



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 214 OF 2017

FORMERLY MERU ELC. 137 OF 2013

MAKUNYI RWANDA.....PLAINTIFF

VERSUS

RUTH KARAUKI AYUB.....DEFENDANT

RULING

1. This application is brought to court under Order 22 rule 2(1); Order 10 rule 11 of the Civil Procedure Rules 2010, section 1A & 1B of the Civil Procedure Act and all other enabling provisions of the law.

2. The application seeks the following orders:

1. That due to the urgency of this application, service thereof in the first instance be dispensed with.
2. That there be a stay of execution of the ex-parte judgment delivered on 22nd January, 2018, as well as all consequential orders made pursuant thereto pending the hearing and determination of this application.
3. That the honourable court be pleased to set aside the ex-parte judgment delivered on 22nd January, 2018 and grant the defendant/applicant unconditional leave to file her defence within 14 days thereafter.
4. That the costs of this application be in the cause.

3. The application is supported by the affidavit of SISTO MARUNGURIA MIGWI and has the following grounds:

- a) The defendant/applicant is a resident of USA and was in Kenya lastly on 8th November, 2015, having entered the country on 13th August, 2015.
- b) That the affidavit of service by one Stanley Mworira M'Mboi is categorical that the defendant/applicant was never served with summons and that the process server was informed that the applicant had migrated to America.
- c) That despite the defendant/applicant being in Kenya for a period of almost 3 months with the full knowledge of the plaintiff/respondent between the periods stated in (a) above, the plaintiff/respondent never made any attempt of effecting service upon her.
- d) That the defendant/applicant who is the registered owner of L.R. No. S. Tharaka/Tunyai/2788 will be greatly prejudiced if she is not granted leave to defend the suit.
- e) That it is only in the interest of justice and fairness that the execution of the ex-parte judgment be stayed and set aside to allow the defendant/applicant to file her defence within 14 days thereafter.
- f) That defendant/applicant avers that the court reached its judgment since the plaintiff/respondent was not put to strict proof.
- g) That no prejudice will fall upon the plaintiff/respondent if the orders sought herein are granted.

4. The supporting affidavit sworn on 15th May, 2018 states as follows:

I, SISTO MARUNGURIA MIGWI of care of P. O. Box 122 Mitunguu in Meru County within the Republic of Kenya do hereby make oath and state as follows:

1. That I am an adult of sound disposition, a resident of Tunyai Location within Tharaka Nithi County and holder of a Kenyan ID Card No. 2468178.
2. That I am related to the defendant/applicant herein by virtue of being his brother-in-law, well versed with the facts giving rise to this application thereof competent to make and swear this affidavit which I swear with her authority and consent. (Annexed herein and marked SMM1 is a copy of authorization letter sent via email on 15th May, 2018 at 11.45 am and copied to the applicant's advocate).
3. That the plaintiff/respondent herein is the uncle to the defendant/applicant and they share a common patrilineal, who is the late Rwanda Mirero.
4. That LR. No. S.Tharaka/Tunyai "A"/218 measuring almost 20 acres is ancestral land which after the process of adjudication was soon thereafter registered to the defendant/applicant herein to hold in trusteeship for the family of Rwanda Mirero in 1992, as the plaintiff/respondent was a reckless drunkard.
5. That in the year 2010, it was unanimously agreed that the trust should be broken and individual beneficiaries to be registered as owners of their respective shares. Consequently, L.R. No. 218 was sub divided into five (5) portions namely LR. NO. 2787, 2788, 2789, 2790 AND 2791.
6. That of the five portions, two portions were transferred to the plaintiff/respondent's two wives, one portion was transferred to the plaintiff/respondent herein, another portion was transferred to a purchaser introduced by the plaintiff/respondent and the last one was retained by the defendant/applicant.
7. That the defendant/applicant's mother being a daughter of Rwanda Mirero was entitled to a portion of the ancestral property, and the defendant /applicant was registered as the holder of her late mother's interests in the ancestral land who had since passed on.
8. That the defendant/applicant is therefore the true and proper holder of L.R. No. S. Tharaka/Tunyai/2788 measuring approximately 1.70 Hectares ("the suit land herein") ha with the full consent and authority of her siblings owing to the vast assistance she has made in uplifting their livelihood.
9. That sometimes in the month of April, I heard rumours that the suit land was up for sale and upon inquiry from the defendant/applicant via her email address (orad@live.com), she reiterated that the land was not on sale as she still held the original title deed in the USA.
10. That when the rumours of the suit land being on sale persisted, I decided to apply for a certificate of search which revealed that although the land was still registered under the name of the defendant/applicant, the same was encumbered pursuant to an order of the court issued vide Meru ELC Case No. 137 of 2013. (Annexed herein and marked SMM 2 is a copy of the search certificate dated 11th April, 2018.
11. That accompanied by the applicant's advocate on record, we attended the Meru ELC Court registry to peruse the court file No. 137 of 2013 however the same was not readily available since it could not be found in the bundle.
12. That after several weeks of searching for the file at the registry the applicant's advocate called me with information that the file had been transferred to Chuka ELC Court which had the territorial jurisdiction over the subject matter, and re-referenced as Chuka ELC Case No. 214 of 2017.
13. That I received verbal instructions from the defendant/applicant to apply for the pleadings and a copy of the court record with further instructions to convey them to her advocate for further action. Vide my letter dated 14th May, 2018 and received at the registry on the same day, I was supplied with copies of the court record after paying the requisite fees vide receipt No. 2834486.
14. That I have been advised by the applicant's advocate that the matter proceeded ex-parte and an ex-parte judgment was delivered on 2nd January, 2018 which allowed the prayers as sought by the plaintiff in the plaint.
15. That I have further been informed by the applicant's advocate that the affidavit of service of summons sworn by a process server namely Stanley Mworira M'Mbui on 13th October, 2014 categorically states under paragraph 3, that he was informed by the area chief that the applicant had migrated to America, a fact which confirms that the applicant was never served to the standards required by the law.
16. That there is nowhere on the record which shows that the plaintiff/respondent made any further effort of serving the applicant despite the applicant being in Kenya for a period of almost three (3) months (From 13th August, 2015 to 8th November, 2015) which was within the full knowledge of the plaintiff/respondent. (Annexed herein and marked SMM 3 is a copy of the applicant's passport).

17. That notwithstanding, when the matter was transferred from Meru to Chuka ELC Court the applicant was not in any way notified of the same as the plaintiff's pleadings never disclosed her last known address in Kenya which is P. O. Box 1 Mitunguu and not Tharaka Nithi County as vaguely described under paragraph 2 of the plaint.

18. That I therefore urge this honourable court to stay the execution of the ex-parte judgment delivered on 22nd January, 2018 and further set it aside to enable the defendant/applicant to enter appearance and file her defence unconditionally.

19. That I verily believe that the plaintiff will not suffer any prejudice should the orders sought in the application annexed hereto and filed herewith be granted.

20. That I therefore make this affidavit in support of the application annexed herein and filed herewith.

21. That what is stated above is true and to my own knowledge save as to matters deposed to on information and belief the sources and ground whereof having been specified and set out hereinabove.

5. When the application was heard interpartes on 26th June, 2018, Mr. Kaumbi, the defendant/applicant's advocate told the court that the application and the hearing date had been served upon the plaintiff who was in court. He asked the court to allow the application because it was not opposed as the applicant had not filed a replying affidavit or any other document in opposition to the application.

6. The plaintiff/respondent told the court that the suit land had a curse upon the defendant/applicant. He went on to say that she would surely die if she set her foot upon the suit land. He also said that a local politician was inciting the applicant to file this application.

7. I agree with the applicant's advocate that this application has not been opposed. In the circumstances, prayer 3 in the application is allowed with the consequences that this court's judgment delivered on 22nd January, 2018 is set aside and the defendant is granted unconditional leave to file her defence within 14 days after delivery of this ruling.

8. Costs shall be in the cause.

9. It is so ordered.

Delivered in open court at Chuka this **27th day of June, 2018** in the presence of:

CA: Ndegwa

Makunyi Rwanda – Plaintiff /Respondent

Kijaru h/b Kaumbi for the Defendant/Applicant

P.M. NJOROGÉ

JUDGE