Mary Mugo & others t/a Metpat Enterprises & another v Obadiah H. Wainaina t/ a County Maps Agencies & 2 others; JD Spot Limited (Interested Party) (Environment & Land Case 950 of 2013) [2024] KEELC 322 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 322 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 950 OF 2013

JA MOGENI, J

JANUARY 25, 2024

BETWEEN

MARY MUGO & OTHERS T/A METPAT ENTERPRISES ..... 1ST PLAINTIFF

JULIUS MAINA NDIRANGU ..... 2ND PLAINTIFF

AND

OBADIAH H. WAINAINA T/A COUNTY MAPS AGENCIES ... 1ST DEFENDANT

KARIUA MWIRUKIA FARMERS CO-OPERATIVE SOCIETY .... 2ND DEFENDANT

JUDY WAMAITHA THUO ..... 3RD DEFENDANT

AND

JD SPOT LIMITED ..... INTERESTED PARTY

RULING

1. Judgment in the instant suit was issued on 20/9/2023 by which the 2nd plaintiff was declared the owner of the suit property and the 1st and 2nd defendants were directed to effect transfer to the 2nd plaintiff among other orders all aimed at ensuring that the 2nd plaintiff is restored as the rightful owner of the suit property. They were also condemned to pay the plaintiff damages for trespass.

2. The current applicant now claims not to have been involved in the proceedings in this suit leading to the judgment delivered on 20/09/2023 though the suit touched on Samburu/ Mwitungiri/ Block 1/2087 which they claim to have occupied since the executing a long-term lease which was registered on 7/07/2021. That pursuant to the lease the Interested Party has invested and developed a multi-million establishments on the suit property to completion and was due to commission and/or open the public.

3. It states that it was not served with process and they were not aware of the proceedings in the instant suit as they were not enjoined in the suit. It claims to have been misled, through misrepresentation and withholding of material information on existence of the dispute and court case plus various court order issued in respect of the state of the suit property and existence of a court judgment by the 3rd Defendant.

4. That the applicant has become apprehensive that the 2nd plaintiff will execute the judgment yet the Interested Party has invested heavily on the suit property which project has been going for the last few years. The Interested Party prays for setting aside of the judgment and stay of execution of the judgment and unconditional leave for joinder as a defendant so as to enter appearance and defend the suit. It is claimed that the joinder of the applicant is necessary for the effectual and complete adjudication and settlement of all the questions in the suit.

5. The application has been brought after one month of issuance of the judgment it is dated 3/11/2023.

The Application

6. The Notice of Motion dated 3/11/2023 by the applicant who is the proposed Interested Party is brought under Order 10 rule 11 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the *Civil Procedure Act*. The proposed Interested Party/defendant sought for the following orders:

    1. Spent

    2. That pending the inter partes hearing of the Application herein, there be a stay of execution of the judgment, entered on 20th September 2023, and/or decree arising from the suit herein.

    3. That the honorable court be pleased to set aside the ex parte judgment entered on 20th September 2023, and/or the decree herein, and the Defendant unconditional leave to be enjoined as a Defendant, appearance and defend the suit herein.

    4. That costs of this application be provided.

7. The application is supported by the affidavit sworn on 3/11/2023 by one Josphat Nungu Gachichio who describes himself as the director of the Interested Party. It amplifies the grounds set out hereinbefore.

The Response

8. The replying affidavit was filed by the 2nd plaintiff and he depones that this suit was instituted in 2013 and the 3rd defendant was enjoined in 2018. The 3rd defendant while being enjoined found when the court had issued two orders already relating to the suit property. An order of inhibition was issued by Justice Okongo restraining the 3rd defendant from parting with the ownership of the suit property either by sale or transfer till the suit was heard and determined.

9. He further stated that the issues in the suit were tied to ownership of the suit property between the 2nd plaintiff and the 3rd defendant which were heard and determined and the court issued a judgement. It is deponed further that the applicant never indicated steps that he took to be enjoined in the suit and also he did not lay before this court evidence of how he got to know about the judgment of the court.

10. It is his contention that the applicant's claim lays with the 3rd defendant who he has claimed failed to inform him about the suit. That the claim is not against the 2nd plaintiff. He further states that the applicant can claim damages against the 3rd defendant for his developments if at all on the suit property.

11. He terms the application as mischievous since the applicant has no ownership rights and therefore no locus standi to participate in the suit even if it were to be re-opened since the suit is about ownership of the suit property.

12. The 2nd plaintiff contends that this court is functus officio and cannot re-open issues as sought by the applicant having determined the substantive dispute between the parties. That while the applicant seeks to have the "ex parte" judgment set aside under Order 10 rule 11 of the Civil Procedure Rules, the instant suit was determined inter partes and a final judgment entered into it was not an ex parte judgment.

13. That the application is bad in law and should be struck out in limne.

14. The Counsel for the 1st defendants did participate in the application. While the 3rd defendant supported the application and filed submissions dated 5/12/2023. The 2nd plaintiff equally filed submissions dated 20/12/2023. The submissions for the applicant were filed on 28/11/2023.

Analysis and Determination

15. I have perused the application, the supporting affidavits, the replying affidavits and the submissions filed by the parties herein and the issue for determination is only one:

    a. Has the applicant satisfied the court that the judgment in this suit should be set aside?

16. Before I address the two issues that I have listed above, I believe it is prudent that I point out that there is one sub-issue that inform the two issues I have identified. This is this one; Was the applicant enjoined or given a chance to enjoin itself in the instant suit before judgment?

17. On the issue of whether the applicant was given a chance to be enjoined in the instant suit before judgment, I will start by considering the applicant's main ground for seeking setting aside which is that it was not enjoined in the suit and thus it was not heard before the judgment was issued. It cites the case of Nyancha vs Nyagwaka; Barasa (Applicant) ELC 354 of 2016 [2023] KEELC 215 (KLR) 26 January 2023 (Ruling) and states that an application for setting aside judgment in which the applicant seeks joinder is legally competent. I agree that seeking a setting aside order forms the first hurdle in seeking joinder in a concluded suit and the application is therefore properly before the court for consideration.

18. My reading of the cited case by the applicant points to the fact that the issues in the above cited case are completely different from what is the subject in the instant case. The court has unfettered discretion to set aside judgment on such conditions as it may deem just. The judgment in this case may not be construed as interlocutory or ex parte judgment with all the technicalities that those kinds of judgments present in contrast to a regular judgment as was given in this case, this court, aware of the breadth of discretion it has in the matter refers to the decision made by the court in the case of Shah v Mbogo & Another [1967] E.A. where it was held that:

> " The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."

19. At the same time in the case of Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others [2018] eKLR the Court of Appeal in addressing itself to this issue stated:

> " It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court. Ordinarily, when an application to set aside a default judgment and extend time for filing a defence is filed before a court, there are several factors that the court ought to take into account.

20. 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."

21. The Superior Courts have pronounced itself in numerous decisions on the interpretation of the law regarding setting aside of irregular judgment and/or orders. In the case of Patel -vs- E.A Cargo Handling Services Ltd. (1974) EA 75, Sir William Duffus Pheld as follows;-

> " 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. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

22. There is also a decision of the late Sheridan J. in the case of Sebei District Administration -vs- Gasyali (1968) E.A 300 where he adopted the words of Ainley J. (as he then was) in the same court in Jamnadas -vs- Sodha -vs- Gordandas Hemraj (1951) 7 ULR II where he held:-

> " The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonable be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."

23. What can be discerned from the above decisions is that the principles guiding the exercise of the discretion to set aside vary and/or review and ex-parte judgment are numerous but the following are fundamental:

    i. The nature of the claim or action.

    ii. The reasons for the delay in taking the procedural step to either enter appearance or file defence.

    iii. The merits of the defence.

    iv. Whether the plaintiff/Respondent can be compensated by an award of costs.

24. The applicant applies not only to be enjoined but to review and set aside the judgment and the suit be heard de-novo.

25. I do find that after judgment there are no pending proceedings before court, any person who wishes to be heard on grounds that he was a necessary party but was not made party can only apply for review under Order 45 of the Civil Procedure Rules.

26. Further, the applicant has applied to set aside the judgment herein under order 10 rule 11 of the civil procedure rules 2010. This section provides for the setting aside of default judgment and therefore does not apply in this case as the judgment made herein is not default judgment or exparte judgment but a judgment made after inter parte hearing.

27. The distinction between regular and irregular judgments is clear. In the Court of Appeal case CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another [2016] eKLR it was observed as follows:

> " We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 (see Mbogo & Another V Shah (supra); Patel V EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another V Kubende [1986] KLR 492 and CMC Holdings Vs Nzioki [2004]1 KLR 173).
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> In an irregular 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 justiciae, 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). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:
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> "There must be never present to the mind the fact that ours 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 precluded from participating in them.".

28. In the instant case, the judgment was entered after hearing the parties who include the 3rd defendant who apparently leased the suit property to the applicant knowing very well that the court had issued a temporary injunction and a status quo order. It is not enough for the 3rd defendant to claim that the 2nd plaintiff had not registered the orders against the suit property. When the 3rd defendant was enjoined to the suit they had a responsibility to familiarize themselves on the processes and orders that were subsisting at the time of being enjoined.

29. During the hearing the 3rd defendant confirmed that she did not have the title of the suit property but she had other titles. She could not therefore transact or enter into any agreements with regard to the suit property because in the first place it did not belong to her. These are issues that were settled at trial and I see no value of revisiting the same since the court delivered a regular judgment after hearing the parties who claimed interest in the suit property and found for the 2nd plaintiff.

30. The 2nd defendant brazenly allowed the registration of the 3rd defendant's interest in the suit property knowing too well that there were court orders issued against any action on the suit property. These are actions that are bound to cause confusion and untold suffering to would be purchasers of the suit property.

31. Having said that this does not excuse the action of the Interested Party who entered into the "trap" if I may call it so with its eyes wide open! The good news is that they can claim compensation from the 3rd defendant for their investment and if pushed harder maybe from the 2nd defendant who are the custodians of the documents that should have shown all processes undertaken with the suit property. The Interested party has claimed that the 3rd defendant withheld information about the suit from him this should point him to bringing a cause of action against the 3rd defendant and not the 2nd plaintiff who he has no claim against.

32. I do note that it is clear from the records that the agreement between the 3rd defendant and the Interested Party was registered on 7/07/2021 12/7/2016 during the pendency of the suit violating outrightly the doctrine of lis pendens. The doctrine of lis pendens apply as it prevents transfer of the title of any disputed property without the court's consent.

33. Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)- now repealed.

34. In the case of Mawji vs US International University & another (1976) KLR 185, Madan J.A stated thus...

> " Every man is presumed to be attentive to what passes in courts of justice of the state or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of facts affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgement or decree in the suit".

35. I will also move to adopt the words of the court in the case of Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR where it stated that :

> " It will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party.

> Everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, purchase made of a property actually in litigation pendente lite for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit."

36. Considering that it is the 3rd defendant who claimed to have purchased the land, the argument by the proposed Interested Parties that they should have been heard in this matter is a red herring. Indeed, their interests in the suit land were taken care of by the 3rd defendant.

37. Considering that the issue of which land was allegedly purchased by the 3rd defendant has been determined by the court, I find and hold that the proposed Interested Party was not a necessary party in this matter. For that reason, their evidence viz-a-viz the 2nd Plaintiff's claim was not necessary.

38. Having concluded that the proposed Interested Party's interests in respect to the ownership of the suit was ventilated by the 3rd defendant, the right of the Interested Party to be heard in this matter was not breached. Indeed, the Interested Party was not a necessary party.

39. Consequently, the Court finds and holds that the Notice of Motion Application dated 3/11/2023, is not merited and the same is dismissed entirely with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 25th DAY OF JANUARY 2024.

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MOGENI J

JUDGE

In the virtual Presence of:

Mr. Mutungi holding brief for Mr. Kihiko for the Applicant

Mr. Amadamba for the 2nd Plaintiff/Respondent

Mr.Wahome for the 3rd Defendant

None appearance for the 2nd Defendant (Did not participate in the application)

Ms. Caroline Sagina: Court Assistant.

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MOGENI J

JUDGE