



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.346 OF 2017

LYDIA WANJIRU MWANGI.....1ST PLAINTIFF/RESPONDENT

BEATRICE MUMBLI.....2ND PLAINTIFF/RESPONDENT

VERSUS

ESTHER WACHU MURUGA.....DEFENDANT/APPLICANT

RULING

The matter for determination is the *Notice of Motion* application dated **11th September 2017** wherein the Defendant/applicant has sought for the following orders:-

- i. That the Honourable Court be pleased to set aside, vary and/or vacate the orders dated 13th April 2017 pending the hearing and determination of this application and suit.***
- ii. That costs of the application be provided for.***

The application is premised upon the following grounds:-

- 1) That the defendant was never served with the Summons to Enter Appearance nor the requisite pleadings as required by law but was only served with a Court Order issued on 13th April 2017 which gave injunctive orders pending the hearing and determination of the suit.***
- 2) That the Affidavit of Service deposed by one Gibson Wamweya Mburu, an alleged Process Server which was considered by court as proof of service is misleading and tenuous.***
- 3) That in the interests of justice and the right to be heard but before such substantive orders are issued, the court ought to allow the application as prayed.***

Further, the application is supported by the affidavit of **Esther Wachu Muruga**, the Defendant/applicant who deposed that she learnt of the suit herein sometimes in **June 2017** upon being served with the **Court Order** issued on the **13th April 2017** which had granted injunctive reliefs substantially upto the final determination of the suit. That upon seeking legal advice from her advocate, it was noted that she had not been served with summons to enter appearance and the application for injunction.

That upon perusal of the court file, her advocate noted that one **Gibson Wamweya Mburu**, a **Process Server** alleged to have served the Defendant/Applicant but that was misleading as she was never served with **Summons to Enter Appearance** nor the substantive application for injunction. It was her contention that she was denied a chance to defend the application and the Court was therefore misled into confirming the orders as prayed. She further contended that she late got the substantive pleadings from her neighbor one **Richard Mwemi** who had been served with the substantive pleadings. She therefore urged the Court to allow her application as it is only fair and just to do so.

The application is contested and **Lydia Wanjiru Mwangi**, the 1st Plaintiff swore a **Replying Affidavit** and averred that she is an elected official of **Wiyumiririe Women Group, a Self Help Group** and was

authorized to swear the said Affidavit on behalf of the said group. She averred that her advocate has advised her that the instant application is incompetent and fatally defective and should be struck out as it does not seek to set aside the ex parte proceedings that led to the issuance of the ex parte orders which the Applicant seeks to set aside.

She further averred that she has been advised by their advocate that upon filing this suit on their behalf, a qualified process server one

Gibson Wamweya Mburu was served with **Summons to Enter Appearance** and the Hearing notice for the application dated **20th March 2017**. The said service was done on **30th March 2017**. That the said **Process Server** knew the Defendant from the previous service of demand letter prior to the institution of this suit. She therefore deposed that the Defendant/Applicant was duly served and her application is riddled with falsehood and should be dismissed with costs.

The application was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the pleadings in general and the relevant provisions of law and makes the following orders:-

The application is premised under **Order 40 Rule 7** of the **Civil Procedure Rules** which provides:-

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

Further the Application is also premised under Section **3A & 63E** of the **Civil Procedure Act** which donate inherent power to this court to make or issue any orders that are necessary for ensuring that end of justice is met and to prevent abuse of the court process.

It is not in doubt that the Plaintiff's herein filed the instant suit on **20th March 2017** seeking for various orders against the Defendant.

Simultaneously, the Plaintiff's/Respondents also filed a **Notice of Motion** application even dated and sought for injunctive orders against the Defendant/Applicant seeking to restrain the Defendant from any dealings or interfering with the suit property **LR.No.10087/108** situated in **Thika Municipality**.

From the court record, the said application was set for hearing on **6th April 2017**, wherein on the material date, **Mr. Mutua** appeared for the Plaintiffs/Applicants then and there was no appearance for the Defendant. An **Affidavit of Service** was sworn by one **Gibson Wamweya Mburu** on **31st March 2017**, which the Court relied on and allowed **prayer No.3** of the said **Notice of Motion** dated **20th March 2017**. The substantive orders were issued on **13th April 2017**.

This application was filed on **11th September 2017**. A request for **Judgement** was filed on **26th May 2017** and **Memorandum of Appearance** by the Defendant was filed on **8th June 2017** and statement of defence on **11th September 2017**.

It is clear from **Order 40 Rule 7** that the court has discretion to **discharge, vary** or **set aside** any order for injunction upon any application made by any party that is dissatisfied with such orders. As usual the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

The Court has considered the rival written submissions and it is evident that both the Applicant and Respondents relied on the case of **Yamko Yadpaz Industries Ltd...Vs...Kalka Flowers Ltd (2013) eKLR**, where the Court held that:-

“To my mind, in determining this matter I needed to be guided by the principles governing the exercise of judicial discretion as to the setting aside of an ex parte Judgement obtained on default which were clearly set out in the Judgement of the Court of Appeal in the Maina..Vs..Mugiria case as follows:-

The principles governing the exercise of Judicial discretion to set aside an ex parte Judgement obtained in default of either party to attend the hearing are:-

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the suit is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah..Vs..Mbogo (1967) EA 116 at 123B, Shabir Din..Vs..Ram Parkash Anand (1955) 22 EACA 48.

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion had misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo..Vs..Shah (1968) EA 93.

d) The court has no discretion where it appears there has been no proper service (Kanji Naran..Vs..Yelji Ramji (1954) 21 EACA 20).

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith ..Vs..Middleton [1972] SC 30)”

The Defendant/Applicant has alleged that she was not served with the **Summons to Enter Appearance** and the application for injunction and thus she was not aware that the Notice of Motion application dated **20th March 2017** was coming for hearing on **6th April 2017**. It was further submitted that the **Affidavit of Service** by the **Process Server** one **Gibson Wamweya Mburu** was false and thus misleading.

The Court has considered the said **Affidavit of Service** sworn by the **Process Server** which the court relied on and the submissions by the parties herein. The said Process Server deposed on how he visited the rural home of the Defendant and served her with the **Summons to Enter Appearance** and **Hearing Notice** among other pleadings. The Court will concur with the Plaintiffs' submissions that the Defendant has not disputed the nitty details about her home and personal information. The Court is persuaded by the findings of **Makhandia J. (as he then was) in the case of "Nyeri Succession Cause No.122 of 2002, In the Matter of the Estate of Naomi Wanjiru Wachira...Vs...Titus Muraguri Warothe & 2 Others (2009) eKLR**, where the Court held:-

"I am being asked to review my Ruling dated 10th February 2009 on the main ground that the applicant was not served with the application for revocation of grant. When the application for revocation of grant came up for interpartes hearing on 28th January 2009, the Applicant was absent though the Respondents were present, having perused the Affidavit of Service, I was satisfied that the Applicant had been duly served but for reasons that were unclear, she had filed to turn up for the hearing nothing has been brought to the fore by the Applicant either in her supporting or supplementary affidavits to persuade me to think otherwise I was still persuaded that the Applicant was duly served with the hearing notice of the application for revocation of grant. The Applicant does not dispute the fact that she stayed in Bondeni Village in Amboni Sub-location of Mweiga Kieni West Division. I have gleaned this information from the Affidavit of Service sworn by Stephen M. Kamunguya, a Court Process Server, on 27th January 2009. How else would the Process Server have gathered such detailed information about the applicant without it being true? The Applicant claims in her Supplementary Affidavit that though she farms in Mweiga and has a house thereat, her actual home is in Muthinga at Ithekahuno where she was on 1st November 2008. That may well be so. However the Applicant is not saying that she was in Ithekahuno the whole day. She does not say when she went to the said Ithekahuno. She could have been served before she went there or after she had come back..."

The Court finds that there were no good reasons given to dispute that the Defendant/Applicant was duly served and this Court has no reasons to doubt the averments made by the **Process Server** in his **Affidavit of Service** that was filed in court on **4th April 2017**.

Having found that the Defendant/Applicant was duly served, the court will now turn to the other principles to be considered in an application for setting aside.

In exercise of its discretion, the court should consider what is just as the main concern of the court is to do justice. The Court has considered the pleadings in totality. The Plaintiffs have alleged to have purchased a parcel of land from the late **George Muruga Kiari** who owned **LR.No.10087/108**. However, the said **George Muruga Kiari** died before he could transfer the said portion to the Plaintiffs. The Defendant is the administratrix of the Estate of her late husband **George Muruga Kiari**. The Plaintiffs have alleged that the Defendant/Applicant has now subdivided the said parcel of land without considering the portion purchased by the Plaintiffs. In her Defence, the Defendant/Applicant denied knowledge of any purchase of any portion of the suit property by the Plaintiffs. These are disputed facts which can only be considered at the main suit. However for the purpose of justice and fairness, the suit property needs to be preserved. The said preservation can only be done by maintaining the orders for injunctions as granted by the court on **6th April 2017** as the main concern of the court is to do justice to the parties.

The Court has further noted that there was delay in bringing this application. The **Memorandum of Appearance** was filed in **June 2017** and the instant application filed on **11th September 2017**. There was no explanation given for the delay. Instead of filing this application for setting aside the injunctive orders, the Defendant/Applicant should have sought for expeditious disposal of the main suit by complying with Order 11 and setting the suit for main hearing.

For the above reasons, the Court finds no reason to set aside, vacate and or vary the orders issue by the court on **13th April 2017**. Consequently, the Court finds the said application not merited and it is dismissed entirely with costs to the Plaintiffs/Respondents.

The parties to comply with Order 11 within a period of 60 days from the date hereof. Thereafter the matter to be fixed for Pre-trial directions before the Deputy Registrar and then given a hearing date for the main suit

so that the disputed issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

19/10/2018

In the presence of

M/S Karwitha holding brief for Mr. Juma for the Plaintiff/Respondent

Mr. Maina holding for Muturi Njoroge for Defendant/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

19/10/2018