



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 987 OF 2007 (FORMERLY HCCC NO. 240 OF 2003)

TERESIAH WACU GATHUKU.....PLAINTIFF

VERSUS

MARGARET NJERI MUKUL.....1ST DEFENDANT

GATUNDU NYAKINYUA CO. LTD.....2ND DEFENDANT

AND

GITHAKU INVESTMENT LIMITED.....1ST INTERESTED PARTY

JAMES MBIYU NGARUIYA.....2ND INTERESTED PARTY

R U L I N G

1. This ruling relates to the 1st defendant's Notice of Motion dated 7th December 2012. The 1st defendant seeks an order setting aside the interlocutory judgement entered against her on such terms as the court deems fit. The application is supported by the 1st defendant's affidavit sworn on 7/12/2012.

2. The applicant contends that she learnt about the existence of this suit in December 2012 when her assistant chief summoned her and informed her that some people laying claim to the suit property had enlisted his help to evict her. The plaintiff contends that she conducted a search at the Thika Lands Registry and discovered that the suit property had been transferred pursuant to an ex parte court decree issued in this suit on 7th December 2006.

3. The applicant contends that she was not aware of the existence of this suit and was not served with summons to enter appearance and or notice of entry of judgement. She contends that she has a constitutional right to be heard in this suit. She states that her defence raises triable issues and that she should be allowed to defend this suit.

4. The application is opposed by the plaintiff through her replying affidavit sworn on 18th June 2013. The plaintiff contends that she was legally allocated the suit property by the 2nd defendant more than 28 years ago. She further contends that she has been in occupation of the suit property without interference from any one for more than 28 years. According to the plaintiff, the suit property had been wrongly allocated to the 1st defendant and upon scrutiny of the documents and registers relating to the suit property, the board of directors of the 2nd defendant confirmed that the suit property belonged to her. The plaintiff contends that she instituted this suit seeking to have the 1st defendant's title cancelled and the property registered in her name.

5. The plaintiff contends that the 1st and 2nd defendants were duly served with summons to enter appearance and that she and her son Zakaria Nyaga were present at the time of service. She contends that the 1st defendant refused to enter appearance. The defendant averred that the decree was served upon the Thika District Lands Registrar who wrote to the 1st defendant through the Chief of Gatwanyaga Location on 26th January 2007 requiring him to surrender the title deed of the suit property. It is the plaintiff's case that the 1st defendant failed to comply and the Thika Land Registrar issued a notice in the Kenya Gazette for cancellation of the 1st defendant's title. The plaintiff contends that she is entitled to the suit property since there was no fraud in her registration as the proprietor thereof. She further contends that the 1st defendant who had ample time to defend herself has come to court 11 years later. The plaintiff contends that she has already transferred the suit property to James Mbiyu Ngaruiya.

6. The 1st Interested Party also opposes the application through a replying affidavit sworn on 15th August 2013 by its director, Kenneth Macharia Njuru. He states that it is the registered proprietor of the suit property pursuant to a sale agreement dated 17th November 2010 between it and the 2nd Interested Party. The 1st Interested Party contends that being a bonafide purchaser, it holds a good, absolute and indefeasible title to the suit property which cannot be impeached. According to the 1st Interested Party, the 1st defendant has approached the court with tainted hands and does not deserve the equitable relief sought as she did not disclose material facts that the suit property had changed hands twice and was in its hands. Further, it contends that the 1st defendant misled the court to issue an injunction against the

plaintiff when she was not in possession or control of the suit property. The 1st Interested Party avers that it was not privy to any fraud or misrepresentation and that the 1st defendant's remedy lies in damages against the plaintiff.

7. Counsel for the 1st defendant in written submissions dated 23rd October 2013 stated that the 1st defendant had not been served with summons and therefore, the *ex parte* judgement should be set aside *ex debito justitiae*. She argued that the 1st defendant has a constitutional right to be heard and averred that the 1st defendant should be allowed to ventilate her claim as she had a good defence. The 1st defendant relied on Section 1A of the Civil Procedure Act, the decisions in **Waweru v Ndiga NRB CA No 64 of 1982**, **Pithon Waweru Maina v Thuka Mugiria (NRB CA No 27 of 1982)**, and **Patel v East Africa Cargo Handling Services (1974)EA 75**.

8. In written submissions dated 14th October 2013, counsel for the 1st Interested Party argued that the present application has been overtaken by events because the orders sought are untenable. Counsel submitted that the decree had already been executed and ownership of the suit property had changed hands severally. Counsel argued that the 1st Interested Party who was registered as proprietor on 15th February 2011 acquired the suit property for value from the 2nd Interested Party and was a stranger to any dispute that the plaintiff and the 1st defendant had.

9. Counsel for the 1st Interested Party argued that the 1st Interested Party undertook due diligence before purchasing the suit property by carrying out the necessary searches. He submitted that no evidence of fraud or misrepresentation on part of the 1st Interested Party had been adduced. Counsel submitted that upon purchase of the suit property, the 1st Interested Party acquired an absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation to which the 1st Interested Party is proved to have been party. The 1st interested party relied on Sections 27 and 28 of the Registered Land Act now (repealed) and Section 26(1) of the Land Registration Act. Reliance was also placed on the case of **Wreck Motor Enterprises v Commissioner of Lands & 2 others CA 71 of 1997**, **Gitwany Investments Ltd vs. Tajmal Ltd & 3 others(2006)eKLR** and **Sojahi v Amreliwalla & another (1956)EACA 71** for the submission that the title of a bonafide purchaser cannot be impeached once title passes.

10. The single issue for determination in the present application is whether the applicant has satisfied the criteria for setting aside an *ex parte* judgment. I have carefully considered the rival submissions by the parties. I have also considered the prevailing legal framework on interlocutory judgment as at 13/10/2003, the date when the interlocutory judgment in this suit was entered. It is that interlocutory judgment which culminated in the *ex-parte* hearing at formal proof. The applicable legal framework was contained in Order XIA Rules 5 and 6 of the Civil Procedure Rules (1998) which provided as follows:-

Rule 5 Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No 26 of Appendix C, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

Rule 6. Where the plaint is drawn as mentioned in rule 5 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form NO 26 of Appendix c, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

11. The plaintiff in this suit prays for the following orders:-

(a) A declaration that the plaintiff is the sole proprietor of all that parcel of land known and registered as Gatunyaga/Nguriba Block 1/1392 measuring 1.00 Acres.

(b) Costs of this suit.

(c) Any other alternative relief this Honourable Court may deem fit to grant

12. Suffice to note that, the plaintiff's claim in this suit is not a claim for pecuniary damages. Consequently, in my view, the plaintiff's claim fell outside the ambit of claims that qualify for interlocutory judgment within the framework in Order XIA Rules 5 and 6 of the repealed Civil Procedure Rules (1998). The legal ramification of this is that, the interlocutory judgment entered on 13/10/2003 was entered without any legal basis and was irregular judgment. What the Deputy Registrar was required to do, if satisfied that indeed there was *prima facie* evidence of service of summons to enter appearance, was to certify the suit for hearing as an undefended cause; not to enter interlocutory judgment.

13. Order 10 Rule 11 of the Civil Procedure Rules 2010 gives the court discretion to set aside a judgment entered in default of appearance. The principles upon which that jurisdiction is exercised are well settled. The court has unfettered discretion to set aside a regular judgement entered in default of appearance. Where the judgement is irregular, the court has no discretion but is obligated to set aside the irregular judgment *ex-debito justitiae*. This distinction was made by the Court of Appeal in the case of **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another MBSA CA 6 of 2015 (2016) eKLR** as follows:-

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among

other. See *Mbogo & Another v. Shah (supra)*, *Patel vs. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another vs. Kubende [1986] KLR 492* and *CMC Holdings vs. Nzioki (2004) 1 KLR 173*.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General [1986-1989] EA 456*).

14. I have made a finding to the effect that the interlocutory judgment entered on 13/10/2003 was irregular because the plaintiff's claim was not amenable to interlocutory judgment. On that ground alone, the interlocutory judgment entered on 13/10/2003 cannot stand. So do the consequential decree and all the resultant vesting actions.

15. Even if this court were to be wrong in its finding that the interlocutory judgment was entered irregularly, the court has unfettered discretion to determine whether or not to set aside a regular interlocutory judgment. The principles which govern the exercise of the court's discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant was articulated by the Court of Appeal in *Pithon Waweru Maina vs. Thuka Mugiria Nairobi CA No. 27 of 1992* as follows:-

Firstly, 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 it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E b*) Secondly, 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. *Shah v Mbogo [1967] EA 116 at 123B*, *Shabir Din v Ram Parkash Anand (1955) 22 EACA 48*

16. The applicant's case is that she was never served with summons to enter appearance, plaint or notice of entry of judgement. There is on record an affidavit of service sworn by John Waweru on 15th July 2003. He states that on 12th April 2003, he served the 1st defendant with summons and plaint at her residence in Karatu Sub Location. The process server contends that the 1st defendant was personally known to him. He does not, however, disclose how he got to know the 1st defendant and for what period of time. Secondly, the process server was never cross-examined to test the veracity of his deposition. The court is therefore unable to conclusively find that service was beyond reproach. Faced with similar circumstances, the court in the case of *Wachira Karani vs. Bildad Wachira Nyeri HCCC No. 101 of 2011* stated as follows:-

It is also important to mention that the integrity of the service having been questioned, it was necessary for the process server to be availed and shed light on the issue. Counsel for the applicant raised the issue but never applied to cross-examine the process server. Similarly, counsel for the respondent did not deem it fit to avail him if at all the service was indeed beyond reproach. The court was denied a golden opportunity to interrogate the issue further when the parties opted to dispose the application by way of written submissions.

17. I have perused the draft defence annexed to the application. In my view, the 1st defendant's draft defence raises triable issues. The 1st defendant is also in possession of the suit property. Although the ex-parte decree was obtained on 30/1/2004, the plaintiff did not execute it. She allowed the defendant to continue occupying the suit property. She instead preferred to quietly effect a transfer of the suit property. In my view, the interest of justice will be better served by allowing the 1st defendant her day in court so that the issues in controversy can be determined on merit.

18. The upshot of the above findings is that the 1st Defendant's Notice of Motion dated 7/12/2012 is allowed in terms of prayer 5 of the Notice of Motion to the extent that the interlocutory judgment entered in this suit together with the consequential ex parte decree and or ex-parte orders are set aside. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Gachuhi holding brief for Mr. Ambani advocate for the 1st Defendant

