



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 488 OF 2016

ZIPORAH NYAMBUGU MBUGUAPLAINTIFF

VERSUS

LAND REGISTRAR NAIVASHA.....1ST DEFENDANT

CHRISTOPHER NGUGI CHIURI2ND DEFENDANT

PAUL GITAH MWAURA.....3RD DEFENDANT

RULING

(Applications to set aside judgment and leave to file defence; suit by plaintiff being that the 2nd defendant fraudulently procured title to her land and then sold it to the 3rd defendant; defendants being served with summons; 2nd defendant neither entering appearance nor filing defence; 3rd defendant only filing an appearance but no defence; suit proceeding for hearing without the involvement of the defendants and judgment entered for the plaintiff; 2nd defendant now claiming that he was not served with summons; 3rd defendant claiming that his erstwhile counsel failed to file defence despite being instructed to do so; affidavit of service showing that 2nd defendant was duly served and court does not doubt the service; 2nd defendant not traversing the plaintiff's position that he acquired title to the suit land by way of fraud; no triable defence raised by either 2nd or 3rd defendant; application dismissed)

1. There are two applications before me, that dated 13 June 2018 filed by the 2nd defendant, and that dated 6 July 2018, filed by the 3rd defendant. Both applications seek similar orders, that is, the setting aside of the judgment delivered on 18 October 2017 and leave to file defence. The applications are opposed.

2. To put matters into context, this suit was commenced through a plaint which was filed on 10 November 2016. In the plaint, the plaintiff averred to be the legitimate proprietor of the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) (the suit property or suit land) and holding the title deed to the said land. She averred that on 24 September 2015, thieves broke into her residence and stole the title deed among other properties. To safeguard the suit property, the plaintiff registered a restriction in the register of the title. However, the restriction was removed and the land was transferred to the 2nd defendant who then transferred it to the 3rd defendant. The plaintiff contended that this was done fraudulently and sought orders of cancellation of the title irregularly obtained by the 2nd and 3rd defendants.

3. No appearance was entered for the 1st and 2nd defendants while the 3rd defendant entered appearance through the law firm of M/s Ikua Mwangi & Company Advocates, but no defence was filed. The case was thereafter listed for hearing on 27 September 2017. On the said day, the plaintiff was present with her counsel and was ready to proceed, but of the defendants, only counsel for the 3rd defendant appeared, and he applied for an adjournment which I declined to give and ordered the case to proceed. I then delivered judgment on 18 October 2017. In my judgment, I found that the plaintiff had proved on a balance of probabilities that her title deed was stolen and that the restriction that she had placed was removed by way of fraud. I also found that the Identity card used to transfer the land to the 2nd defendant was a forged ID card and the photographs used to transfer the land to the 2nd defendant were not those of the plaintiff. There was a document examiner's report which showed that none of the instruments used to transfer title to the 2nd defendant were ever executed by the plaintiff. The 2nd defendant was arrested and was facing criminal charges of forgery and stealing at the time that I wrote the judgment. I ordered the entries in favour of the 2nd and 3rd defendants to be cancelled and directed that the title do reflect the plaintiff as owner and that she be issued with a new title deed given that what she held had been stolen.

4. In the application dated 13 June 2018 filed by the 3rd defendant, he has averred that his erstwhile advocates, M/s Ikua Mwangi & Company, failed to file defence despite being instructed to do so. He has also claimed that the said firm of advocates kept secret the judgment of the court until 5 May 2018 when he received a letter dated 20 April 2018 notifying him that judgment had been entered against him. He

has averred that he was not heard owing to misconduct on the part of his former counsel.

5. In the application dated 6 July 2018, filed by the 2nd defendant, he has deposed in his supporting affidavit that he was never served with summons, any mention notices or the hearing notice. He has stated that he is currently in remand at the Naivasha G.K Prison and has alleged that he only came to know of the suit on 5 July 2018 when the 2nd defendant served him with copies of his application dated 13 June 2018.

6. In replying to the applications, the plaintiff has averred that the conflict between the 3rd defendant and his erstwhile advocate should not affect her. She has further deposed that the position will not change as her documents demonstrate that the applicants obtained title by fraud. She has also argued that the 3rd defendant did nothing to follow up with his advocate and that equity aids the vigilant and not the indolent. On service upon the 2nd defendant, she deposed that he was duly served with summons at Naivasha Law Courts, as noted in the affidavit of service, when he appeared for the hearing of the criminal case facing him. She does not see why the proceedings and judgment should be set aside.

7. The 3rd defendant filed a further affidavit sworn on 31 July 2018 and filed on 1 August 2018, where he averred inter alia that he purchased the suit land without being aware of any fraud that may have been perpetrated by the 2nd defendant. He averred that he purchased the suit land through a sale agreement dated 12 November 2015 which copy he annexed to his affidavit. The sale agreement shows that the land being sold is Gilgil/Gilgil Block 1/3814 (not parcel No. 3843 which is the suit land herein). He was then issued with a title deed and he has displayed a title deed to the land parcel Gilgil/Gilgil Block 1/3814 (Kekopey) (not parcel No. 3843). He deposed that he paid the full purchase price and he annexed some bank transaction receipts. The same show that they are for payment for purchase of the land parcel Gilgil/Gilgil Block 1/3814 (not parcel No. 3843). He deposed that by the time the plaintiff filed this suit, he had applied for consent of the Land Control Board to subdivide the property and consent was issued on 22 October 2015. He has annexed the said consent which reveals that it is consent to subdivide the land parcel Gilgil/Gilgil Block 1/3814 (not parcel No. 3843). He has deposed that he then proceeded to subdivide the property and sell the same and title deeds issued to new owners. He has attached a copy of a mutation form for the subdivision of the land parcel Gilgil/Gilgil Block 1/3814 (not parcel No.3843) allowing subdivision of this land into 16 plots, numbered 36732 to 36747. He has contended that upon subdivision, title deeds were issued to the new owners and he has annexed the following copies of title deeds :- title deed to the land parcel Gilgil/Gilgil Block 1/36716 (Kekopey) in the name of one Ronald Waweru Kitazi issued on 20 June 2016; title deed to the land parcel Gilgil/Gilgil Block 1/36717 (Kekopey) in the name of Ronald Waweru Kitazi issued on 20 June 2016; title deed to the land parcel Gilgil/Gilgil Block 1/36718 (Kekopey) in the name of Ronald Waweru Kitazi issued on 20 June 2016; title deed to the land parcel Gilgil/Gilgil Block 1/36719 (Kekopey) in the name of Ronald Waweru Kitazi issued on 20 June 2016, title deed to the land parcel Gilgil/Gilgil Block 1/36723 (Kekopey) in the name of Newton Tajeru Sadera issued on 5 December 2016; title deed to the land parcel Gilgil/Gilgil Block 1/36726 (Kekopey) in the name of Paul Nderi issued on 5 December 2016; title deed to the land parcel Gilgil/Gilgil Block 1/36728 (Kekopey) in the name of Geoffrey Kariuki Magaki issued on 5 December 2016. All these title deeds indicate that they are subdivisions of the land parcel No. 3843.

8. The plaintiff filed a further affidavit sworn on 20 August 2018, to respond to the depositions of the 3rd defendant. She pointed out that the Land Control Board consent that the 3rd defendant has annexed is for the land parcel Gilgil/Gilgil Block 1/3814 and that the same is dated 22 October 2015 which was before the alleged sale agreement between himself and the 2nd defendant. She further wondered how the title deeds annexed indicate that they are a result of subdivision of the land parcel No. 3843 and were prepared when there were injunctive orders issued in this matter.

9. Another 'further affidavit' was filed by the 3rd defendant sworn on 22 October 2018. In this affidavit, he has annexed a copy of a title deed to the land parcel Gilgil/Gilgil Block 1/3843 (the suit land) issued to him on 16 November 2015. He also annexed a sale agreement between himself and the 2nd defendant dated 12 November 2015 over the same parcel of land. He has annexed another mutation form for this land parcel No. 3843 subdividing the same into 16 plots bearing the parcels numbers 36716 to 36731 received by the Survey of Kenya on 4 April 2016.

10. The State Law Office entered appearance for the 1st defendant and filed Grounds of Opposition on 26 November 2018. Inter alia it is stated that judgment was properly entered against the 3rd defendant; that the records show that his claim is manifestly hopeless and cannot be brought back to redemption through the instant application; that the applicant has remedies against his former law firm; and that the application lacks merit.

11. I invited counsel to file written submissions which they duly did.

12. In his submissions, Mr. Ngotho, who was appointed by the 3rd defendant in place of the firm of M/s Ikua Mwangi & Company Advocates, inter alia pressed the point that the omissions of his client's former counsel should not be visited upon the 3rd defendant. He indeed ventured to submit that there may have been collusion between his client's former counsel and the plaintiff's advocates. He further submitted that the rules of natural justice require that a person should not be condemned unheard. He relied on several authorities to buttress his point.

13. On his part, Mr. Oumo, learned counsel for the 2nd defendant, submitted that there is no proof that the 2nd defendant was served and that he was condemned unheard.

14. I did not quite see any submissions on the party of Mr. Achieng Owuor for the plaintiff, but I have seen some authorities responded to by Mr. Ngotho, and I believe that these were filed by Mr. Owuor. I reserved delivery of the ruling to 4 June 2019 but after retiring to write the rulings, I was rather unclear on some issues that had been raised in the affidavits, particularly the depositions of the 3rd defendant on the subdivision of the suit land, for on one hand he referred me to subdivision of the parcel No.3814 which is not the suit land herein, and in his further affidavit, he referred to the land parcel No. 3843, the suit land herein. So that it may be clear to me what exactly the position of the suit land is, I ordered the Land Registrar Naivasha, to attend court and advise whether the suit land has indeed been subdivided. I asked her to attend court with the Green Card of the suit land and the green cards of any subdivisions said to be from the suit land.

15. The Land Registrar, Ms. Minnie Wachuka, did forward the green card to the suit land. That green card shows that the suit land is intact and has never been subdivided. Indeed, it does show that the judgment of this court was executed on 6 June 2018 with the entries in favour of the 2nd and 3rd defendants being cancelled, thus restoring the plaintiff as proprietor of the suit land, and already a new title deed has been issued to the plaintiff. The Land Registrar also exhibited the Registry Index Map, which does not show any mutations, though she did mention that she has been orally informed that there may be an amendment of the map but which map she did not have in her registry. She was rather ambivalent on whether or not to conclude that the suit land has been subdivided for she did have green cards to some parcels of land said to be subdivisions of the suit land (parcel No. 3843) being green cards to the land parcels Gilgil/Gilgil Block 1/36717, 36718, 36723, 36726, 36727, 37728, and 36731, which are in the names of persons not parties to this suit, yet again the green card to the parcel No. 3843 did not show that the said land has ever been subdivided. She did however add that there is a mutation that shows the subdivision of the land parcel No. 3843. I wondered why she had only 9 out of 16 green cards (for the purported subdivision of the parcel No. 3843 is to 16 parcels of land) but she was also cagey, stating that it is possible that because of the investigations over the title herein, the process may have stalled. She did not have any indication of ownership of the other parcels for which she did not have green cards and could not tell whether they were ever prepared or not.

16. I have taken note of the above.

17. The application before me seeks to set aside a judgment that was delivered without the participation of the 2nd and 3rd defendants/applicants. The 2nd defendant's main contention is that he was never served with summons and therefore the proceedings against him were irregular. He alleges that he only got to know of the proceedings after the 3rd defendant visited him in prison on 13 June 2018 and informed him of the judgment herein. I have noted from the record the affidavit of service which was filed to prove service upon the 2nd defendant. It is sworn by Mr. Benard Nyangate M. Obieroa and it is deposed that the 3rd defendant was served on 7 December 2016 in Naivasha Law Courts when he appeared in court. I have no reason to doubt this affidavit, and if indeed the 3rd defendant wanted to rebut this, he could have availed evidence to show that he was not at the Naivasha Law Courts on 7 December 2016. He could also have asked to cross-examine the process server on his affidavit which he never did. I am thus convinced that the 2nd defendant was properly served with summons but he opted not to make an appearance. On the 3rd defendant, there is no doubt that he was duly served and he appointed counsel who entered appearance on his behalf.

18. I am not therefore dealing with an application to set aside judgment where the defendants were not served. This is thus not the sort of judgment that requires to be set aside *ex debito justitiae*. The applicants need to convince this court that they deserve to have the court exercise its discretion to set aside the judgment so that they may defend the suit. The principles upon which the court exercises its discretion in matters such as these have been the subject of several decided cases. One of the oft quoted decisions is the case of **Shah vs Mbogo (1967) EA 116**. This was an application to set aside an ex-parte judgment on the allegation that the applicant did not have notice of the proceedings. The court did in fact find that the applicant had notice of the proceedings but failed to enter appearance and declined to set aside the judgment. The court, on the discretion to set aside an ex-parte judgment, stated as follows :-

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

19. It is apparent therefore that where the court is of opinion that the applicant stands to suffer some injustice, due to reasons which are excusable, the court can exercise its discretion in its favour, but the court is not bound to exercise its discretion so as to assist a person whose aim was to delay or obstruct the court of justice.

20. Another important principle that the court considers when there is a regular judgment on record is whether the applicant has presented a defence that raises triable issues. This principle was well articulated in the case of **Patel vs EA Cargo Handling Services Ltd (1974) EA 75** where the court stated as follows :-

“I agree what 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.”

21. The reasoning for this is that there would be no useful purpose served if there was no possible defence to the action. It is for this reason, that generally, though it is not obligatory, that parties do outline a draft defence in such applications, so as to demonstrate that they have a defence that raises triable issues.

22. In our case, no draft defence has been annexed by either applicant. Indeed, the affidavit of the 2nd defendant does not even state what sort of defence the 2nd defendant wishes to raise in this matter. It will be recalled that the case of the plaintiff is that her title deeds were stolen from her, and after noticing this, she placed a restriction on the title. The restriction was mysteriously removed and the land transferred to the 2nd defendant. The plaintiff provided evidence that she never signed the transfer forms and that the photograph used to transfer her land to the 2nd defendant was not her photograph. The identity card that was used was also not her identity card. The 2nd defendant in his affidavit does not offer to say how it happened that the suit land came to be transferred to him. He does not refute that the transfer instruments were forged and he does not refute that the identity card used and the photograph used were all dubious. He does not allude to any sale agreement that he may have had with the plaintiff or how he came to be registered as proprietor of the suit land. In fact, nowhere in his affidavit does the 2nd defendant give a hint of what sort of defence he wishes to present.

23. The 3rd defendant of course wishes to plead that he is an innocent purchaser for value. He annexed the sale agreement dated 12 November 2015 that he had with the 2nd defendant and some proof of payment. He however never annexed any document showing how the land was transferred to him. He never annexed any consent of the Land Control Board to show that there was issued consent for the suit land

to be transferred to him. He never exhibited any application forwarded to the Land Control Board for the subdivision of the suit land and that consent to subdivide was duly issued. He has annexed a consent to subdivide the land parcel No. 3814, which land is subject to the suit Nakuru ELC No. 489 of 2016, where the plaintiff in that case is the husband to the plaintiff in this case, and where he has judgment in his favour for the said land based on more or less similar facts as tendered in this case. That consent shows that it was issued on 22 October 2015 before the land was transferred to him and he has not explained how he could obtain Land Control Board consent for land that he never owned. He has also not explained how he obtained a consent, in his name, to subdivide on 22 October 2015 before the land was transferred to him. He has not stated whether he did a search and what inquiry he undertook in respect of the restriction that was placed by the plaintiff on the title.

24. Without these issues being traversed by the 2nd defendant and/or the 3rd defendant, I do not see what sort of defence the applicants have against the plaintiff. The plaintiff's evidence certainly demonstrated that her title was transferred to the 2nd defendant through fraud and pursuant to Section 26 of the Land Registration Act, where land is transferred by way of fraud, the resultant title is subject to cancellation. Since the 2nd defendant has not contested the allegations of fraud, the 3rd defendant cannot hide behind the excuse that he is an innocent purchaser for value, forgetting for a moment that I have serious doubts as to his innocence in the transactions that led to the transfer of the suit land to him.

25. I am thus not persuaded that the applicants have presented before me a triable defence which would lead me to exercise my discretion in their favour and set aside the judgment. I am aware that Mr. Ngotho, for the 3rd defendant, relied heavily on the decision in the case of *Pravinchandra Jamnadas Kakad vs Lucas Olucho Mumia (2015) eKLR* where the court set aside an ex parte judgment. I however distinguish that case with this one, for in the said authority, the court did find that the applicant had presented to court triable issues. In this case, as I have demonstrated above, I am not persuaded that the applicants have presented before me any triable issues that would enable me set aside the judgment, which judgment it should not be forgotten, is a regular judgment in all respects.

26. It was brought to my attention that there is a possible subdivision of the suit land. The Land Registrar did however aver that the extract of the register (green card) of the suit land shows that there has never been any subdivision of the suit land and also produced a map which does not show any subdivision of the suit land. How the 3rd defendant managed to subdivide land without the parent title being closed remains a mystery to me. I will not dwell much on the resultant titles, for the owners are not before me, but what I will affirm is that the plaintiff's title to the land parcel Gilgil/Gilgil Block 1/3843 (Kekopey) is still intact as shown by the extract of the register, and the plaintiff, as far as I am concerned is the genuine title holder. The plaintiff's land should not therefore be affected in the register and in the registry index map for this court has held that it is a genuine title. If there is any on-going amendment of the map to reflect that the plaintiff's title does not exist, such process must stop. Further, if the persons holding titles to the alleged subdivision of this land wish to claim it, they are at liberty to file suit to challenge the plaintiff's title and they will be heard on merits.

27. If at all the 3rd defendant is innocent as he claims, he has his remedy in damages against the 2nd defendant or probably against his erstwhile counsel if at all counsel was negligent, but I do not think that he has demonstrated to me that the plaintiff needs to be brought back to the position that she was in before the case was heard and that he deserves to be given a chance to defend this case.

28. For the above reasons, I am not persuaded to set aside the judgment and I hereby dismiss the 2nd and 3rd defendants' applications with costs to the plaintiff.

29. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Bosire holding brief for Mr. Achieng' Owuor for the plaintiff/respondent.

Mr. Ngotho present for the 3rd defendant/applicant.

No appearance on the part of M/s Oumo & Company for the 2nd defendant applicant.

No appearance for the State Law Office for the 1st defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU