



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 318 OF 2017

STEPHEN SARAMBA VIRAGHI..... PLAINTIFF

VERSUS

HILLARY SAVARI

WALTER MUDAKI DEFENDANTS

AND

AGNETTA MULAMA

GEORGE HAVI MULAMAAPPLICANTS

RULING

The first application is dated 13th June 2019 and is brought under Article 50 (1) and 159 (2) (d) of the Constitution, Section 1A & B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 10, Rule 11 and Order 50, Rule 6 of the Civil Procedure Rules 2010 seeking orders;

1. The application be certified urgent and be heard on priority basis.
2. All other proceedings in this matter be stayed pending hearing and or determination of this application.
3. The judgment of this honourable court entered against the defendants/applicants on or about the 31st day of May, 2018 together with the decree arising there from and all subsequent proceedings thereto and or orders be set aside and or vacated.
4. The defendants/applicants be granted leave to defend the suit.
5. The defendants/applicants joint statement of defence together with the defence pleadings filed herewith be deemed to have been validly filed and served.
6. The suit proceeds to hearing and or determination in a manner authorized by law.
7. Costs of the application abide the outcome.

It is brought on the following grounds that the defendants/applicants were never served in this matter. The ex-parte hearing of the suit leading to the subject judgment was based on the affidavit of service sworn by Eric Swahili on 26th September, 2017 purporting to have effected service on the defendants/applicants which was misleading. The defendants/applicants have a good defence to the plaintiff's claim as demonstrated from the statement of defence and their pleadings filed herewith and it will be just to allow them to be heard. The judgment will cause great loss, hardship and inconvenience to the defendants/applicants unless set aside to allow for inter parties hearing. The defendants/applicants were not aware of the existence of the suit until 10th of May, 2019 when they were served with the plaintiff's application dated 24th March, 2019. The defendants/applicants are not to blame for failure to appear and or defend the suit. The defendants/applicants are eager to defend the suit as they are only tenants in the suit premises without proprietary claim and therefore not liable to the plaintiff in the manner advanced in the suit. The defendants/applicants are ready and willing to abide by the terms of the orders once granted.

The respondent submitted that there is no suit before this court as the applicants are in contravention of order 9, rule 9 of the Civil Procedure Rules. That the defendants were properly served and that they will not suffer any prejudice as they state they are only tenants.

This court has considered the application and the submissions herein. Order 9, rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

Order 9, rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

Looking at the instant application, the firm of A.B.L Musiega & Company Advocates are clearly in contravention of this provision. In the case of **John Langat v Kipkemoi Terer & 2 others (2013) eKLR**, where the court dismissed the whole application for failure to comply with the provision of order 9 rule 9 of the Civil Procedure Rules. Be that as it may, on the issue of setting aside, *Section 3A of the Civil Procedure Act* provides that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Order 12 Rule 7 of the Civil Procedure Rules 2010 provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

Order 45 of the Civil Procedure Rules, 2010 provides as follows:

Any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.

Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of **Esther Wamaita Njihia & 2 others vs. Safaricom Ltd** where the court citing relevant cases on the issue held that:-

“**The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered.**”

In the case of **Shah vs Mbogo and Ongom vs Owota** the court held that for such orders to issue *inter alia* the court must be satisfied about one of the two things namely that, **either that the defendant was not properly served with summons; or that the defendant failed to appear in court at the hearing due to sufficient cause.**

In the case of **Wachira Karani v Bildad Wachira (2016) Eklr** the court held that;

The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated “sufficient cause” to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase “Sufficient cause” mean. The Supreme Court of India in the case of **Parimal vs Veena** observed that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the

facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

The court of appeal in **Simon Thuo Mwangi Vs Unga Feeds Limited Civil Appeal No.181 of 2003 [2015] eKLR** observed that:

“The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.”

The application is based on the grounds that the defendants/applicants were not aware of the existence of the suit until 10th of May, 2019 when they were served with the plaintiff’s application dated 24th March, 2019. The defendants/applicants are not to blame for failure to appear and or defend the suit. I have perused the affidavits of service dated 14th December 2017 and 26th September 2017. The process server one Eric Swahili was clear that the 1st and 2nd defendants were known to him and they refused to acknowledge service. I am satisfied that service was proper. The defendants simply ignored the court process for reasons best known to themselves. I find that the defendant/applicants have not demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. Considering the law and the authorities mentioned above this court finds that this application is not merited and I dismiss it with costs.

The second application is dated 14th June 2019 and is brought under Article 50 (1) and 159 (2) (d) of the Constitution, Section 1A & B and 3A of the Civil Procedure Act, Order 1 Rule 10 of the Civil Procedure rules 2010 seeking the following orders;

1. The application be certified urgent and be heard on priority basis.
2. Further proceedings in this matter be stayed to allow for hearing and or determination of this application.
3. The applicants be enjoined to this suit as parties.
4. Upon being to enjoined as parties, the applicants do file their pleadings and or claim within 14 days of the order being issued.
5. The judgment of this court dated 31st may, 2018 and the subsequent decree and or orders be set aside.
6. Costs of the application remain in the cause.

It is brought on the grounds that the delay in disposing off the application shall occasion gross injustice to the applicants. The suit property namely L.P. Kakamega/Bugonda/2163 belong to the applicants who have been in possession from the year 1983 following sale which involved the plaintiff/respondent and his late father. The transfer of the suit land in the name of the plaintiff/respondent was fraudulent. The plaintiff/respondent instituted and maintained the suit in court against the interested parties who are the applicant’s tenants in the suit property without disclosing to the court the existence of a dispute over the property with the applicants. The judgment of the honourable court in which the plaintiff/respondent sought and obtained a declaration that he is the lawful owner to the suit property was a fraud on his part to defeat the applicant’s claim of title in gross violation of the rules of national justice. The plaintiff/respondent is guilty of non-disclosure of material facts which are that the dispute between himself and the applicants had been the subject of previous court proceedings which had not been finally decided on merit namely Hamisi SRM CC 40 of 2018 and Kakamega High Court Succession Cause No. 861 of 2013 which non-disclosure amounted to gross abuse of court’s process. The interested parties have been the applicants’ tenants in the suit property and had no proprietary claim to warrant institution of the dispute in the ELC court. The applicants claims proprietary interest in the suit property and therefore within the scope of this honourable court’s jurisdiction. It would not serve the interest of justice for the applicants to institute a separate suit when the subject matter, being L.P. Kakamega/Bugonda/2163 is the same as in the instant suit and the interested parties who are sued as defendants have been in occupation of the property as the applicants’ tenants.

The respondent submitted that there is no suit before this court as the applicants are in contravention of order 9, rule 9 of the Civil Procedure Rules. Secondly that the 1st applicant lacks locus standi to represent one Daniel Joseph Mulama who is deceased.

This court has considered the application. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 OF 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. Be that as it may, this matter has been finalized and the application to set aside the judgement dismissed, hence there is no suit to be enjoined to it is also in evidence that a similar suit existed in

Hamisi court and the same was dismissed. There will be no need therefore to go into the merits and demerits of this application. I find that this application has been overtaken by events and is not merited and I dismiss it with costs.

The third application is dated 14th March 2014 and is brought under Order 51 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified urgent and be heard exparte on priority basis.
2. That the decree issued herein on the 13th June, 2018 be and is hereby executed.
3. That Yamuko Auctioneers be and are by ordered to conduct the eviction of the 1st defendant/respondent, the 2nd defendant/respondent, their agents, personal representatives and or assigns from that parcel of land known as Kakamega/Bugonda/2163.
4. That the officer commanding station (OCS) Vihiga Police Station to ensure that the process of eviction of the 1st defendant/respondent, the 2nd defendant/respondent, their agents, personal representatives and or assigns from that parcel of land known as Kakamega/Bugonda/2163 is carried out smoothly.
5. That costs of this application be provided for.

It is founded upon the affidavit of the applicant herein, Stephen Saramba Viraghi, annexed hereto, and on the following grounds that this suit was determined by way of a judgment on 31st May, 2018 by this honourable court. That the decree was extracted and issued on 13th June, 2018. That it was impossible to execute the said decree because a case relating the suit parcel herein was filed by one George Havi Mulama against the applicant at Hamisi Law Courts vide Hamisi PMC No. 50 of 2018. That the said suit was then concluded when a preliminary objection furthered by the plaintiff/applicant was sustained leading to dismissal of the said case. That there is neither appeal nor any order stopping the plaintiff/applicant from executing the eviction process. That the plaintiff/applicant has a pressing need to develop the property known as Kakamega/Bugonda/2163 hence he is required to be in full use and occupation of the property known as Kakamega/Bugonda/2163 to enable him accomplish the same. That the 1st and 2nd respondents have refused to vacate the property known as Kakamega/Bugonda/2163 despite there being a judgment and a decree ordering them to vacate.

The respondents submitted that the applicant/plaintiff is guilty of non-disclosure of material facts which are that the dispute between himself and the applicants had been the subject of previous court proceedings which had not been finally decided on merit namely Hamisi SRM CC 40 of 2018 and Kakamega High Court Succession Cause No. 861 of 2013 which non-disclosure amounted to gross abuse of court's process. The interested parties have been the defendants' tenants in the suit property and had no proprietary claim to warrant institution of the dispute in the ELC court. I find that the judgement of this court still stands and has not been appealed against hence the application for execution is merited and I grant the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE