



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 57 OF 2016

MONIKA HERTA ELFRIEDE BEHRMANN.....PLAINTIFF

VERSUS

MUBIA HOLDINGS LIMITED.....DEFENDANT

RULING

1 By a Notice of Motion dated 4th July 2017 brought under Order 10(2), Order 10 Rule 11 of the Civil Procure Act and Article 50 (2) of the Constitution of Kenya, the Applicant Caroline Mwelu Mwandiku is seeking the following orders:

- a) That this application be certified urgent and heard ex-parte in the first instance.
- b) That pending hearing and determination of this application there be a stay of execution of this court's judgement and decree dated 11-04-2017.
- c) That this court's interlocutory judgment dated 16-05-2016 and all other consequential orders be set aside.
- d) That this court's judgment and decree dated 11-04-2017 be set aside unconditionally.
- e) That Caroline Mwelu Mwandiku be enjoined in this suit as a defendant as the court may deem just and appropriate.
- f) That this suit be consolidated with this court's case number 251 of 2013 (0S) for hearing and determination.
- g) That the plaintiff do pay the costs of this application.

2 The application is based on the grounds on the face of the motion namely:-

- i. That there exists another suit in this court the same being case No. 251 of 2013 (0S) in which the plaintiff is also a party.
- ii. That the plaintiff in this suit is aware and has actively participated in the previous suit.
- iii. That the said suit number 251 of 2013 (0S) involves the same property as in this suit.
- iv. That the applicant herein lives in the property which is the subject matter of this suit.
- v. That the applicant has been adversely mentioned in this suit and condemned unheard.
- vi. That the judgment and decree in this suit is effectively against the applicant and any orders of eviction will in essence adversely affect her.
- vii. That the applicant does not know and is not related to the defendant in this suit and in case number 251 of 2013 (0S).
- viii. That the plaintiff has committed a fraud against the court by withholding material facts and misleading the court on the true position of the subject matter.

ix. That the evidence used by the plaintiff in this suit was obtained fraudulently and against court orders in Malindi High Court Land Petition Number 8 of 2016.

x. That the resultant judgment and decree are being enforced against a party who did not participate in this suit and was not given an opportunity to be heard.

xi. That unless this application is heard urgently and granted the applicant stands to suffer irreparable loss.

3 The application is supported by the affidavit of the Applicant sworn on 4th July 2017 and a supplementary affidavit sworn on 11th December 2017 in which she depones that she knew the plaintiff in this matter having stayed with her for a longtime in land known as plot Number 533 Section 111 mainland North CR Number 14272 situated in Kilifi County, (the suit land); that they have constructed a house on the suit land which they bought from one Anne Waiguru but later learned that it was registered in the name of the defendant. The applicant depones that sometime in August 2013, the plaintiff expressed her willingness to move out of the suit land and approached the applicant to buy her interest in the land at a price of Kshs. 23,000,000/= and they entered into and executed an agreement on 21st August 2013 in the presence of their advocate and witnessed by one Sammy Mwanyaa Mutwanyaa and the plaintiff started and continued paying the plaintiff.

4 It is the Applicant's further deposition that the agreement stipulated that they were to file suit to have the suit land registered in their names and they did file case number 251 of 2013 (OS); that as the suit progressed, the plaintiff herein fell out with their advocate which culminated in the advocate filing his Bill of costs vide Mombasa High Court miscellaneous Civil application Number 12 of 2015 but later discovered the existence of this suit.

5 The Applicant has denied any involvement in registration, revival or documentation of the company known as Mubia Holdings Ltd whose directors form the affidavit of service of Terrence Omondi sworn on 28/04/2016 which was the basis for the entry of interlocutory judgment are named as Tonny Kamande Kamau and Patrick Kuria Mwangi whom the applicant states she does not know nor associated with in any way.

6 The applicant states that she has read the proceedings and judgment and noticed that the suit has mentioned her adversely without having been given an opportunity to be heard; that the plaintiff has committed a serious act of perjury by stating in the plaint that there has never been any suit and there is none pending between her and the defendant whereas she was much aware of proceedings in case No. 250 of 2013 (OS); that paragraph 5 of the plaint is not true as the plaintiff did not purchase the land from the defendant but that they purchased it from one Anne Wairagu.

7 The Applicant further depones that she has made a lot of improvement and development on the suit property since the plaintiff moved out and evicting her from the house will cause irreparable damage; that the plaintiff's application dated 24th May 2017 seeks inter alia an order which will culminate in the applicant being evicted from the suit property yet there was no such prayer sought in the plaint; that in her pleadings and evidence before this court, the plaintiff conveniently failed to disclose that they had moved out of the suit property leaving the applicant in occupation; that the plaintiff who is a foreigner of German origin at the time she left the house had indicated that she was intending to relocate to her country.

8 It is the applicant's deposition that the decision of the National Land Commission was not brought to her attention despite being a party to the proceedings and that this was a smart calculation and move to hide the position from her because she had challenged the commission's jurisdiction at the High Court at Malindi in Petition No. 6 of 2016 which issued an order stopping the National Land Commission from hearing and determining the complaint by the plaintiff.

9 The Applicant finally depones that it is important that she be made a party to this suit, preferably as a defendant to enable her ventilate her rights which the plaintiff is infringing by withholding pertinent information from this court. The applicant therefore seeks that the orders sought in the application be granted.

10 The plaintiff opposed the application and filed a notice of Preliminary objection dated 11th July 2017 in which she contends that the application is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason inter alia that the matter is res judicata and the prayers sought have been overtaken by events and that the applicant has no locus and the application is an abuse of the court process and ought to be struck out with costs.

11 The plaintiff also filed a Replying Affidavit sworn by herself on 20th November 2017 in which she depones inter alia, that the applicant is a fraudster who is ill bent to dispossess the plaintiff of her property by making false misrepresentations; that she has not given the Applicant authority to represent her or act on her behalf in ELC case No. 251 of 2013 (OS) and if there is any consent the same was acquired through misrepresentation of facts and fraud and the suit was filed without her authority. The plaintiff states that she objected to her inclusion in the suit without her knowledge and consent and that she was away in Germany at the time

12 It is the plaintiff's case that the Applicant was heard and adequately represented at the hearing at the National Land Commission proceedings and did not challenge the proceedings or outcome of the commission's decision delivered on 10th March 2016. The plaintiff further contends that the orders sought cannot be granted the same having been overtaken by events as the judgment and decree has been executed and that the court is now functus officio; that the applicant cannot be joined in a suit that has been finalized and now the court is functus officio; that there cannot be a consolidation of suits in a matter that has already been finalized.

13 The plaintiff has denied the allegation that she has withheld material facts and fraud and accuses the applicant of withholding vital information and misleading the court that she is a financier of the new registered owner; that she was unheard whereas she was represented at the hearing at the National Land Commission and has misrepresented facts with an intention to defraud the plaintiff of her property by wanting to acquire it through adverse possession without the consent of the plaintiff and by alleging that she contributed to the same whereas by then she was a minor and has not demonstrated any contribution. She accuses the Applicant of continuing to abuse the process of court by

filing various suits in different courts while knowing that the same are not merited and a fishing expedition. The plaintiff denies that the Applicant has done anything in the suit property and depones that all the development therein were solely done by the plaintiff. The plaintiff states that the agreements referred to by the applicant are unknown to her and that the authority and consent was obtained fraudulently, though the plaintiff adds that she has since revoked or denounced the same.

14 It is the plaintiff's contentions that the Applicant has all through been aware of what transpired herein, but refused to participate and depones that the applicant has through illegal means tried to acquire her land and colluded with others to procure a title in the name of Mubia Holdings and later in her name hence cannot claim equity from this court over a title that was nullified by National Land Commission. The plaintiff avers that the Applicant participated in the proceedings at the National Land Commission and was aware of the judgement and this suit, as well as case No. 251 of 2013 (OS) but opted to file a Petition in Malindi and not Mombasa where these other two suits which are over the same property were pending.

15 The plaintiff asked the court to recall Malindi High Court Petition No. 8 of 2016 to be heard concurrently with case No. 251 of 2013 (OS). The plaintiff depones that she was not made a party to the Malindi High Court Petition No. 8 of 2016 because the Applicant's intention was to defeat the plaintiff's claim over the suit property.

16 The court gave directions that the application be canvassed by way of written submissions which were duly filed and highlighted by the advocates for the Applicant and for the plaintiff.

17 The applicant submitted inter alia, that the plaintiff knew the existence of case No. 251 of 2013 (OS) where she is the 2nd plaintiff. The applicant further submitted that she was condemned unheard yet she is the one residing on the suit property and that the plaintiff in the pleadings herein has named the applicant and has even filed an application for eviction. The applicant denied that the court is functus officio as the law under which the application has been brought allows the court to revisit a case which has been finalized.

18 On her part, the plaintiff submitted inter alia, that the applicant and the plaintiff entered into an agreement for sale of the suit property at the price of Kshs. 23 million wherein the applicant only paid ksh. 2 million. The plaintiff submitted that the orders sought cannot issue as they have been overtaken by events and that the court is functus officio.

19 I have carefully considered the application, the affidavits both in support and against, the rival submissions and the authorities cited as well as the pleadings herein. The main issues that I am supposed to determine in my considered view, are as follows:

i. Whether I should set aside the ex parte judgment and decree that was entered into by the court in favour of the plaintiff on 11th April 2017 and all other consequential orders;

ii. Whether the applicant, Caroline Mwelu Mwandiku should be enjoined in this suit as a defendant;

iii. Whether this suit should be consolidated with ELC Case No. 251 of 2013 (OS) for hearing and final determination.

20 The dispute in this suit revolves around the property known as plot Number 533 Section 111 mainland North, CR. Number 14272, situated at Kikambala in Kilifi County. By a plaint dated 6th April 2016 the plaintiff filed this suit on 6th April 2016 against the defendant, Mubia Holdings Limited seeking an order to cancel the registration of the defendant as the owner of the suit property and an order to have the plaintiff registered as the owner and issued with a certificate of title over the suit property. The defendant was duly served with summons to enter appearance but failed to do so and upon request by the plaintiff, interlocutory judgment was entered against the defendant in default of appearance on 16th May 2016 and the matter proceeded for formal proof on 14th February 2017. By a judgement delivered on 11th April 2017 and by a decree issued on the 19th April 2011, I granted the plaintiff the reliefs sought in the plaint. On 7th July 2017, the applicant who is not a party to this suit filed this application.

21 The main grounds in support of the application are that the plaintiff failed to disclose that there exists another suit in this court, ELC No. 251 of 2013 (OS), in which the plaintiff is also a party and which involves the same subject matter and that the applicant who is in occupation of the suit land has been condemned unheard.

22 Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

In the case of *James Kanyiita Nderitu & Another [2016] eKLR*, the court of Appeal stated thus:

*"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 others. See *Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I 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 justiae, 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.”

23 The court of Appeal went on and cited the supreme court of India which forcefully underlined the right to be heard as follows in the case of Sagram Singh –vs- Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

“ There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

24 In the plaint dated 6th April 2016, the plaintiff avers that she purchased the suit property from the defendant company on 23rd January 1994 and conducted an official search and the certificate of official search showed that as at 20th November 1996, the suit property was registered in the name of Mubia Holdings Limited. The plaintiff further avers that on 23rd January 2014, one Caroline Mwelu Mwandiku (who is the applicant herein) through proxies namely, Tonny Kamande and Patrick Kuria Mwangi incorporated a new company with the same name as Mubia Holdings Limited and thereafter fraudulently obtained a provisional title over the suit property in the name of the new company. She then pleaded the particulars of fraud. The plaintiff added that upon noticing the fraud, she lodged a complaint with the National Land Commission who after hearing the parties determined that the plaintiff was the rightful claimant of the suit property. It is apparent from the above pleadings that the plaintiff recognises that the applicant herein has some interest in the suit property.

25 I have also perused the list and copies of documents filed by the plaintiff and in particular the correspondence and the determination of the dispute over the suit property by the National Land Commission. It is clear that the dispute at the National Land Commission was between the plaintiff and Caroline Mwelu Mwandiku, the applicant herein. Among the documents submitted by the parties before the National Land Commission were the pleadings and a court order in Case No. 251 of 2013 (OS) in which both the plaintiff and the applicant have made a claim of adverse possession over the suit property. The applicant’s interest in the suit property is also acknowledged by the plaintiff in her testimony before this court on 14th February 2017 as well as in the submissions filed herein. It is also not disputed that the applicant entered into an agreement with the plaintiff to purchase the property for Kshs. 23 million and made a down payment to that effect. From the material placed before me, it is clear that the plaintiff was very much aware of the existence of ELC Case No. 251 of 2013 (OS) in which she is named as a party yet the plaintiff made an averment and further swore a verifying affidavit that there is no other suit pending and that there was no previous proceedings between the plaintiff and the defendant. The plaintiff made the averment and swore the verifying affidavit knowing very well that she was not telling the truth. The plaintiff also knew that applicant had an interest in the suit property but did not enjoin her in this suit. Indeed the plaintiff succeeded in duping this court into granting her the reliefs sought in the plaint. As submitted by the applicant, the plaintiff failed to make material disclosure to this court when filing and prosecuting this suit. The plaintiff was prepared to conceal crucial facts from this court to achieve her objective of obtaining the orders granted in the decree herein. As stated by Ojwang, J (as he then was) in Mungai –vs- Gachuhi & Another [2005] eKLR. “a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. As those conditions had not been satisfied when I heard the matter and that hearing led to the said ruling, it is apparent that some of the most crucial matters of fact were inadvertently or deliberately distorted, and so just outcome could not have been arrived at...”

26 In my considered view, and taking into account all the circumstances of this case, the resultant default judgment entered herein on 11th April 2017 is an irregular judgment liable to be set aside by the court ex debito justiae as a matter of judicial duty to remedy the situation and in order to uphold the integrity of the judicial process. I do not subscribe to the submission made by the plaintiff that this court is functus officio.

27 As already noted, both the plaintiff and applicant have an interest in the suit property. The applicant has stated that she has been and is still in occupation of the suit property. The applicant will directly be affected by the matters the subject of this suit and any orders made in this suit will directly affect her and will ultimately be binding upon her. In my view, the applicant is a necessary party and her presence in the suit will enable the court to effectively and completely adjudicate upon and settle all the issues or questions involved in the suit. It is only fair and just that all parties that have any claim over the suit property be joined so that all those varying claims can be determined at once. I would like to adopt the reasoning outlined by Warsame J (as he then was) in the case of Omondi Kokore –vs- The Town Clerk & Others (Kisumu HCCC No. 834 of 2005) in which he stated as follows:

“In my view in deciding an application for joinder, the court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however, the court must guard against frivolous or vexatious litigants whose sole motivation is to complicate and confuse issues that are before court for determination.

It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit to make the performance of the order of the court perfectly safe to those who are compelled to obey it and to prevent future litigation for this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants however numerous they be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the court may be safely executed by those who are compelled to obey them and future litigations may be prevented.”

Under the overriding objective spelt out in Section 3 of the Environment and Land Court Act, the objective of that statute is to enable the

court to facilitate just, fair, expeditious proportionate and accessible resolution of disputes. I therefore find that the joinder in this case of the applicant as a defendant is in the best interest of justice and is not prejudicial to the plaintiff.

28 In the circumstances, I find that the Applicant's application dated 4th July 2017 is merited and the same is allowed in the following terms.

- a) The judgment and decree dated 11th April 2017 and all other sequential orders are set aside.**
- b) That Caroline Mwelu Mwandiku be and is hereby enjoined in this suit as a defendant.**
- c) That this suit be and is hereby consolidated with ELC Case Number 251 of 2013 (OS) for hearing and determination.**
- d) The plaintiff to pay the applicant costs of the application.**

Dated, signed and delivered at Mombasa this 10th April, 2018

C. YANO

JUDGE