



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 260 OF 2017**

**WANJIRU RICHU.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**CYRUS GATHATA KIBU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMUEL RICHU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application dated **31<sup>st</sup> October 2017** brought by the Applicant herein under, **Order 51 Rule 1** of the **Civil Procedure Rules, Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers:-

- 1) The 1<sup>st</sup> Defendant herein be evicted from the Plaintiff's piece of land known as LR.No.Lari/ Magina/1109.**
- 2) The Officer in Charge Uplands Police Station(OCS) be authorized and/ or assist in the execution of the Decree of this Court issued on 26<sup>th</sup> September 2017.**
- 3) The costs of this Application be paid by the 1<sup>st</sup> Defendant/Respondent.**

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of **Wanjiru Richu**. The grounds are:-

- a) On 20<sup>th</sup> July 2017, the court entered Judgment in favour of the Plaintiff against the Defendants and further ordered that the 1<sup>st</sup> Defendant do vacate the Plaintiff's piece of land known as Lari/Magina/1109 within 90 days of the Honorable Court's Judgment.**
- b) On 31<sup>st</sup> July 2017, the 1<sup>st</sup> Defendant was served with a copy of the Judgment and on 26<sup>th</sup> September 2017 the court issued a decree in terms of the said Judgment and the 1<sup>st</sup> Defendant was served with the same on 30<sup>th</sup> October 2017.**
- c) The 1<sup>st</sup> Defendant has unlawfully and unreasonably refused to vacate the land despite being served and it is therefore necessary for him to be evicted.**

The Applicant in her *Supporting Affidavit* averred that **Judgment** was passed in her favour against the Defendants and the **1<sup>st</sup> Defendant was ordered to surrender vacant possession of the suit land**. She further averred that the 1<sup>st</sup> Defendant despite being served with the **Judgment** and the **Decree**, has continued to unlawfully occupy the land and cause substantial loss and anxiety to her. She further averred that it is necessary for the court to authorize police assistance to assist and supervise the eviction.

The Application is opposed and the 1<sup>st</sup> Defendant/Respondent filed a *Replying Affidavit* on **20<sup>th</sup> December 2017**, and sworn on the **19<sup>th</sup> December 2017**. He averred that he was served with the suit papers on the **8<sup>th</sup> of August 2015** and he then instructed the **Law Firm of Moses Odawa & Co. Advocates**, who entered a **Memorandum of Appearance**. It was his contention that when his current Advocates perused the file that his former Advocates did not follow up on the matter. He further alleged that the plaintiff did not serve him or his former advocates with any suit papers and the matter proceeded ex parte and he only learnt of the matter when he was served with the **Decree** on **30<sup>th</sup> October 2017**.

It was his contention that it was the duty of his Advocates to inform him of the case progress and that he was not adequately represented and given an opportunity to defend himself and therefore the **Judgment** against him is irregular and granting the Application will render his Application on **Stay of Judgment** delivered on **20<sup>th</sup> July 2017**, nugatory and therefore it is fair that the court disallows the orders sought.

The Applicant filed a further Affidavit in response to the **Replying Affidavit** on **11<sup>th</sup> January 2018**, and averred that the Respondent is a person who does not heed to the Summons served either by the area Chief or the Court and has defied orders by the Chief as evidenced by **annexture WR-1**. She further averred that it is untrue that the Respondent was unaware of the court proceedings as he was also served with Court **Judgment** on **31<sup>st</sup> July 2017**, and the **Decree** and failed to approach the Court. She further alleged that if the Court re opens the case for hearing, she will be greatly prejudiced as she will be required to pay her Advocates further fees to represent her in the hearing. She further averred that the Respondent has not moved the court for stay orders and/ or setting aside of the **Judgment** and the **Replying Affidavit** is aimed at further delaying the proceedings.

The Application was canvassed by way of written submissions and the Applicant filed her submissions through the **Law Firm of M/S Wanjama & Co. Advocates** on **12<sup>th</sup> February 2018**. It was submitted that allegations made by the Respondent are untrue as he was given an opportunity to defend himself but he failed. It was further submitted that the Respondent's **Replying Affidavit** lacks merit as the Application before Court is for an Order of eviction and not one to set aside **Judgment** and the Court having had an opportunity to analyze the Plaintiff's evidence during hearing came to a conclusion that the Plaintiff inherited the suit property from her father. The Court was therefore urged to allow the Application with costs.

The Respondent acting on his own after an Application by his Advocates to cease acting for him was allowed, filed his submissions on the **27<sup>th</sup> April 2018**. He relied on various provisions of law and decided cases and submitted that the circumstances resulting to the **Judgment** being entered ex parte was due to his Advocates mistakes. He further submitted that the court has discretion to grant the orders sought as he is aggrieved by the orders made by the court as he was not properly served and therefore the ex-parte Judgment should be set aside.

He relied on **Order 10 Rule 11** of the **Civil Procedure Rules** which

provides:-

**“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.”**

The Court was therefore urged to intervene and set aside the ex parte **Judgment** and allow him to file my defence and disallow the Application to evict him.

The Court has now carefully considered the instant **Notice of Motion** and the response to the same. The Court has also considered the pleadings and annexures in general and makes the following findings:-

There is no doubt that the Plaintiff/Applicant filed this suit against the Defendants on **16<sup>th</sup> July 2014** and sought for various Orders against them. Among the Orders sought was for the 1<sup>st</sup> Defendant to vacate the Plaintiff's parcel of land known as **Lari/Magina/1109**, and in the event of disobedience, the 1<sup>st</sup> Defendant be evicted from therefrom.

Though the 1<sup>st</sup> Defendant had entered appearance through the **Law Firm of Moses Odawa & Co. Advocates**, he failed to Enter Appearance nor file Defence.

The matter proceeded for **Formal Proof** and on **20<sup>th</sup> July 2017**, the Court entered **Judgment** in favour of the Plaintiff in terms of **prayers No. (a) & (b)** of the **Plaint**.

Further, the Court directed the 1<sup>st</sup> Defendant to vacate the suit premises within a period of **3 months** or **90 days** from the date of Judgement, and failure to do so, the Plaintiff was to apply for eviction Order.

From the court record, a Decree to that effect was issued on **26<sup>th</sup> September 2017**. The Plaintiff has alleged that she served the Defendant with the **Judgment** of the Court on **31<sup>st</sup> July 2017**. There is an Affidavit of Service of the said Judgment to the 1<sup>st</sup> Defendant sworn by **William Bibiu, Advocate** of the **High Court**. It was also averred that after the **Decree** was issued on **26<sup>th</sup> September 2017**, the same Advocate also served the 1<sup>st</sup> Defendant with the said Decree on **3<sup>rd</sup> October 2017**. It is evident that even with the service of the said **Judgment** and **Decree**, the 1<sup>st</sup> Defendant did not come to court to seek for Stay of the said Decree or setting aside of the Judgment. The Plaintiff/Applicant then filed this application for eviction on **31<sup>st</sup> October 2017** as directed by the court in the event of failure by the 1<sup>st</sup> Defendant to vacate the suit property **Lari/Magina/1109**.

In his opposition to the instant application, the 1<sup>st</sup> Defendant admitted to have instructed the **Law Firm of Moses Odawa & Co. Advocates** to act for him. He blames his advocate for failure to file the Defence and even keep him informed on the development of his case. However, it is trite that a case belong to a litigant and he/she has a duty to follow the progress of the said case while it is still on-going in court.

The Respondent averred that he learnt of the Judgment when he was served with the **Decree** on **30<sup>th</sup> October 2017**. However, it is clear from

the **Affidavit of Service** that the 1<sup>st</sup> Defendant was served with the **Decree** of the court on **3<sup>rd</sup> October 2017** and had earlier been served with the **Judgment** of the court on **31<sup>st</sup> July 2017**. Even after service of the court's Judgment, the 1<sup>st</sup> Defendant did not act at all. He sat back and waited for the next action by the Plaintiff/Applicant. This is a court of equity and will be guided by the maximus "**Equity aids the vigilant and not the indolent**"

It is also evident that when the **Notice of Motion** dated **31<sup>st</sup> October 2017**, came up for hearing, the 1<sup>st</sup> Defendant had instructed **the Law Firm of Mitiambo & Co. Advocates** who later filed an application to cease acting for him on allegation that 1<sup>st</sup> Defendant had stopped giving the advocate further instructions. The actions of the 1<sup>st</sup> Defendant smacks of a person who is out to delay the final conclusion of this matter. The Plaintiff/Applicant herein is a successful litigant and she should be allowed to enjoy the fruits of her Judgment.

The 1<sup>st</sup> Defendant has not yet filed any application challenging the Judgment of the court which is in force and which Judgment has not been set aside and/or overturned. As the court has observed above, the Plaintiff/Applicant should be allowed to enjoy the outcome of her Judgment.

In her further affidavit, the Plaintiff/applicant has alleged that the 1<sup>st</sup> Defendant is one person who does not heed the Summons served upon him by the Chief or the Court Order. Indeed the advocate who served the Judgment and Decree upon the 1<sup>st</sup> Defendant deponed that he arrogantly refused to sign for receipt of the same.

Therefore the 1<sup>st</sup> Defendant cannot seek to object to the Plaintiff's/Applicant's application too late in the day when he failed to follow up with his advocate to find out the progress of his case and later after service of the **Decree**, he did move to court but only came to oppose the instant application.

Having now analyzed the pleadings herein and the rival written submissions, the Court should point out that this is not an application for setting aside the **Judgment** of the court dated **20<sup>th</sup> July 2017** and therefore the 1<sup>st</sup> Defendant's submissions are misplaced. The application herein is for order that the 1<sup>st</sup> Defendant should be evicted from the suit land. Being guided by **Section 3A** of the **Civil Procedure Act**, the Court finds that the necessary order herein which should ensure that justice is done and to prevent abuse of the court process is to allow the Plaintiff's/Applicant's **Notice of Motion** application dated **31<sup>st</sup> October 2017**, entirely in terms of **prayers No.(b) & (c)** and **costs to be borne by the 1<sup>st</sup> Defendant/Respondent**.

It is so ordered.

**Dated, Signed and Delivered at Thika this 17<sup>th</sup> day of May 2019.**

**L. GACHERU**

**JUDGE**

**17/5/2019**

In the presence of

No appearance for Plaintiff/Applicant (though served with Ruling Notices)

No appearance for 1<sup>st</sup> Defendant/Respondent

No appearance for 1<sup>st</sup> Defendant/Respondent

Diana - Court Assistant

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**17/5/2019**