



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL CASE NO. 834 OF 2016
(FORMERLY HCC NO. 170 OF 2012)

SAMWEL MISATI OICHOE 1ST PLAINTIFF/RESPONDENT

JOSHUA MOGUSU OICHOE 2ND PLAINTIFF/RESPONDENT

VERSUS

CHARLES MAYAKA GERA 1ST DEFENDANT/APPLICANT

DENIS MOSOTI 2ND DEFENDANT/APPLICANT

R U L I N G

1. On 17th September 2018, the 1st defendant/applicant filed a Notice of Motion dated 7th September, 2018 seeking the following orders;

1) THAT pending the hearing and determination of this application, there be a stay of orders issued by this Honourable Court on the 23rd day of April 2018 directing the land registrar and surveyor Kisii County to proceed and delineate the boundaries between LR. No. Majoge/Boochi/428 and LR. No. Majoge/Boochi/ 4658;

2) THAT pending the hearing and determination of this application, the report dated 25th July 2018 and its findings be suspended as the same was done without the input participation of the Defendant/Applicant;

3) THAT the Honourable Court be pleased to set aside the proceedings of 23rd April, 2018 to enable the Defendant/ Applicant participate in the hearing and determination after hearing and determining of this suit on merits;

4) Costs of this application and interest thereon be provided for; and

5) Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The application is grounded on Sections 1A, 3A and 63 (e) of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya. The defendant/applicant also swore an affidavit in support of his application on 14th September 2018.

3. It is necessary to give a background of the matter before examining the issues raised in the defendant's application. The plaintiffs herein filed this suit seeking to *inter alia* evict the defendants and permanently restrain them from dealing in any way with their land parcel **Majoge/Boochi /4658**. The plaintiffs are the registered owners of land parcel **4658** which they acquired from the original owner of the land, Nyamboba Misati on 11th August 2011. In their plaint amended on 23rd September 2015, the plaintiffs contended that the initial defendant, Maria Nyaitondi Gera (deceased), who was the owner of land parcel **Majoge/Boochi/428** encroached onto their land claiming ownership thereof. They claimed that after her demise, her sons, the defendants, persisted in the encroachment of land parcel **4658**.

4. The late Maria Nyaitondi Gera, in her defence dated 26th June 2012 and filed on 27th June 2012 denied the plaintiffs' claim. She stated that she had bought land parcel **Majoge/ Boochi/4206** measuring 0.22 Ha. in 1970 and had been in occupation of the land since then. She claimed that on 11th August 2011 parcel 4206 was secretly subdivided and the suit land registered in the names of the plaintiffs who are the vendor's grandsons. She informed the court that she had filed Originating Summons vide Kisii HCC No. 189 of 2012 claiming adverse possession over land parcel **4658** which she claimed to have had uninterrupted possession of since 1970.

5. The matter proceeded before me on 23rd April, 2018. As there was no appearance for the defendants, I heard the 1st plaintiff who gave evidence in line with his pleadings and adopted his lists of documents as his evidence. Upon appreciating that the dispute between the parties related to a boundary dispute between the parties, I *suo moto* made the following orders/directions:

“Arising from the evidence adduced by the plaintiff its apparent that the issue may be one of a boundary dispute between land parcels Majoge/Boochi/4658 and 428. The court in the premises *suo moto* directs that the Land Registrar and County Surveyor Kisii County visit land parcels Majoge/Boochi/4658 and 428 and to fix and delineate the boundaries of the two parcels and file a report in court within the next 90 days from today. The OCS Ogembo Police Station to provide security during the exercise. Mention on 30/07/2018 for further directions.”

6. Pursuant to the foregoing orders, the Land Registrar and the County Surveyor filed a joint report in court on 27th July 2018, where they observed that there was no visible boundary between land parcel **4658** and land parcel **428**. They found that the total ground area was more compared to the combined registered areas of the two parcels of land and proceeded to recommend that the registers of the two parcels of land should be amended accordingly.

7. This prompted the 1st Defendant/Applicant to file the instant application. The Defendant denied that he was present when the Land Registrar and County Surveyor visited the parcels of land. He also averred in his supporting affidavit that contrary to the Plaintiffs' claims, he was not served with the hearing notice and so he was unaware that the matter had been scheduled for hearing. He contended that the orders directing the Land Registrar and County Surveyor to visit land parcels **Majoge/ Boochi/4658** and **428** were only issued due to his absence on the hearing date. He therefore urges the court to grant the orders sought.

8. The 1st Plaintiff swore an affidavit in response to the application on 18th October 2018. He averred that during pre-trial directions on 29th September 2016, the Defendants/Applicants were given 60 days to comply with pre-trial issues before hearing which was scheduled for 15th March 2017 but on that day, the defence had not yet complied. The suit was once again fixed for hearing on 23rd April 2018 but the Defendants/Applicants did not attend court on that day and the court proceeded to hear the Plaintiffs' case and issued orders for the delineation of the boundaries in dispute. The Plaintiff insisted that the Defendants were served with the hearing notice and were present during the entire exercise. He averred that at the time the Land Registrar and Surveyor were fixing the boundaries of the suit parcels of land, all parties to the suit were accorded an opportunity to address the Land Registrar and were content with the process. The Plaintiff dismissed the application as a ploy to delay the expeditious disposal of the matter.

9. The parties filed their respective submissions which I have considered together with their dispositions. The main issue arising is whether this court should set aside the proceedings of 23rd April 2018.

10. The principles for setting aside were outlined in the case of **Shah -vs- Mbogo [1967] E. A 116** as follows;

“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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

11. Similarly, in **CMC Holdings Ltd -vs- James Mumo Nzioki Civil Appeal No. 329 of 2001 [2004] eKLR** the Court of Appeal held,

93. Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. In the case before us, it is our view that the learned magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it could not appear was true or not and if true, the effect of the same on the ex parte judgment that was entered as a result of the non appearance of the appellant and on the entire suit. We do not think the answer to that weighty issue was to advise the appellant of the resource open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.

The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.

12. In the present case, the 1st Defendant/Applicant argued that he was not notified of the hearing date by his previous advocate and that had he been so notified, he would have participated in the proceedings and shown that the matter is not a boundary dispute but a dispute on how the land was acquired in the first place. He submitted that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system. He stated he had not been given the opportunity to be heard and therefore urged the court to invoke its inherent powers to prevent an injustice.

13. The 1st Defendant’s claim that he was not informed of the hearing date by his advocate is however cast into doubt by the fact that there is on record an affidavit of service filed in Court on 23rd April, 2018 which indicates that he was personally served with the hearing notice. On the other hand, the Plaintiffs/Respondents argue that the dispute concerns the physical boundaries between land parcels **4658** and **428** which is an issue that can only be resolved by the Land Registrar and the Surveyor according to Sections 18 and 19 of the Land Registration Act. The Plaintiffs submitted that the report filed by the Land Registrar and the County Surveyor confirm that the Defendants had trespassed onto their land and want the court to grant them the orders sought in their plaint. The Land Registrar and the Surveyor’s report however does not shed any light as to the circumstances that led to the subdivision of land parcel

Majoge/Boochi/4206 which the Defendants claim was their property. The Defendants assert that the subdivision was secretly and/or fraudulently carried out.

14. In the statement of defence filed on 27th June 2012, the Defendants claim ownership of land parcel **4206** which is separate and distinct from land parcel **428**. It is their case that the Plaintiffs fraudulently caused subdivision of land parcel **4206** on 11th August 2011 and that land parcel **4658** was unlawfully excised from parcel **4206**. This claim is supported by the mutation forms for parcel **4206** and the green card for land parcel **4658**. I am of the view that the defence raises triable issues which need to be ventilated during a formal hearing in Court where evidence is adduced. The Land Registrar's report as I have observed does not show the nexus between land parcel **Majoge/Boochi/4206** and **4658** that led to the subdivision of the former to create the latter.

15. In the circumstances, I allow the Defendants application dated 7th September 2018 on the following terms:-

1) That I set aside and vacate the order issued on 23rd April directing the Land Registrar and Surveyor Kisii County to delineate and fix the boundaries between land parcel Majoge/Boochi/428 and 4658.

2) The report by the Land Registrar and the Surveyor dated 25th July 2018 filed in court on 27th July 2018 is set aside and ordered expunged from the record.

3) That the suit be heard afresh on merits.

4) Each party to bear their own costs of the application.

RULING DATED AND SIGNED AT NAKURU THIS 27TH DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

RULING DELIVERED AT KISII THIS 8TH DAY OF OCTOBER 2019.

J ONYANGO

JUDGE