



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 426 of 2016

MICHAEL MUTURI KARANJA.....PLAINTIFF

VERSUS

PAUL KIMANI NOROGE.....DEFENDANT

RULING

Background

1. This is a ruling in respect of a Notice of Motion dated 16th April 2019 which seeks to set aside the ex-parte orders of 21/4/2019. The application is brought by the Defendant / Applicant Paul Kimani who is the Senator of Kiambu County.
2. The Plaintiff/Respondent had filed a suit against the Applicant on 27th April 2016 in which the Respondent sought for a permanent injunction restraining the applicant from interfering with *Nairobi Block 93/1469* (suit property) . The Respondent also sought for an eviction order against the Applicant and an order for mesne profits at the rate of Kshs.500,000/=per month with effect from April 2013 . The Respondent contemporaneously filed a Notice of Motion in which he sought an order of eviction against the Applicant which eviction was to be undertaken under supervision of the OCS Industrial Area Police Station.
3. On 24/5/2016, the Respondent filed another Notice of Motion similar to the one filed on 27/4/2016. When this Motion was placed before Lady Justice Gitumbi on 25/5/2016, the judge noted that this Motion was similar to the one filed on 27/4/2016. She directed that the two applications be heard on 9/6/2016. The court record does not show what happened on 9/6/2016. However one of the two applications that is the one dated 22/3/2016 came up for hearing on 13/4/2017 when the same was allowed as prayed. The Respondent proceeded to extract an order which was issued on 21/4/2017.
4. On 10/5/2018 the Respondent attempted to evict the Applicant from the suit property but the Applicant came to the suit property and managed to forestall the eviction. It is after this that the Respondent came to court and filed a notice of motion dated 16/5/2018 seeking orders of court committing the Applicant to civil jail for a period not exceeding six months or in the alternative have his properties attached. When the notice of motion dated 16/5/2018 came for hearing on 12/11/2018, the court noticed that there was an advocate on record for the Applicant. The hearing was deferred to 28/1/2019 to enable service to be effected upon the counsel on record.
5. On 28/1/2019 the notice of motion dated 16/5/2018 came up for hearing. The same proceeded ex-parte and a ruling date was reserved for 28/3/2019. Before 28/3/2019 the Applicant moved to court and filed a notice of motion dated 6/3/2019. The court directed that the application be served for directions on 28/3/2019. The court made an observation that there was another advocate on record.
6. On 18/3/2019 a notice of motion dated 15/3/2019 seeking to set aside judgement was filed. The court observed that there was no judgement on record which was to be set aside. Directions were given that the application be served for directions on 28/3/2019. On 28/3/2019 the court directed that the Applicant's advocates be given opportunity to peruse the file and make up their mind whether they wished to proceed with the applications the way they were. This is because the two applications were filed while the file was in chambers awaiting ruling. The matter was fixed for mention on 9/4/2019.
7. On 9/4/2019 the Applicant's advocates who had by then perused the court file withdrew the notice of motion dated 6/3/2019 and the one dated 15/3/2019 . Ruling on application dated 16/5/2018 was set for 24/4/2019 . Before the date of the ruling, the current application was filed.

Applicant's contention

8. The Applicant contends that he was neither served with summons to enter appearance nor the application dated 22/3/2016. He denounced all the affidavits of service by a process server one Samuel Nderitu Kiariki who purports to have served him. The Applicant denied that he

has ever had an office on the ground floor of KICC or that his office at parliament buildings is next to the canteen as alleged by the process server. As regards the KICC building, the Applicant contends that his office at the time of the alleged service was on the 4th floor but he later moved to the 10th floor. As regards parliament building, the Applicant contends that at the time of the alleged service, his office was on the 10th floor.

9. On the issue of service upon M.s J Ogada & Co. Advocates, whereas the Applicant admits that the said advocate was served, the hearing notice was received under protest. The Applicant states that he has a good defence to the claim by the Respondent and that he should not be condemned unheard.

Respondent's contention

10. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 6/5/2019. The Respondent argues that the Applicant was duly served with the application dated 22/3/2016 and that since he is a public figure, the process server would not have mistaken his identity. As to the service of the hearing notice for the application for contempt, the Respondent contends that the Applicant is not being truthful when he denies that he never instructed the firm of J Ogada & Co. Advocates to act for him. The Respondent annexed a letter dated 14/3/2019 from J Ogada & Co. Advocates in which the advocate refers to a discussion between him and the Applicant regarding handing over of documents relating to this suit where the advocate intimated that he was going to file a notice of cessation which he indeed proceeded to do on the same day.

11. The Respondent further contends that the Applicant has never filed a draft defence and that in any case as at the time the Applicant completed paying for the suit property, the suit property had already been registered in the name of a person who later sold it to the Respondent. The Respondent therefore argues that the Applicant has no case. The Respondent further argues that the Applicant disobeyed the court order and that he has proved all the ingredients necessary to find the applicant in contempt.

Analysis.

12. I have carefully considered the Applicant's application and the opposition to the same by the Respondent. The only issue for determination in this case is whether the Applicant was served with the application which led to the issuance of the order given on 13/4/2017 which was subsequently issued on 21/4/2017. As can be seen from the background herein, this suit was filed on 27/4/2016 together with the application for eviction. Summons to enter appearance have never been issued or served. Summons are supposed to be served together with the plaint. There is no evidence that the plaint was ever served. There is also no evidence whether the notice of motion dated 22/3/2016 was ever served upon the Applicant.

13. On 24/5/2016 the Respondent herein filed a similar application as the one of 22/3/2016. This application was allegedly served upon the applicant on 31/5/2016. When the Respondent's counsel appeared before me on 13/4/2017, he indicated to the court that they had served the Applicant. This is the basis upon which the orders sought to be set aside were given. The hearing notice which was allegedly served upon the Applicant referred to the application of 22/3/2016. As I have already pointed out hereinabove, there is no evidence that application dated 22/3/2016 was ever served. It is therefore clear that the hearing notice dated 2/2/2016 (sic) was misleading and that actually the affidavit of service may have been false. On this ground alone, the orders given on 13/4/2017 and issued on 21/4/2017 cannot stand.

14. This application was provoked by the pending ruling which directly arose from the orders of 13/4/2017 which were issued on 21/4/2017 . There is no doubt that M/s J Ogada & Co. Advocates were on record for the Applicant. They were served with the application dated 16/5/2018 which is the subject of the ruling which was suspended pending the outcome of this application. Despite service, the advocate did not come to court. Does this then mean that the Applicant should be condemned unheard?. The answer to this question is simply no. In **Mbaki & Others Vs Macharia & Another (2005) & EA 206**, it was held as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

15. The firm of J Ogada & Co Advocates may have made a blunder by not coming to court but this blunder should not be visited upon the Applicant who from what I have stated hereinabove and from the applications which his present lawyers filed which applications were subsequently withdrawn was not in the picture as to what suit was facing him. In the case of **Philip Chemwolo & Another Vs Augustine Kubende (1982-88) KAR 103, Apaloo J** (as he then was) stated as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merits.”

16. In **Belinda Murai & Others Vs Amos Wainaina (1978) KLR 278**, the court made the following observations:-

“ A mistake is a mistake regardless of who commits it. The door to justice is not closed because a mistake has been committed by a lawyer who ought to know better. The court should do whatever is necessary to rectify it”.

Conclusion.

17. In the instant case, it is clear that the orders of 13/4/2017 which were issued on 21/4/2017 were irregularly obtained based on false affidavits of service. The Applicant had not been served with summons to enter appearance. It was premature for the Respondent to apply for eviction before service of plaint. Though the irregular order had not been discharged as at the time the application for contempt was made, that order should not be entertained. I therefore find that the orders given on 13/4/2017 and issued on 21/4/2017 cannot stand. The same are

hereby set aside together with any consequential orders issued thereafter. Costs of this application shall be costs in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 18th day of September 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Munyororo for Plaintiff /Respondent and M/s Wanjiku for M/s Wambui for Defendant/Applicant

Court Clerk: Hilda

E.O.OBAGA

JUDGE