

**21.** In the foregoing, while associating myself with the decisions cited, I find that the judgement issued herein on 7<sup>th</sup> October 2014 is valid and decline to set it aside. I will further decline to transfer the matter to Engineer Law Courts as this matter is concluded and is at the execution stage.

**As to whether the Defendants should be evicted from the suit land.**

**22.** The Plaintiff has sought for an eviction order as against the Defendants. The 2<sup>nd</sup> Defendant contends that the Plaintiff has

sued the wrong parties in a bid to defeat justice, thus judgment herein was fraudulently acquired as the Plaintiff failed to disclose the proper parties before the Court. Further, that the beneficiaries of the estate of Gachu Muchema (deceased) have been in continuous occupation of the property since 1964 and it is their constitutional right to defend this suit.

**23.** I wish to reproduce an excerpt from the impugned judgement here below:

***'...In the meantime, Gachu Muchema sold the 4.5 acres which were reverted back to him to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was issued with a title number Nyandarua/ Olaragwai/1591 on 31<sup>st</sup> January, 1996 with respect to the said 4.5 acres, which is the subject matter of this suit. The Plaintiff is seeking an Order for rectification of the register in respect to the 1<sup>st</sup> Defendant's title number Nyandarua/ Olaragwai/ 1591, cancellation of the 1<sup>st</sup> Defendant's title in the suit land and registration of the suit parcel in her name.....The 1<sup>st</sup> Defendant on other hand***

*has contended that he is an innocent purchaser for value without notice.....In my view, the Plaintiff is entitled to the order of rectification sought since no appeal was lodged to challenge the decision in Nairobi High Court Misc. Case No. 265 of 1994 that quashed the Senior Resident Magistrate's Court decision to hive off 4.5 acres from the Plaintiff's property.'*

24. From this excerpt alone, it is evident the Court found that the Plaintiff is entitled to Nyandarua/ Olaragwai/ 1591. Further, I note the Deputy Registrar already executed the Transfer Forms for Nyandarua/ Olaragwai/ 1591, in favour of the Plaintiff. In my view, I find that the Plaintiff is entitled to enjoy the fruits of her judgement and the 2<sup>nd</sup> Defendant or the agents should not be allowed to block the Plaintiff from the suit land. In the foregoing, I find that eviction orders should hence issue.

25. In the circumstances, I find the 2<sup>nd</sup> Defendant's Notice of Motion dated the 16<sup>th</sup> December 2024 unmerited and will dismiss it with costs. I find the Plaintiff's application dated

**ELC CASE NO.1003 OF 2005 (OS)**

**Ruling**

the 18<sup>th</sup> September, 2024. merited and allow it in the following terms:

- a) **An eviction order is hereby issued to evict the Defendants, their agents and or any person encroaching on the suit land LR No. Nyandarua/Olaragwai /1591.**
- b) **That the OCS Murungaru police station and area chief Kambata location do oversee security in enforcing the Court order of eviction.**
- c) **The costs of this application is awarded to the Plaintiff.**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
12<sup>TH</sup> DAY OF NOVEMBER, 2025**

**CHRISTINE OCHIENG  
JUDGE**

**In the presence of:**

Wanjohi for Plaintiff

Joseph Mbatia Gachu and Solomon Njehu Gachu in person

Court Assistant: Joan

ORIGINAL