



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 49 OF 2018

MARGARET NJOKI KAMAU - PLAINTIFF/RESPONDENT

VS

REUBEN NDIRO MWANGI - DEFENDANT/APPLICANT

RULING

1. This Application is expressed to be brought under Order 10 Rule 11 & 22 Order 51 Rule 1 & 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act together with all enabling sections of the law.

2. The Applicant sought the following orders;

- a. Spent
- b. There be stay of execution of the orders given by this honourable Court on the 10/7/14.
- c. The Court to set aside the judgment and orders given in this case including the decree issued on the 10/7/14
- d. The costs of the application be provided for.

3. The application is premised on the following grounds that; -

- a. The Applicant was served with the summons to enter appearance on the 10/2/14.
- b. The Applicant engaged the services of Waithira Mwangi & Company Advocates who filed a notice of appointment and entered appearance on his behalf.
- c. On the 7/3/14 the said advocate filed a defense through Christopher Wanjohi.
- d. The Applicant was served with a decree of the Court indicating that the matter was heard in the absence of the Defendant though served.
- e. The entry of the judgement was erroneous in that a defence had already been filed.
- f. The Defendant was never served with a mention notice or hearing notice for formal proof on the dated fixed by the Court as required by law.
- g. By reasons of the matters aforesaid the application should be allowed with costs.
- h. The Defendant is the registered owner of the suit land LOC 17/IGANJO/2041 which is the subject of the suit.

4. The Application aforesaid is supported by the affidavit of Catherine Waithira Mwangi Advocate sworn on the 4/8/14. In it she deponed that she received instructions to act for the Respondent in the month of February 2014 whereupon she filed a memorandum to enter appearance and caused a defense to be filed in Nyeri ELC Court through 2NK SACCO to one Christopher Wanjohi, a licensed Court process server to file the same in the Registry. The said Wanjohi confirmed that he had filed the defence the same day and she has annexed a copy of the defense and a payment receipt marked CWMII. That the Respondent was later served with a decree and upon perusal realized that there

indeed was no defence on the file when the judgment was entered. It is apparent that the defence was misplaced or filed in the wrong file. The Respondent was not served with the notice for the formal proof. That the defence raises strong triable issues and ought to be heard on merits.

5. Christopher Wanjohi confirmed receiving documents from the firm of Waithira Mwangi on the 7/3/14 through 2NK SACCO for filing in Nyeri Registry. Upon receipt he duly filed them in the registry and paid Kshs 300/- through receipt No 5798991 on the same day.

6. The application was served on the Respondent variously resting on the affidavit of service dated the 18/3/19. The application is not opposed.

7. The Applicant has filed written submissions which I have read and considered.

8. This suit was filed on the 7/2/14 and ex parte judgement delivered on the 10/7/14. I have seen that the statement of defence was indeed paid for as exhibited by the receipt of payment from the Registry. The Applicant has not shown evidence that the same was served on the Respondent as required by the Civil Procedure Rules. This is so because the Applicant had entered appearance by Counsel on the 21/2/14 and thus was represented.

9. Order 10 Rule 11 provides that where judgement has been entered under this order, the Court may set aside or vary such judgement and any consequential decree or order upon such terms as are just. The power to set aside judgment is a discretionary one. In the case of **Pithon Waweru Maina Vs Thuka Mugiria (1982-88) 1 KAR 171** Bosire J as he then was set out the principles applicable to the above orders as follows; the power to set aside judgment is discretionary; the discretion is unlimited provided it is properly exercised; it being judicial discretion must be exercised on the basis of evidence and sound legal principles; the Court has powers under this order to set aside on terms as are just; the Court is obliged to look at the defence the Applicant /Defendant may be having to the claim; if a party establishes a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined towards setting aside.

10. The claim of the Respondent as set out in the plaint is that she is the legal representative of Gibson Mburu Nganga, deceased who owned parcel No KAKUZI/KIRIMIRI/BLOCK9-1557. She avers that the same was transferred to the Applicant through fraud, particulars of which are pleaded under para 7 of the Plaint. She sought orders inter alia that the title in the name of the Applicant be cancelled, vacant possession and a permanent injunction do issue against the Applicant.

11. The Applicant on the other hand has denied fraud and avers that the deceased sold the land to him during his lifetime and inter alia put him in possession and occupation. That he is a purchaser for value without notice who has been in continuous occupation of the suit land since 2004.

12. I have considered the defence on its face and I am satisfied it raises a reasonable defence which has triable issues. In the upshot the application is merited. It is allowed with costs payable by the Applicant.

13. The Applicant is directed to serve the defence on record within the next 7 days from the date hereof.

14. Thereafter parties are directed to fix the matter for pretrial within 14 days of service.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Respondent: Absent

Defendant/Applicant – Absent

Kuiyaki and Njeri, Court Assistants