



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 31 OF 2018 (O.S.)

IN THE MATTER: AN APPLICATION FOR ORDERS DECLARING THE APPLICANTS ENTITLED TO BY VIRTUE OF ADVERSE POSSESSION OF 25 YEARS ALL THAT PIECE OF LAND KNOWN AS L.R. NO. MN/III/5612 REGISTERED AS CR.58960

IN THE MATTER OF: SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA.

1. HUSSEIN SULEIMAN MASILA

2. LILIAN KAVUTI MUSYOKA

3. IBRAHIM LUGUSA ALUDA.....APPLICANTS

VERSUS

KROTONITE ENTERPRISES LIMITED.....RESPONDENT

RULING

1. By a Notice for Motion dated 24th December, 2018, brought under Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act Registration Act, and all other enabling provisions of the law, the Respondent/Applicant seeks orders:

1. Spent

2. That the judgment and the decree given herein on 11th May, 2018 be set aside.

3. That order given by the court on 10th August, 2018 be set aside and the Land Registrar be directed to cancel the provisional title issued to the Applicants pursuant to the said order.

4. That in the meantime pending the hearing and determination of this application an order of inhibition do issue inhibiting the registration of any dealing with the suit premises namely LR. NO. MN/III/5612

5. That the costs of this application be provided for.

2. The application is premised on the grounds that:

i. The originating summons filed by the Applicants was never served upon the respondents.

ii. The applicants served the originating summons by advertisement in the Nairobi Star of 28th March, 2018 but the said publication was never brought to the notice or attention of the respondent's directors.

iii. The so called Nairobi Star is not a newspaper of nationwide circulation as was envisaged by the court in its Order of the 19th March, 2018.

iv. In any event the Respondent has a good defence to the Applicants suit and should be allowed to urge its defence at a trial of the suit so that the suit can be determined on its merit.

v. The applicants have obtained judgment based on false evidence when in fact they are not and have never been in occupation of the suit premises at all.

vi. The applicants stand to suffer no prejudice as their suit will in the event the respondent's application is allowed be heard and determined on its merit

3. The application is further supported by the grounds contained in the supporting affidavit of Abdulkarim Sale Muhsin sworn on 24th December 2018 in which he depones that he is a director of Kryptonite Enterprises Limited the Respondent Applicant. He reiterates that the Applicant was never served with the originating summons or other pleadings filed in this suit. That he got to know about the suit when he visited the Land Titles Registry Mombasa on 21st December 2018 and found out that the Applicants in this suit had presented a decree of the court given in this suit for registration. That the Applicants chose to advertise the summons in the Nairobi Star which does not enjoy countrywide circulation and which they never read. It is the Respondent's contention that they have a good defence to the Applicants suit which should be allowed to urge at a trial. The Respondent avers that they obtained title to the suit premises on 5th February, 2013 and therefore its title cannot be said to be extinguished as the limitation period of 12 years has not lapsed. That the Applicants are not and have never been in possession of the suit premises. They have attached photographs showing the property is vacant.

4. The Application is also supported by the affidavit of David Kahindi Samson, the chief of Junju Location where the suit property is located sworn on 24th December, 2018. He depones that there are no buildings and there has never been any buildings on the suit premises, and that there are no homesteads or persons living or residing in the suit premises. That the suit premises is and has always been lying idle and vacant with no agricultural or any other activity taking place therein. He also depones that the Applicants are not known to him and are not residents of Junju Location.

5. The Application is opposed by the Applicants through a notice of Preliminary Objection dated 17th January, 2019 and grounds of opposition also dated 17th January, 2019. It is the Applicants contention that the Application is fatally defective, badly constituted, spurious and an abuse of the court's process and that the said application has been filed by an entity known as Kryptonite Enterprises Limited who are strangers to this suit and do not have *locus standi* to bring an application on behalf of Krotonite Enterprises Limited.

6. I have considered the Application together with the affidavits in support and the Preliminary Objection and Grounds of Opposition as well as the submissions filed. The law on the setting aside of ex-parte judgment is now settled. The principle guiding the setting aside such ex-parte orders are trite that the court has wide powers to set aside such orders save that where the discretion is exercised, the court will do so on terms that are just.

7. In the case of Patel –v- EA Cargo Handling Services Ltd (1974)1 EA 75 at page 76 Sir Duffus P states thus:

“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, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

8. In the case of Shah-v- Mbogoh (1967)EA 116 at page 123, Harris J, Stated:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the court of justice.”

9. In this case the Respondent was served by way of advertisement in the Nairobi Star Newspaper. The Respondent states that the said newspaper does not have nationwide circulation and therefore they did not see the advertisement. The Applicants have not disputed this fact. The Applicant's main ground in opposing the Application is that the same has been filed by Kryptonite Enterprises Limited and not Krotonite Enterprises Limited. I however note that in his affidavit sworn on 6th March 2019, Abdulkarim Saleh Muhsin has deponed that the title documents of the suit property was incorrectly written as Krotonite Enterprises instead of Kryptonite Enterprises Limited. In my considered view, the discrepancy in the name has been satisfactory explained.

10. The Respondent's main ground in the application, as already stated, is that it was never served. For the reason that the service was effected through a newspaper whose circulation may not be nationwide, the court will exercise its discretion in favour of the Respondent.

11. I have also looked at the defence raised in the affidavits in support of the application. The defendant has pleaded inter alia that they obtained title to the suit property on 5th February 2013 and therefore their title could not be said to have extinguished since 12 years had not lapsed. Further, that the suit property is vacant and that the Applicants have not been in possession of it. In my view, the defence raised raises triable issues which call for trial. The Applicants have not demonstrated that they will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit. The overriding objective of the court would no doubt come to the aid of the respondent.

12. In the result, I find merit in the Notice of Motion dated 24th December 2018 and the same is allowed in the following terms:

a. The application is allowed as prayed in terms of prayers 2, 3, and 4 thereof.

b. The Respondent to file and serve its response to the Amended originating summons within 14 days of delivery of this ruling.

c. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Obinju for applicant

No appearance for respondent.

Yumna Court Assistant

C.K. YANO

JUDGE