



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL SUIT NO. 490 OF 2017**

**JOHN NGANGA KIBE.....PLAINTIFF**

**=VERSUS=**

**REBECCA MUTHONI KIAMA.....1ST DEFENDANT**

**MESHACK MBUTHIA GITAU ALIAS**

**MICHECK MBUTHIA GITAU.....2ND DEFENDANT**

**R U L I N G**

1. On 27/2/2018, the 1st defendant, Rebecca Muthoni Kiama, presented a Notice of Motion dated 26/2/2018 seeking, *inter alia*, the setting aside of the *ex parte* orders made on 17/10/2017. The application is supported by the 1st defendant's affidavit sworn on 26/2/2018 in which the 1st defendant deposes that the impugned *ex parte* orders were obtained through falsehoods and concealment of material facts.
2. The plaintiff opposed the application through a replying affidavit sworn on 9/3/2018, in which the plaintiff deposed that he served upon the defendants both the application and summons to enter appearance. He further deposed that he purchased the suit property from the 2nd defendant who he thought had an authentic power of attorney from the 1st defendant.
3. Prior to the hearing of the application, parties recorded a consent which substantially disposed the application, leaving only prayer 2 of the Notice of Motion to be determined by the court.
4. At the hearing of the application, Mr Kimamo Kuria, counsel for the 1st defendant, submitted that the *ex parte* orders obtained on 17/10/2017 should be set aside because they were obtained through falsehoods and concealment of material facts. He contended that the affidavits of service dated 5/10/2017 and 5/12/2017 were false because service was effected on an imposter and not on the 1st defendant. He argued that it was undisputed that at the time of hearing the application, it had not been served on the 1st defendant.
5. Secondly, Mr Kuria submitted that the plaintiff had misrepresented to the court that the 1st defendant had lawfully sold the suit property to him and was unreasonably attempting to rescind the contract and evict him together with third party purchasers from the suit property. In this regard, he submitted that the plaintiff had failed to disclose to the court that by the time he brought the application, he had already met the 1st defendant and he had already discovered that the 1st defendant was the real owner of the suit property, and that the power of attorney and the two affidavits purportedly signed by the 1st defendant were forgeries. Mr Kuria further submitted that the plaintiff had failed to disclose to the court that upon discovering that he had been conned, he offered to purchase the suit property from the 1st defendant. He urged the court to set aside the *ex parte* orders.
6. In reply, Mr Kariuki, counsel for the plaintiff submitted that as at the time the plaintiff came to court, he genuinely believed that he was dealing with the genuine Rebecca Muthoni Kiama. He further submitted that at the time the process server served the court papers and swore the affidavits of service, the plaintiff and the process server genuinely believed that the person they dealt with was the genuine Rebecca Muthoni Kiama. He added that it was much later that the plaintiff discovered that the person served with the court papers was an imposter. He added that both the plaintiff and the 1st defendant are victims of fraud.
7. Mr Kariuki added that the 2nd defendant who procured the impugned power of attorney resides on the suit property as an agent of the 1st defendant and that the 1st defendant has not taken any steps to have him arrested. Mr Kariuki urged the court not to interfere with the status quo of the suit property because part of it had been sold to third parties.
8. The single issue for determination in this application is whether the applicant has satisfied the criteria for setting aside *ex parte* orders. I have considered the rival affidavits and oral submissions by counsel for the parties. I have also considered the legal framework and prevailing jurisprudence on setting aside *ex parte* orders.

9. Order 40 rule 7 of the Civil Procedure Rules grants this court powers to discharge, vary or set aside an injunctive order. Section 1A, 1B and 3A of the Civil Procedure Act vests in the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

10. The general principle guiding the exercise of this jurisdiction is that, where the *ex-parte* orders have been obtained irregularly, the court has no discretion but to vacate the irregular orders *ex-debito justitiae*. The court has discretion on whether or not to set aside *ex-parte* orders only in instances where *ex-parte* orders are regular.

11. In the present application, the plaintiff has conceded that the 1st defendant was not served with the application which culminated in the issuance of the *ex-parte* orders. The plaintiff has contended that at the time of serving the application together with the court papers, he genuinely believed that the person they served was the genuine Rebecca Muthoni Kiama. He added that it was much later that he discovered that the person they dealt with and upon whom the court papers were served was an imposter.

12. Without saying much, it is clear from the plaintiff's admission in his submissions that, the 1st defendant was not served with the application and court papers which culminated in the subject *ex-parte* orders. To that extent, the *ex-parte* orders are rendered irregular and cannot remain in force for a moment. For this reason, the application ought to be allowed.

13. Allegations have been made and denials have been rendered regarding some engagements that allegedly took place between the plaintiff and the 1st defendant prior to the institution of this suit on 25/7/2017. The applicant has, however, not presented documents to support the view that the plaintiff was fully seized of the identity of the genuine Rebecca Muthoni Kiama (1st defendant herein) at the time of obtaining the *ex-parte* orders. There is therefore no sufficient evidence to support the allegation that there was wilful concealment of material facts by the plaintiff.

14. In light of the foregoing, the 1st defendant's Notice of Motion dated 26/2/2018 is allowed in terms of prayer 2. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MARCH 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendant

Ms Halima Abdi - Court clerk