



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.158 OF 2016

AHMED SALIM ABDALLA BAWAZIR

SWALEH SALIM ABDALLA BAWAZIR

SAID SALIM ABDALLA BAWAZIR

(Suing as the administrators of the estate of **SHEIKH**

SALIM ABDALLA BAWAZIR (DECEASED)...PLAINTIFFS/RESPONDENTS

VERSUS

ALI ABOUD ABDALLAH.....DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 16th June 2016, the Plaintiffs sought orders to compel the Defendant by way of mandatory injunction to hand over vacant possession and/or be evicted from a house built on Plot No. 960/III/MN situated at Kikambala in Kilifi County. In addition, the application also sought to have the Court Bailiff execute the Orders and remove the Defendant from the suit property with the assistance of the OCS Kijipwa Police Station.

2. When the application was first placed before the Honourable Justice Said Chitembwe on 17th June 2016, the Learned Judge certified it urgent and directed that it be served for inter-partes hearing on 28th June 2016. On the appointed date, the matter went before the Honourable Justice Oscar Angote who, upon satisfying himself that the Defendant had been served as per the Court's directions, allowed the application in its entirety.

3. It is apparent that subsequent to the issuance of the Orders, the Court Bailiff with the assistance of the police moved in and evicted the Plaintiff from the suit premises.

4. On or about 14th September 2016, the Defendant Ali Aboud Abdalla came to Court and filed the application presently before me dated the same day seeking the following orders:-

(i) That the orders issued by this Honourable Court on 28th June 2016 be set aside.

(ii) That there be an order staying all proceedings and further execution of the Orders made on the 28th June 2016 pending the hearing and determination of this Application.

(iii) That the Defendant be granted leave to file his Statement of Defence and Counterclaim out of time and he be allowed to defend and counterclaim through this suit.

(iv) That the draft defence and counterclaim attached herein be deemed as duly filed and served upon payment of the necessary court fees.

5. The Defendant's application is supported by his own affidavit sworn on 14th September 2016 and is based on the following grounds:-

- a) *That the Defendant was neither served with the suit papers, the Notice of Motion application or summons to enter appearance.*
- b) *That the Affidavit of Service sworn by one Thoma Nyandika is based on falsehood and is a lie and the same ought to be struck out and expunged from the record.*
- c) *That on the date of the alleged service, the Defendant and his entire family were not at home as they were attending a funeral of his sister-in-law at Gongoni, Malindi and could not have been served as purported.*
- d) *That he only learnt of this suit a day before his eviction when Senior Police Officers visited his home and informed him of the same.*
- e) *That the following day being 19th July 2016, he travelled to Malindi to establish the existence of the suit only to learn from his wife that the police had broken the padlock to his house and were now forcefully throwing out his belongings.*
- f) *That subsequent to his eviction, the Plaintiffs proceeded to demolish his house and thereby destroyed vital documents relating to the suit property and frustrating any prospects of re-entry thereto.*
- g) *That the Defendant has a good defence to the claim and wishes to file a counterclaim seeking general damages for loss suffered which counterclaim has overwhelming chances of success.*

6. In a Replying Affidavit filed on 3rd October 2016 sworn by Swaleh Salim Abdalla Bawazir on behalf of the other Administrators of the Estate of the late Sheikh Salim Abdall Bawazir, the Plaintiffs refute the Defendant's contention that he was not served with the suit papers. It is their case that the Defendant was served by a duly licensed process server on 22nd June 2016.

7. It is the Plaintiffs' case that the Draft Defence and counterclaim raise no triable issues and do not disclose any reasonable cause of action to warrant the re-opening of the case. It is further the Plaintiffs case that the suitland is part of the estate of the late Sheikh Salim Abdalla Bawazir and the Defendant does not claim ownership thereof. They further contend that the Orders issued on 28th June 2016 have already been executed and therefore incapable of being stayed.

8. I have perused the Defendant's Application and the Plaintiffs' response thereto. I have also taken into account the submissions made before me by the Learned Counsels appearing for the parties and the authorities they referred me to. As has been stated numerous times by our Courts, the power to set aside an ex-parte order is a discretionary power exercised with the main aim of doing justice to all the parties. In *Philip Kiptoo Chemwolo and Mumias Sugar Compnay Ltd –vs- Augustine Kubeede(1982-1988)KAR 1036*, the Court of Appeal stated that:-

“The Court has unlimited discretion to set aside or vary a Judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”

9. In *Patel –vs- EA Cargo Handling services Ltd(1974)EA 75*, the Court observed that:

“The main concern of the Court is to do justice to the parties, and the Court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.

10. In the matter before me, the Defendant avers that he was not served as on the date of the alleged service, neither himself nor his relatives were at the alleged place of service as they had travelled to attend the burial of their sister-in-law. At paragraphs 2-4 of the Affidavit of Service sworn on 24th June 2016, the Process Server Thomas Nyandika states:-

2. That on 22nd June 2016 I received Summons to Enter Appearance issued on 17th June 2016, Notice of Motion and Supporting Affidavit dated 16th June 2016, Order issued on 17th June 2016 and Plaint dated on 16th June 2016 from the firm of Balala & Abeid Advocates with instructions to go and serve the Defendant herein.

3. That on the same date, I (ac) accompanied by the one of the Plaintiffs (sic) called Swaleh Salim Abdalla Bawazir we proceeded to the resident of the Defendant herein at Majengo-Kanamai Mtwapa.

4. That upon we (sic) arrival we met the Defendant standing outside the house who confirm (sic) to me he is the one. I explained the purpose of my visit and tendered the copy of Summons to Enter Appearance, Notice of Motion and Supporting Affidavit, Order and Plaint he declined to sign to (sic) my original.

11. According to the Defendant however, he could not have been served on the said date as he was away attending the burial of his sister-in-law-Rehema Ali Mzee at Gongoni. To prove his assertion that the Affidavit of Service was based on falsehood, the Defendant issued a notice for the Process Server's Thomas Nyandika's cross examination. As it were, efforts to trace the Process Server in July 2017 proved futile. From an Affidavit of Service sworn on 18th July 2017 by another Process Server Joshua Mutua, it is apparent that efforts were made to trace the said Thomas Nyandika between 5th July 2017 and 17th July 2017 but he could not be traced after it was claimed that he had gone up country for good.

12. It was thus not possible to have the Process Server cross-examined on the contents of the Affidavit of Service sworn on 24th June 2016. I note however that in his Affidavit of Service, the said Thomas Nyandika states at paragraph 3 thereof that he was accompanied for the service by the 1st Plaintiff herein. In his Replying Affidavit sworn on 3rd October 2016 and filed herein on 4th October 2016, the 1st Plaintiff asserts at paragraph 4 thereof that the Defendant was served as stated on 22nd June 2016. He then proceeds to challenge the Defendant to provide evidence to show that he was on the said date attending the burial of his sister-in-law as he states.

13. In a Further Affidavit sworn on 21st October 2016, the Defendant responds to the Plaintiff's challenge at paragraph 4 thereof as follows:-

4. That contrary to what is stated by the Plaintiff at paragraph 4 of his Replying Affidavit, I was never served with summons nor with the suit papers on the said date nor at any time thereabout as alleged, I wish to reiterate the fact that at the said time, I was involved in the Muslim Traditions mourning/funeral rites at Gongoni following the unfortunate demise of Rehema Mzee my sister in law at Gongoni(sic) the rites/traditions of dua which require that the family to present dua for a departed Muslim family member within seven(7) days at the house from where the deceased hailed. I attach herewith a Photostat copy of the Chief's Letter Supporting the averment, same is marked "AAA 1"

14. The said letter marked "AAA 1" emanates from the Office of the Chief, Gongoni and is dated the same day 22nd June 2016 when the Defendant is supposed to have been served. Without giving the date of the said Rehema's death, it reads in full as follows:-

TO WHOM IT MAY CONCERN

REHEMA ALI MZEE (DECEASED)

The above mentioned was a resident of Gongoni in my area of work.

She was an active member in the social activities within.

The family will be holding a gathering today to finish (sic) the seventh day since her death, at the late house, throughout the day.

This permit has been issued to his in-law a one Ali Abound Abdalla holder of ID 13733797. Law and Order should be maintained.

Signed"

15. From the contradictions in the Defendants affidavits, it is deducible that the Defendant was served with the suit papers. The above letter from the Chief's Office is in my mind an afterthought meant to demonstrate that the Defendant was away on the date he is said to have been served. That can only be the reason it goes along way to mention the Defendant's name as the person who was issued with a permit for a function that was ending that very day. From the nature of the dispute, the Plaintiffs and the Defendant had had the dispute for a while. The Defendant was residing on the suitland and there would have been no possibility that the 1st Plaintiff who accompanied the Process Server would have been mistaken as to who the Defendant was. This must also be the reason the police were able to identify the Defendant's place when they went and informed him about the impending eviction a day before he was evicted.

16. Even if this Court were wrong in the finding that the Defendant had knowledge of the matter in Court before the Orders of 28th June 2016 were issued, it would still be incumbent upon the Defendant to prove that his intended Defence and counterclaim raise a triable issue which should go to trial for adjudication as was held in ***Patel -vs- EA Cargo Handling Services Ltd*** (above).

17. In the draft Defendants Statement of Defence and Counterclaim annexed to his Supporting Affidavit, the Defendant denies that the Plaintiffs are the registered owners of Plot Subdivision No. 960/III/MN and states that if indeed the Plaintiffs are the registered owners of the suit property, then the same is dubious, fraudulent and was registered without the authority of a committee that runs the Azhar Mosque in which he was appointed a Madrassa teacher. At paragraph 5 and 6 of the Defence he makes his case as follows:-

5. The Defendant is a stranger to the Plaintiffs allegations at paragraph 5 of the Plaintiff. The Defendant states that the Committee of the Mosque appointed him as a Madrassa teacher and thereby mandated or authorized him together with his family to live and stay in a structure adjacent to the Mosque as long as he professes the Islamic faith, he was thereby mandated/allowed to build a suitable house at the site at his own cost to replace the one roomed Makuti thatched house that was given to him when he joined the Mosque as a Madrassa teacher. Upon such consensus, he proceeded and built a new seven roomed house that he uninterruptedly lived in peacefully together with his family for a period lasting more than thirty years before he got evicted and the said house got illegally demolished by the Plaintiffs pursuant to proceedings undertaken mischievously after the plaintiffs misled the Court on the fact of Service.

6. The Defendant as a Madrassa teacher working at the Mosque and as part of the local community, states that he has always presided over services and/or all events at the Mosque up to the eve of the illegal eviction exercise and the Defendant is consequently still part of the founder members of the Mosque aforesaid and with a Right of claim over the land on which is built his house and that even if it were true but is denied that the Plaintiff is the rightful owner of the land aforesaid, he does so with the full knowledge of the Mosque and all its appurtenant thereon having an overriding interest over the property and that such right is of necessity protected by law, based on the foregoing the Defendant is entitled to the unimpeded right of both ownership and possession of the said structure and the land beneath it.

18. With Respect, I am unable to discern how the engagement of the defendant as a Madrassa teacher gives him rights of ownership and

possession of the portion of land he occupied by dint of such engagement. From a number of correspondences annexed to both the Plaintiffs and the Defendants affidavits herein, it is pertinent that the Plaintiffs are the Administrators of the Estate of the late Sheikh Salim Abdalla Bawazir who is the registered owner of the plot subdivision No. 960/III/MN situated at Kikambala within Kilifi County. A certificate of Title was issued to the deceased on 26th February 1993.

19. It is further clear that on the suitland lies the Azhar Mosque to which the Defendant was appointed a Madrassa Teacher. The Defendant was provided with a staff house which he claims to have demolished and built another bigger one at his own cost. No evidence whatsoever has been annexed however of the agreement allowing him to demolish the existing staff house he found in place and/or allowing him to build the bigger house. Indeed from the material placed before me, there is nothing to show that the Defendant even built the alleged or any other house on the suitland.

20. Similarly, from the record, it is pertinent that the Defendant no longer serves as a Madrassa teacher at the premises as his services are no longer required. From annexure "SSWABS" of the Plaintiff's Affidavit sworn on 16th June 2016, it is clear that the Defendant subsequently refused to vacate the house allocated to him by virtue of his being a Madrassa teacher and the dispute was referred to the Supreme Council of Muslims (SUPKEM) for mediation. The same did not however bear fruit forcing the Plaintiffs to file the present case for eviction.

21. The Defendant was clearly in my view a tenant at will of the Plaintiffs and they were right to follow due process to have him removed from the land after he refused to move on his own volition. His claim that he owns the part of land where the house he lived in stood is neither supported by any evidence nor the law.

22. Arising from the foregoing, I am satisfied that the Defendant's draft Defence and counterclaim does not disclose any triable issue or reasonable cause of action against the plaintiffs. The eviction sought to be stayed had already happened two months before this application was filed and the same was done pursuant to a lawful court order.

23. Accordingly, I find no merit in the Defendant's application dated 14th September 2016. The same is dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE