



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELCA CASE NO. 15 OF 2016

PATRICK RUGENDO IRERI.....APPELLANT

VERSUS

JOHN NJAGI NJERU.....RESPONDENT

(Being an appeal from the judgement and decree of the Honourable M.N. Gicheru (Chief Magistrate) dated 14th November 2016 in Embu CMCC No. 193 of 2016)

RULING

1. By a notice of motion dated 26th February 2019 brought under **sections 3 & 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Appellant sought the following orders:

- a. *That the OCS Runyenjes Police Station do provide security during eviction of the respondent, his agent, servant or anybody claiming through the respondent from land parcels Nos. Kyeni/Kigumo/3890 and 3891.*
- b. *That the applicant be allowed to implement the decree issued on 20th July 2018 a second time.*
- c. *That costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the Appellant's affidavit sworn on 26th February 2019. It was contended that after execution of the decree and eviction of the Respondent, he had gone back to the suit properties and built some illegal structures thereon. The Appellant therefore wanted the police service to provide security for the Respondent's eviction once more. The Appellant exhibited a copies of the decree and a copy of a certificate of vacant possession from Quickline Auctioneers in his affidavit.

3. The Respondent filed a replying affidavit sworn on 14th March 2019 in opposition to the said application. He contended that he was never served with any court process in both the suit which was before the Chief Magistrate's court as well as the appeal before this court. He accused the concerned process servers of having sworn false affidavits of service with respect to both cases.

4. The court record shows that by a notice of motion dated 25th February 2019 brought under **section 3A of the Civil Procedure Act (Cap. 21), Order 10 Rule 11, Order 22 Rules 6 & 25 of the Civil Procedure Rules and all enabling provisions of the law**, the Respondent sought the setting aside of the judgement delivered by this court on 28th June 2018 together with all consequential orders.

5. The said application was based upon the several grounds set out on the face of the motion. The said application was supported by the Respondent's affidavit sworn on 25th February 2019 in which he reiterated and expounded upon the grounds set out in the application. In a nutshell, the Respondent contended that he was never served with suit papers in the suit before the Chief Magistrates Court and that he was never served with the memorandum of appeal in this matter. It was his case that he had been condemned unheard.

6. The Appellant filed a replying affidavit sworn on 15th March 2019 in opposition to the said application. He disputed that the Respondent was condemned unheard and maintained that he was duly served with court process as per the affidavits of service filed before the respective courts. The Appellant contended that even after execution of the decree and eviction of the Respondent, he had unlawfully returned to the suit properties and built temporary structure thereon. The Appellant also contended that the application was merely an afterthought filed 4 months after the Respondent's eviction.

7. When the said two applications were listed for hearing on 7th March 2019 the advocates for the parties agreed to canvass them through written submissions. The parties were to file and exchange their respective submissions on both application within 30 days. The record shows that the Respondent filed his submissions on 24th May 2019 whereas the Appellant filed his on 12th June 2019.

8. The court has considered the two applications on record. The Respondent seeks to set aside the *ex parte* judgement of this court whereas the Appellant seeks to execute the decree by evicting the Respondent from the suit properties. Ideally, the Respondent's application for setting aside the *ex parte* judgement should have been heard first. However, there was an omission on the part of the court in directing so when the applications were listed for hearing.

9. The court has considered both applications on record. The court has borne in mind that the Respondent has found himself saddled with an *ex parte* judgement. It is not clear whether or not he was duly served with court process before the two courts which dealt with the dispute on the suit properties. A determination on that point alone may not, however, resolve both applications. The court would still have discretion to set aside even a regular *ex parte* judgment where the court is satisfied that it would be just to do so.

10. In the case of **Shah V Mbogo & Another [1967] EA 116 at 123 Harris J** held that :

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgement obtained *ex parte*. The 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 course of justice ...”

11. Assuming that the Respondent was duly served, there is no evidence on record to indicate that he is the sort of person who is merely seeking to deliberately delay or obstruct the course of justice. It must be remembered that denying a litigant a hearing should be the last resort of a court, unless the gravity of the circumstances justify such a course.

12. On the basis of the material on record the court is inclined to grant the Respondent a chance of being heard. The Respondent has indicated in his affidavits that he intends to challenge the legality of the Appellant's title to the suit properties. Owing to the fact that this court rendered the *ex parte* judgement dated 28th June 2018 in exercise of its appellate jurisdiction, the court will have to remit the dispute back to the Magistrates court for hearing and disposal.

13. For reasons which have already been given, the Appellant's application dated 26th February 2019 shall not be granted. The Appellant will have to hold his horses until the land dispute is resolved upon re-hearing by the Magistrates court.

14. The upshot of the foregoing is that the court finds merit in the Respondent's notice of motion dated 25th February 2019. The court shall therefore make the following orders for disposal of the matter:

- a. The *ex parte* judgement of this court delivered on 28th June 2018 is hereby set aside to the extent stated in paragraph 17 (b) and (c) thereof only.
- b. The judgement of the learned Chief Magistrate in *Embu CMCC No. 193 of 2016* dated 10th November 2016 remains set aside.
- c. The court file in *Embu CMCC No. 193 of 2016* is hereby remitted back to the Chief Magistrate's court for hearing on priority basis before a magistrate with jurisdiction other than the Chief Magistrate, Hon. M.N. Gicheru.
- d. The Respondent shall file and serve his statement of defence and relevant documents **under the Civil Procedure Rules** within 14 days from the date hereof.
- e. The Appellant's notice of motion dated 26th February 2019 is hereby disallowed.
- f. There shall be no order as to costs with respect to the applications dated 25th February 2019 and 26th February 2019.

15. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **20TH** day of **JUNE, 2019**.

In the presence of Ms. Muthoni for the Appellant and Mr. Okwaro holding brief for Mr. Momanyi for the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.06.19