



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 1194 OF 2016

JENIPHER NYANCHOKA KIMONGE.....PLAINTIFF

VERSUS

NYAMONDO ONCHWARI.....1ST DEFENDANT

HENRY ONCHWARI.....2ND DEFENDANT

GEDION ONSONGO.....3RD DEFENDANT

ZABLON ONSONGO.....4TH DEFENDANT

RULING

INTRODUCTION

1. What is before me is the Defendant's application dated 21st May 2018 seeking the following orders:

- a) That the Honorable court be pleased to grant leave to the firm of B.N Ogari & Company Advocates to come on record for the Applicants.
- b) That the honourable court be pleased to issue an order of stay of execution of the decree herein and any consequential orders emanating therefrom till the hearing and determination of this application inter partes.
- c) That the judgment of the honourable court delivered on 26th October 2018 and any consequential order passed against the Applicant/ Defendant be varied and/or set aside and the defendants be accorded an opportunity to be heard.

2. The application is based on the supporting affidavit of Gideon Onsongo the 3rd defendant/ applicant sworn on the 21st May 2019 on his own behalf and on behalf of the other defendants. In the said affidavit, the 3rd defendant depones that they were served with summons to enter appearance together with the pleadings whereupon they instructed the firm of Mbeche and Company Advocates to handle the matter on their behalf but they did not hear from the said advocates until judgment was entered against them and they only learnt about the judgment, when the respondent spread rumours that they were about to be evicted and locked up in jail. That they tried to trace their advocate in vain. He has attached a draft defence to his affidavit and prays that the defendants be given an opportunity to be heard. He contends that if the judgment is not set aside, he and his co-defendants will be land-locked.

3. The application is opposed by the defendant through his Replying Affidavit sworn on the 17th July 2019 in which he gives a background of this case leading upto the point when the case was heard. The long and short of it is that the defendants were served with Summons and were represented by the firm of Mbeche and company advocates but they never made a follow up on their case, until judgment was entered against them. He denies that the defendants would be land locked if the judgment is not set aside as they have direct access to the main road and are merely using the road created on the plaintiff's parcel of land, for their own convenience as a short-cut without the plaintiff's consent. He maintains that the trial court satisfied itself that the defendants had been served before proceeding to hear the matter in the defendants' absence.

4. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

5. Having considered the Notice of Motion, the rival affidavits, pleadings and submissions, the following issues fall for determination:

- i. Whether the applicants have met the conditions for setting aside the judgment delivered on 26th October 2018.
- ii. Whether the draft defence attached to the supporting affidavit raises triable issues.

ANALYSIS AND DETERMINATION

6. A brief background of this case is that the plaintiff and the defendant share a common boundary. The plaintiff is the registered owner of land parcel number SOUTH MUGIRANGO/BOTABORI/124 while the defendants are the registered owners of land parcel number SOUTH MUGIRANGO/BOTABORI/126 and 127. The dispute between the parties revolves around an access road between the two parcels of land, with the plaintiff claiming that the defendants have trespassed onto her land and created an illegal road to enable them gain access to the main road. Since the parties have a common boundary, the parties agreed to refer the matter to the Land Registrar and District Surveyor, Kisii for purposes of determining whether or not the road exists on the official map. The Land Registrar and district surveyor subsequently visited the disputed parcels of land and filed their report in court on 1st July 2011.

7. The court then proceeded to hear the matter and judgment was entered against the defendants on 26th October 2018. It is the said judgment that the applicants are seeking to set aside on the grounds that they were not present when the case was heard as they were not aware of the hearing date.

8. The principles of setting aside an ex-parte judgment or order are now well settled. In the case of **Yamko Yadpaz Industries Limited Vs Kalka Flowers 2013 KLR** Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:

- a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*
- b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116 at 123.***
- c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***
- d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***
- e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30.***

9. I have read the judgment of my learned brother Justice Mutungi and I note that he observed at paragraph 3 of his judgment as follows:

“The suit was fixed for hearing on 18th July 2018 and a hearing notice dated 29th January 2018 to the defendants’ advocates notifying them that the suit was set down for hearing was duly served on them on the same date. An Affidavit of service filed by one Isaiah Miruka, a Court Process Server on 17th July 2018 attaches the copy of the hearing notice which was served on the defendant’s advocates. The hearing notice was stamped with the advocates’ stamp, dated and signed.”

10. The judge being satisfied that the defendant’s advocates had been served therefore proceeded to hear the case in their absence. The defendants have alluded to the fact that their advocate did not inform them of the hearing date. They have gone as far as casting aspersions on the said firm of advocates by suggesting that they could be masqueraders. I find it preposterous for the defendants to make such allegations in this era where it is possible to ascertain whether one is an advocate who bears a current practising certificate at the touch of a button. Be that as it may, I am not persuaded that the defendants are blameless as they had a duty to follow up on the progress of their case.

11. I have looked at the draft defence attached to the supporting affidavit and I am equally unpersuaded that it raises triable issues as this is a matter where the Land Registrar and District Surveyor had visited the suit property and established that the road created on the plaintiff’s land was illegal. There mere fact that he suggested it should be legalized since it had been in use for some length of time does not make it legal.

12. In view of the foregoing I find, and hold that the application lacks merit and I dismiss it with costs to the plaintiff.

Dated, signed and delivered at Kisii this 14th day of November 2019.

J.M ONYANGO

JUDGE