



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 185 OF 2016

**LYDIA WANJIKU MARINGA (Suing as the Legal Representative of the Estate of the late
LEONARD MARINGA MUNYI.....PLAINTIFF**

VERSUS

FRANCIS KINYUA MARINGA.....1ST DEFENDANT

SERWASIO MURIUKI MARINGA.....2ND DEFENDANT

EVANS MACIGO MARIA.....3RD DEFENDANT

RULING

The defendants have moved to this Court by their Notice of Motion dated 30th August 2017 premised under the provisions of **Section 3A of the Civil Procedure Act, Order 9 Rule 9 and Order 10 Rule 11 of the Civil Procedure Rules** seeking the following orders:

a. Spent.

b. Spent.

c. Pending the hearing and determination of this application, this Court do grant an order of stay of execution of the orders given on 14th July 2017 in respect of land parcel numbers KABARE/NYANGATI/1882 and KABARE/NYANGATI/3193 and the said parcels of land to remain in the names of the 3rd defendant and 1st defendant respectively.

d. The ex-parte judgment entered against the defendants on 14th July 2017 be set aside.

e. The defence annexed to the affidavit be deemed as duly filed and served upon payment of the requisite Court fees.

f. Costs be in the cause.

The application is based on the grounds set out therein and also supported by the affidavit of **SERWASIO MURIUKI MARINGA** the 2nd defendant herein. It is the defendants' case that they had instructed the firm of **IGATI MWAI & CO. ADVOCATES** to represent them in this matter and a memorandum of appearance was even filed on their behalf and although the defendants kept enquiring about the position of the case, they were informed that it was awaiting hearing. They did not receive any up-dates from their advocate and recently when they got impatient and perused the Court file, they

discovered that infact no defence had been filed and that on 14th July 2017, judgment had been entered against them jointly and severally after the case proceeded ex-parte. However, this Court's orders are yet to be executed and so they instructed another advocate to take over the conduct of their case and that they have a good defence to the plaintiff's claim since the transfer of the land in dispute to them was done during the life-time of their late father and they have good titles. Annexed to that supporting affidavit are copies of the certificate of search in respect to land parcels No. KABARE/NYANGATI/3193 and KABARE/NYANGATI/1882 dated 25th August 2017 and 24th August 2017 respectively in the names of the 1st and 3rd defendants as well as the defence and list of documents.

The application is opposed and the plaintiff has filed both grounds of opposition and a replying affidavit sworn by **LYDIA WANJIKU MARINGA** the plaintiff herein and it is her case that the application is a sham, frivolous, vexatious and an abuse of the Court process since the defendants advocates were duly served and prayer No. (c) has already been over-taken by events since the Land Registrar has already implemented the changes as ordered by this Court as per the annexed official searches for land parcels No. KABARE/NYANGATI/1882 and 3193. That contrary to the defendants' averments, land parcels No. KABARE/NYANGATI/1882 and 3193 formed part of the Estate of their deceased father **LEONARD KARINGA MUNYI** who died on 28th December 2013 and therefore would not have been transferred to the defendants as a gift in April and July 2015. That this application is untenable as it amounts to this Court sitting on appeal over its own judgment and that the real intention of the defendants is to unlawfully deprive the plaintiff and the other heirs of their rightful share of the land in dispute.

The application has been canvassed by way of written submissions which have been filed both by **Mr. GACHECHE WA MIANO ADVOCATE** for the plaintiff and **Mr. MAINA KAGIO ADVOCATE** for the defendants.

I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.

I will start with prayer (c) which seeks the stay of execution of this Court's judgment dated 14th July 2017 in respect of land parcels No. KABARE/NYANGATI/1882 and KABARE/NYANGATI/3193 and that the said parcels remain in the names of the 3rd and 1st defendants respectively. The plaintiff's response to that prayer is that it has been over-taken by events since the Land Registrar has already effected the order of this Court. I have looked at the plaintiff annexures **LWM 1** and **2** which are certificates of search in respect to the said two parcels and they confirm that indeed in September 2017 after this Court delivered its judgment, the two parcels of land reverted back to the names of the deceased **LEONARD MARINGA MUNYI**. That prayer is therefore not available to the defendants as it has been over-taken by events.

Prayer (d) seeks the setting aside of the ex-parte judgment dated 14th July 2017 and from the supporting affidavit of the 2nd defendant, it is clear that the defendants were let down by their then advocate **Mr. IGATI MWAI** who did not file a defence having entered appearance on their behalf. It is also the defendants' case that despite several enquiries made by them to the said advocate, he kept informing them that once a hearing date is taken, he would inform them. Obviously when a party instructs counsel in a matter, it is to be expected that the counsel will act diligently and professionally in pursuit of the client's interests. It is not like the defendants went to sleep. Indeed by paragraph five (5) of the supporting affidavit, they made "*several enquiries from the office as to the progress of the case*" and were informed "*that once a hearing date was taken, we shall be informed*". I have no reason to doubt the veracity of that averment. The defendants were let down by their counsel and I take judicial notice under **Section 60 (1) (a) of the Evidence Act** that **Mr. IGATI MWAI** has been notorious for such lapses. It would be a grave injustice to punish the defendants due to the transgressions of their counsel.

There is no doubt that the judgment obtained by the plaintiff on 14th July 2017 was a regular judgment. Service upon the defendants counsel is not in dispute and indeed even when the suit came up for hearing on 15th May 2017, this Court confirmed that a hearing notice had been served upon **Mr. IGATI MWAI**. However, even in a regular judgment such as this one, the defendant is still entitled under **Order 10 Rule 11 of the Civil Procedure Rules** to move the Court to set aside such default judgment and to grant leave

to defendant. This Court retains unfettered discretion in determining whether or not to set aside such a judgment. In so doing, the Court will consider the length of time taken, any defence filed and if it raises triable issues and also the prejudice that may arise and, generally, the broad interests of justice in the matter. That discretion is however not to be exercised in favour of a party that is un-deserving of such a remedy which is an equitable one. As was held by **HARRIS J.** in **SHAH VS MBOGO 1967 E.A** 116 and approved in **MBOGO VS SHAH 1968 E.A 93**:

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

There is nothing to suggest that the defendants have sought, ***“whether by evasion or otherwise, to obstruct or delay the course of justice”***. Indeed as is clear from paragraph six (6) of the supporting affidavit, the 2nd defendant ***“got impatient and decided to peruse the Court file”*** only to find, to his ***“shock”***, that counsel had not filed any defence on their behalf and the suit had proceeded ex-parte and a judgment entered against them. Given those circumstances, it is only fair that the defendants are given an opportunity to defend this suit. In **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75**, the then Court of Appeal for East Africa stated as follows:

“There are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules”

In exercising its discretion to set aside a default judgment, the Court will also consider if there is a defence on record and whether it raises triable issues. I have looked at the defence annexed to the supporting affidavit, and among the issues raised therein is that in fact in early October 2013, the deceased had obtained consent to transfer land parcel No. KABARE/NYANGATI/1882 to the 1st and 2nd defendants and that in September 2013, the deceased had similarly obtained consent to transfer land parcel No. KABARE/NYANGATI/3193 to the 1st defendant. This was before the deceased passed away in December 2013 and that all that remained was the transfer which was done in December 2015. These are issues that need to be determined by the trial Court which will test their veracity through evidence. For now, I take the view that the defence raises triable issues and the law is that a triable issue is not necessarily one that will ultimately succeed – see **PATEL** (supra) and also **OLYMPIC ESCORT INTERNATIONAL CO. LTD & ANOTHER VS PARMINDER SINGH SANDHU & ANOTHER 2009 e K.L.R.**

The up-shot of the above is that the defendant’s Notice of Motion dated 30th August 2017 is hereby allowed in the following terms:

- 1. The ex-parte judgment entered against the defendants on 14th July 2017 is hereby set aside.***
- 2. The defence annexed to the supporting affidavit be deemed as duly filed and served upon payment of the requisite Court fees.***
- 3. The defendants shall meet the plaintiff’s cost of this application and also thrown away costs which I assess at Ksh. 15,000.***
- 4. The thrown away costs be paid within thirty (30) days of this ruling and in default, the judgment dated 14th July 2017 shall revert.***

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February, 2018

Mr. Ngigi for Mr. Miano for Plaintiff present

Mr. Kagio for Defendants absent

1st Defendant present.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018