



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 86 OF 2010

JANE KANDA KIPKORIR.....PLAINTIFF

VERSUS

DORCAS CHEBET.....1ST DEFENDANT

MR. KUNDU.....2ND DEFENDANT

DORCAS CHEBET.....3RD DEFENDANT

JONATHAN KIPKORE KIMWAI.....4TH DEFENDANT

KIPKORIR KIPKALAMU.....5TH DEFENDANT

DORCUS JEPKEMOI CHEBET.....6TH DEFENDANT

R U L I N G

1. The application dated 14/12/2017 seeks the following orders:-

(1)(spent).

(2)(spent)

(3).....(spent).

(4) That there be a review of the orders made herein to the extent of determining whether:-

(a) Parcel No. 1527 and Parcel No. 1615 are really consolidated by the 6th defendant.

(b) Further orders be invited in respect of the map of Parcel No. 1615 of its location on the ground.

(c) Whether indeed, the alleged Margaret Kananu was allocated Parcel No. 1615, Milimani Settlement Scheme.

(d) Whether indeed the said Margaret Kananu gave out a Power of Attorney to the said Jane Kanda Kipkorir.

(e) Whether indeed service was ever effect in the defendant/applicant and/or their advocates

(f) Whether indeed, the surveyors herein informed that, the issue of Parcel No. 1615 and 1527 measure 5 acres each if at all they are on the ground.

2. The grounds in support of the application are stated at the foot thereof though for their greater part despite this court's attempts to understand them, they remain incomprehensible. The application is supported by the sworn affidavit of the 1st defendant dated 14/12/2017.

3. The 1st defendant states she was never served with the process to enable her appear and defend her interest in this matter; that she holds the title to the Land Reference No. Trans-Nzoia/Milimani/1527, which was allocated to her husband; that she farms the land and her workers and relatives live there; that Plot No. 1615 is not on the ground and is being forced onto Parcel No. 1527 and there is new evidence to show this; that Margaret Kananu has no rights and that the 1st defendant has been on the said land for 20 years.

4. The application is opposed. The plaintiff has filed her sworn replying affidavit dated 19/12/2017 in response. She avers that the application lacks merit and is meant to scuttle the eviction process; that this suit was heard and judgment was regularly entered against the defendant; that the defendants were duly informed of the proceedings; that the application has no grounds; that the District Land Adjudication Officer confirmed the consolidation vide a report dated 31/5/2012 and confirmed that the Plot No. 1615 exists; and that the plot was allocated to Margaret Kananu and she donated a power a Power of Attorney to the plaintiff; that a County Surveyor confirmed the acreage of the land. She denies that Plot No. 1615 is being forced on Parcel No. 1527 and avers that all the issues raised by the application were dealt with the court.

5. In retracing the steps in this litigation for clarity about what the application is seeking, I have examined the record. The plaintiff filed suit on 15/10/2010 pursuant to power of attorney donated to her by one Margaret Kananu who she stated was the lawful allottee of Plot No. 1615 - Milimani Scheme. She pleaded that the defendants resided and worked on Plot No. 1527 in the same Scheme. She stated that following a long dispute, Government officials came together and resolved the dispute and placed beacons on the boundary between the two plots which beacons the defendants pulled out, and trespassed into Plot No. 1615 thereby ploughing and planting crops on the latter plot. Soon thereafter the plaintiff filed this suit seeking a declaration that the defendants are trespassers on Plot No. 1615 - Milimani Settlement Scheme and a permanent injunction to issue against them to prohibit them from in any manner interfering with the suit land.

6. The plaintiff filed an application for injunctive orders dated 15/10/2010 which according to the affidavit of service of Peter Orwaru, a court process server dated 8/11/2010, was served on 27/11/2010, alongside other documents which included the summons to enter appearance in this suit, upon the defendants including the 1st defendant who is the current applicant. Another affidavit of the same process server dated 10/11/2010 states that summons were served on the 4th defendant. I have noted that after the first affidavit of service the process server filed four other affidavits of service showing the 1st, 2nd, 3rd and 4th defendants were served with summons and other documents.

7. This court thereafter issued an order of temporary injunction against the defendants on 18/11/2010. The defendants appear not to have entered appearance or filed defence and the plaintiff requested judgment against them on 7/2/2011. On 21/3/2011 an application for substitution of the 6th defendant, now deceased, was made in this matter. On 2/11/2011 an application for orders punishing the defendants for contempt of court was filed by the plaintiff. On 30/1/2012 the applicant herein filed her sworn replying affidavit to the contempt proceedings in this matter. An application for orders of substitution was granted on 31/7/2013. The defendants filed a joint defence on 30/1/2014.

8. The plaintiffs filed their submissions on 8/6/2016 and the opening paragraph of the defendants' submissions filed on 18/7/2016 show that they were aware, and probably were served, with the plaintiff's submissions. Judgment was delivered on 16/8/2016. The current application was filed on 14/12/2017.

9. The history of this matter, as I have retraced it, speaks for itself. It helps assess the merits of the 1st defendant's claim when she states that she was not served with process, for indeed that is the only ground that this court, in its opinion, needs to consider in order to dispose of the application dated 14/12/2012. For indeed if the 1st defendant was not served with process, it would be necessary to inquire into the whys and the wherefores before delving into the appropriate remedy for that non service.

10. It will be clear that when this application first came before me on 14/12/2017 I was, after perusing the entire record, quick to observe that even in the judgment there was evidence that the defendants were served and they filed a joint defence. They participated passively in these proceedings. The finale of their act in the theatre of this litigation was the filing of the submissions which, as I have alluded to above demonstrated at their very first paragraph that the plaintiff had kept them abreast, through service, of what her final submission in the case was.

11. The court at paragraph 3 of its judgment dated in this case stated as follows:-

“The defendants’ case was closed without any evidence from the defendants. The defendants’ lawyer however filed submissions”.

12. I fail to see the merits of the 1st defendants' claim of non-service in view of the foregoing. The question at paragraph 4(e) of the application is suitable only for a discussion between the 1st defendant and her erstwhile advocates on the record in this matter, for by filing a defence on her behalf, they seemed to acknowledge and thus shut the issue of service of summons behind them, and her.

13. I agree with the plaintiff/respondent that the matters raised by the application should have been raised at the hearing of the suit. In my view, the opportunity to be heard having been provided by way of service, and that opportunity having been ignored, the question as to whether the suit should be reopened again does not arise.

14. This court observed as follows in the case of *Marcellus Lazima Chegge -vs- Mary Mutoro Sirengo & Others Kitale ELC No. 97 of 2008*:-

“It is true that Article 50 of the Constitution of Kenya safeguards the right to a fair and public hearing of any dispute that can be resolved by application of the law. It is the position that the denial of the adjournment that was sought by the 2nd defendant on 27/6/2017 and the subsequent denial of leave to file the statement of the 2nd defendant will shut out the 2nd

defendant from being heard by the court. However, does that fact *per se* translate into a violation of Article 50 of the constitution?

In my view however, to arrive at the proper conclusion, the proper test to apply in this particular case is to inquire into the whether the 2nd defendant had been accorded a chance of being heard, and, if he never took that chance, whether there was any good reason provided as to why he omitted to take it.

A provision granting the right to be heard, even if contained in the Constitution of Kenya is no licence for negligence or misconduct on the part of any party to a suit.

In my view where a chance to be heard has been availed to the party, and out of his own unexplained default he is finally locked out of the hearing, he cannot simply invoke Article 50 of the Constitution so as to reopen the proceedings”.

15. This matter was heard on its merits and the defendants having opted to absent themselves and partake only of submissions, they cannot be heard to urge its reopening.

14. I find that the application dated 14/12/2017 has no merits. I therefore vacate the orders of stay of execution granted on 29/12/2017 and I dismiss the application dated 14/12/2017 with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 23rd day of April, 2018.

MWANGI NJOROGE

JUDGE

23/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for Plaintiff/Respondent

N/A for the Defendant/Applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

23/4/2018