

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 264 OF 2016

BONFACE KARANJA MWANGI

COSMAS CHEGE

DANCAN NJOROGE NYOKABI (Being Officials of

AGGRERIAN RUARAKA UPGRADING SCHEME.....PLAINTIFF

VERSUS

NTIKYA ENTERPRISES LIMITED.....DEFENDANT

RULING

Through the application dated 5/2/2018, the Defendant seeks to set aside or vary the orders issued on 31/3/2017 by the Honourable Lady Justice Gitumbi. It seeks to have the court give directions for the hearing and expeditious disposal of this suit. The Defendant claims it was never served with any summons or pleadings filed in this suit. It is the lawful owner of the L.R. No. 8480/2 with the registered subtitles. The Defendant claims the Plaintiff obtained court orders on 31/3/2017 by giving false information and misrepresenting facts to the court and that it is only after the orders were given that the Plaintiffs moved into the Defendant's property and took possession.

The application is supported by the affidavit of the Defendant's Director, James Waitthaka Chege. He denies being served with the pleadings and states that he does not have an office along Mama Ngina Street. He denies knowing the Plaintiffs. He claims that his company purchased the suit land over 50 years ago from the Agricultural Finance Corporation. He maintains that the Plaintiffs have never owned the suit land and that there were no persons living on the land when the Defendant purchased it in June 2004 and was granted authority to subdivide and dispose the land. He states that in 2016 when this suit was filed his company had already commenced subdivision and sale of the plots carved out of L.R. No. 8480/2. He denies that the Plaintiffs could have acquired rights through adverse possession to the suit land since the Defendant has been in possession of the land from 2004 to date.

Boniface Karanja Mwangi, the Chairman of the Plaintiff Welfare Group swore the affidavit in opposition to the application. He maintains that proper service was effected and that the Defendant was aware of the existence of this suit. He relies on the notice to show cause dated 27/9/2017 which the court caused to be served upon his advocates. He believes the same notice to show cause was served upon the Defendant company. The court has looked at the file and is unable to find evidence that the notice to show cause was served on the Defendant. Mr. Mwangi claims that they have been on the suit land for 12 years and they are not trespassers.

The Defendants Director swore a supplementary affidavit on 26/2/2018 in response to the Plaintiff's replying affidavit. He gives the correct physical address of the Defendant as being 4th floor, Bruce House along Standard Street and not along Mama Ngina Street. He also states that he does not sit in the office throughout as he is employed elsewhere. He obtained copies of the pleadings in this case when the OCS Kasarani Police Station informed him that there was an invasion on the Defendant's land following the issuance of a court order, a copy of which the Plaintiffs presented to the OCS. He accuses the Plaintiff of misusing the orders for *status quo* given by the court by moving into the Defendant's land and beginning construction to defeat the Defendant's title.

The issue for determination is whether there is a defence that raises triable issues which should go to trial for adjudication. The Defendant denies service.

The court has looked at the affidavit of service sworn by Peter Kisilu on 11/4/2016. He depones that he served a Mr. Chege who introduced himself as one of the directors of the Defendant company. He states that he effected service on him but the said director declined to sign on the principal copy. He claims he effected service in an office on 4th floor Bruce House, North Wing, Standard Street located between the offices of Chigiti & Company Advocates and Global Connect Travel and Safaris where the offices of the Defendant are situated.

The court has considered the submissions of both parties. The Plaintiff relied on the decision of **Sameer Africa Limited v. Aggarwal and Sons Limited [2013] eKLR** in which the court stated that where judgement was regularly obtained the court will not interfere with it unless it is satisfied that there is a defence on merit. There must be a triable issue which should go to trial for adjudication.

The orders issued by Lady Justice Gitumbi on 1/9/2017 allowed the Chamber Summons dated 17/3/2016 and directed that the matter proceed for pre-trial conference. The Plaintiff's application dated 17/3/2016 sought orders of injunction to restrain the Defendant from further subdividing, selling and or in any other way interfering with the Plaintiff's occupation of L.R. No. 8480/2 situated along Kasarani Mwiki Road and further from evicting the Plaintiff therefrom. The Defendant maintains that the Plaintiff only came to occupy the land after obtaining the court order. The trial court will have to determine who is in possession of the Suit Property.

The court finds that it is just and meet to set aside the orders given by the court on 1/9/2017 and give the Defendant an opportunity to participate in that application and the suit. Each party will bear its own costs.

Dated and delivered at Nairobi this 30th day of May 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Wandabwa holding brief for Ms. Guserwa for the Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff