



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 27 OF 2014**

**ALBERT MBURU KARINGA.....APPELLANT**

**=VERSUS=**

**PETER MAMBO KARINGA.....1ST RESPONDENT**

**EDWARD CHEGE KARINGA...2ND RESPONDENT**

**(Being an Appeal from the Ruling by the Honourable D A Okundi (Mrs), Principal Magistrate, in Kiambu SPMC Civil Case Number 73 of 2009 delivered on 21st October 2010)**

**JUDGMENT**

**Background**

1. This appeal arose from a ruling rendered by Hon. D A Okundi (Mrs) PM in Kiambu PMCCC Number 73 of 2009 on 21/10/2010 through which she dismissed the appellant's chamber summons application dated 15/2/2010 seeking the setting aside of the *ex-parte* judgment obtained in the said suit by the respondents in this appeal. The application also sought an order summoning the process server who was engaged to serve summons to enter appearance, for cross-examination by the appellant. Upon hearing the application, the trial court found that the appellant having abandoned his plea for cross-examination of the process server, there was unqualified presumption in favour of the process server that summons to enter appearance was served as required by law. Secondly, the trial court found that the appellant had not demonstrated that he had a good defence because the draft defence annexed to the appellant's affidavit consisted of mere denials and contained allegations of fraud without setting out particulars of the alleged fraud. Consequently, the trial court dismissed the application.

2. Aggrieved by the dismissal order, the appellant brought this appeal setting out the following three verbatim grounds of appeal:

- 1. The learned principal magistrate erred by disregarding and ignoring the deficiency and illegality of the service in the suit.**
- 2. The learned principal magistrate erred by dismissing the appellant's application against the overwhelming weight of the evidence adduced.**
- 3. The learned principal magistrate erred in law and in fact by not appreciating the gravity of the investigations of the Criminal Investigation Department regarding the fraudulent dealings with the land, the subject matter of the application.**

**Submissions**

3. The appeal was canvassed through written submissions. The appellant, through his counsel, Ms Maina, filed written submissions dated 11/10/2018. Counsel identified the following as the four verbatim issues falling for determination in this appeal: (i) whether the subdivisions of Land Reference Number Kiambaa/Thimbigua/630 and Kiambaa/Karuri/T.386 done contrary to the confirmed grant are illegal, null and void; (ii) whether all subsequent title deeds should be cancelled; (iii) whether the appellant should be granted leave to defend the suit out of time; and (iv) what are the available remedies.

4. Counsel for the appellant submitted that the sub-divisions relating to the two properties were done contrary to the grant of probate issued on 22/12/1988. She further submitted that since the respondents fraudulently subdivided the properties and disinherited the rightful beneficiaries, an order should be issued cancelling all subsequent titles and proper sub division should be done in accordance with the confirmed grant of probate. Thirdly, it was submitted that the appellant was never served with summons or pleadings and it was only fair that the *ex-parte* judgment be set aside and the appellant be granted the opportunity to defend the suit.

5. The respondents, through their counsel, Mr Kiplagat, filed written submissions dated 19/3/2019. He identified the following as the three verbatim issues falling for determination in this appeal: (i) whether an injustice shall be done and/or whether the applicant will suffer prejudice; (ii) whether the applicant has a good defence that raised a triable issue; and (ii) whether the application to set aside the judgment was made timely and without inordinate delay.

6. Counsel for the respondents submitted that even if this court were to find that the appellant was not served with the suit papers seeking eviction orders, the matter had been overtaken by events and the suit property had been sold to a third party. Counsel added that the trial court acted procedurally in finding that the appellant's draft defence consisted of mere denials and lacked merit. Lastly, it was argued that because the appellant had already been evicted, the appeal herein had been rendered nugatory.

### **Analysis & Determination**

7. I have considered the grounds set out in the memorandum of the appeal, the entire record of the trial court, and the parties' respective submissions in this appeal. I have also considered the relevant legal frameworks and jurisprudence. The appellant framed four issues for determination in this appeal. On their part, the respondents framed three issues. I have considered the two sets of issues. I will dispose the appeal by way of analysing the three grounds set out in the memorandum of appeal. Before I analyse the three grounds of appeal, I will summarise the contextual background of this appeal.

8. The appellant and the respondents are siblings sired by the late Karinga Njihia who died on 7/12/1986. On 6th May 1988, the parties to this appeal, together with their other sibling, John Gitonga Karinga, initiated Nairobi High Court Succession Cause Number 140 of 1988 and obtained a grant of probate of written will. The grant was confirmed on 22/12/1988. Among the assets distributed by the High Court in the said Succession Cause was Land Title Number Kiambaa/Thimbigua/630 measuring approximately 0.88 hectares which was to be apportioned in equal shares amongst the five sons of Karinga Njihia. In 1981, the four executors of the will caused the land to be registered in the names of the five beneficiaries. On 4/3/2008, the respondents obtained from the High Court in the same Succession Cause an order authorizing the Deputy Registrar of the High Court to sign all necessary documents on behalf of the appellant on the ground that the appellant had refused to sign necessary documents to facilitate partitioning and vesting of the respective subdivisions in the names of the respective beneficiaries. The respondents proceeded to partition the land without the involvement of the appellant. It was contended in paragraph 3 of the plaint that the appellant subsequently declined to move onto his parcel and unlawfully occupied Parcel Number Kiambaa /Thimbigua/4885 which had been parcelled in the names of the respondents. This prompted the respondents to file Kiambu CMCC 73/2009 seeking the following verbatim orders:

**a. eviction order against the defendant be issued forthwith**

**b. cost of this suit**

**c. any other relief this court may deem fit to grant**

9. The respondents obtained *ex parte* judgment in the said suit. The appellant's application to the trial court for an order setting aside the *ex parte* judgment was rejected through a ruling rendered by Honourable D A Okundi on 21/10/2010.

10. The first and second grounds of appeal are related and revolve around the question of service of summons to enter appearance in the suit. The appellant contended before the trial court that the respondents never served upon him summons to enter appearance. The only response of the respondents to this serious allegation is contained in paragraphs 15 of the replying affidavit sworn on 24/2/2010 by Peter Mambo Karinga and was as follows:

**“ 15 That the defendant/applicant was duly served with summons to appear in court in this cause but deliberately refused, neglected, and or failed to appear”**

11. The process server's affidavit was not annexed to the replying affidavit. The respondent did not in any way explain where, by whom, and at what time the appellant was served. Under Section 109 of the Evidence Act, the duty to demonstrate that the appellant was duly served with summons to enter appearance lay with the respondents. The respondents did not discharge that duty. All they stated was that the appellant was served with summons.

12. The trial court's finding that the issue of service was spent because the appellant had abandoned the plea to cross-examine the process server was, in my view, gravely erroneous. At the point when counsel for the appellant abandoned the plea for cross-examination of the process server, the respondent had not demonstrated that there was service upon the appellant. Counsel for the appellant was therefore right in abandoning the plea for cross-examination because in the absence of prima-facie evidence of service of summons, cross-examination of the process server was not necessary.

13. For the above reasons, I am persuaded that indeed the trial court failed to properly address the critical issue of service of summons. Consequently, the appeal herein succeeds on the ground that the trial court failed to properly address itself to the question of service of summons to enter appearance which was the most critical question in the application giving rise to the present appeal.

14. The third ground of appeal is that the trial court erred in failing to appreciate the gravity of investigations by the Criminal Investigations Department regarding fraudulent dealings relating to the estate of the late Karinga Njihia. In his draft statement of defence, the appellant had denied the respondents' claim and had contended that the plaintiffs had fraudulently caused the registration of Title Numbers Kiambaa/Thimbigua/5161 and 5162 into their names. The trial court found that the appellant's defence constituted mere denials and was

only intended to delay the court process.

15. The right to a hearing in a land dispute such as the one which was before the trial court cannot be gainsaid. In their response to the application for setting aside the *ex-parte* judgment, the respondents did not present to the trial court key documents relating to the subdivision of the original parcel inherited by the five children of Karinga Njihia to dispel any allegation of fraud. It was therefore wrong for the trial court to deny the appellant the chance to ventilate his defence. Secondly, failure to set out particulars of fraud in the draft statement of defence was not fatal at that stage of the proceedings because the appellant would still have had time to refine the statement of defence before filing it. He would similarly have had the opportunity to amend it without leave of the court upon receipt of the respondents' reply to defence. It is therefore my finding that the trial court erred in failing to accord the appellant a chance to ventilate his defence against the claim by the respondents.

16. The totality of the foregoing is that this appeal succeeds on the ground that the respondents did not tender evidence to controvert the appellant's contention that he was not served with summons to enter appearance. Secondly, the trial court erred in shutting the appellant out of the seat of justice on the ground that the draft defence consisted of mere denials and was intended to delay the court process.

17. In the end, the trial court's dismissal order made on 21/10/2010 is set aside and is substituted with an order setting aside the *ex-parte* judgment entered against the defendant (present appellant) in Kiambu CMCC Number 73 of 2009 together with all consequential orders made in the said suit. The appellant shall file his defence in the said suit and the suit shall thereafter be disposed as provided under the law. Each party shall bear their costs of this appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF OCTOBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kiplagat Advocate for the 1st and 2nd defendant

Mr Albert Mburu Karinga - appellant present in person

Court Clerk - Roselyne Nechesa