



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.24 OF 2017

VERONICA WANGARI KABOGO.....PLAINTIFF/RESPONDENT

-VERSUS-

JULIUS GITHOME.....1ST DEFENDANT/APPLICANT

ABEDNEGO GACHOMO.....ND DEFENDANT/APPLICANT

GEDION WAMBUA.....3RD DEFENDANT/APPLICANT

SHADRACK NYONGESA

T/A PRAYER REVIVAL FIRE MINISTRY.....4TH DEFENDANT/APPLICANT

RULING

This suit was filed by the Plaintiff on **5th February 2013**, wherein she sought for various orders against the Defendants. The Orders sought in the **Plaint** were:-

- a) An order of eviction against the Defendants, their family members, heirs, servants or agents from land parcels Nos. Thika Municipality Block 2/1030 and 1031 with all structures thereon.**
- b) An order of permanent injunction against the Defendants, their family members, heirs, servants or agents barring them from entering, and/or interfering in any manner with land parcels Nos.Thika Municipality Block 2/1030 and 1031.**
- c) Any other relief as the Court deems just under the circumstances.**

Simultaneous to that **Plaint**, the Plaintiff also filed a **Notice of Motion** application even dated and sought for injunctive orders against the Defendants. The Plaintiff had alleged that she was the registered owner of the suit properties **Thika Municipality Block 2/1030** and **Thika Municipality Block 2/1031** and she attached **Certificates of Lease** that were issued to her on **5th July 2012**.

Upon service of the **Summons to Enter Appearance**, the Defendants filed a **Memorandum of Appearance** through the **Law Firm of Ng'ang'a Munene & Co. Advocates** on **20th February 2013**. Later a **Notice of Change of Advocates** was filed on **15th April 2013** by **Mutuli & Associates Advocates**. A **Replying Affidavit** in response to the Plaintiff's **Notice of Motion** was filed on **2nd May 2013**, and was sworn by **Julius Githome**, one of the Defendants herein.

Further, the Defendants participated in prosecution of the Plaintiff's **Notice of Motion** application for injunction and even filed their written submissions on **21st May 2013** through the said **Law Firm of Mutuli & Associates Advocates**.

Subsequently, the Court delivered a **Ruling** on the said application on **23rd May 2014** and directed that:-

“Status quo to be maintained to the effect that there will be no development carried out on the suit premises.”

Further, parties were to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days of the said **Ruling**. Therefore compliance was to be effected by **end of June 2014**.

However, the Defendants herein did not file any Defence and when the Plaintiff sought for interlocutory Judgement, she was directed to set the matter down for formal proof since there was no Defence on record. The matter was eventually heard on **23rd June 2017** *exparte* and **Judgement** was delivered on **13th October 2017**.

When the Plaintiff tried to enforce the **Decree** of the court, the Defendants herein filed this instant **Notice of Motion** application dated **1st February 2018** and sought for the following orders:-

- 1) *That the Honourable Court be pleased to grant the Firm of Norman Otieno & Co. Advocates leave to come on record on behalf of the Defendants/Applicants in place of the Firm of Mutuli & Associates Advocates and the Notice of change of Advocates herein be deemed as duly served.*
- 2) *That pending the hearing and determination of this application the Honourable Court be pleased to order a Stay of Execution of the Judgement and the resultant Decree and any other consequential Orders obtained against the Defendants/Applicants.*
- 3) *That the Honourable Court be pleased to set aside the proceedings and Judgement and the resultant Decree and any other consequential Orders thereto obtained against the Defendants/Applicants herein.*
- 4) *That the Honourable Court be pleased to grant unconditional leave to the Defendants/Applicants to file a Statement of Defence and take part in the main trial of the suit. Thereafter the Honourable Court be pleased to issue any other consequential Orders as may be fair, just and proportionate and expedient in the circumstances.*
- 5) *That the costs of this application be in the cause.*

The said application is premised on the following grounds:-

- 1) *That hearing of the main suit proceeded *exparte* on the 23rd May 2017 in absence of counsel for the Defendants/Applicants whereas the Hearing Notice was received under protest and grounds advanced on the face thereof as to why the said Counsel would not be able to proceed on the material date. Moreover, the said Hearing Notice was served upon the Firm of Norman Otieno & Co. Advocates instead of Mutuli & Associates advocates, whereas a Change of Advocates had not been effected as required by the Law.*
- 2) *That the Defendants/Applicants have a cogent Defence based on merits to the Plaintiff's/Respondent's claim which raised triable issues and are ready and willing to agitate the same in a substantive trial in which they are allowed to take part.*
- 3) *That neither the Defendants/Applicants nor their Advocates on record were served with any Notice of entry of Judgement as stipulated by the Law.*
- 4) *That the Defendants/Applicants are equally ready and willing to abide by any terms as may be imposed by the Honourable Court pursuant to the ends of justice being met and to ensure the expeditious disposal of the suit.*
- 5) *That no form of prejudice whatsoever will be occasioned on the part of the Plaintiffs/Applicants if the prayers sought are granted since the Defendants/Applicants actively operate a Church on the suit property. However the Defendant/Applicants stand to suffer immense prejudice if the status quo remains as it is.*
- 6) *That in the premises it is just, fair, proportionate and in the wider interest of justice that the orders sought be granted to avert a miscarriage of justice.*

Further the application is supported by the **Affidavit** of **Norman Otieno Advocate** who admitted that he was served with a **Hearing Notice** on **12th May 2017** by the Plaintiff's Advocates for hearing on **23rd May 2017**. However, it was received under protest because the Advocate handling the matter was to be away in **Gatundu Law Courts** in a matter fixed earlier. That the Defendants were only aware of entry of **Judgement** on **29th January 2018**, when they were served with the **Decree**. He urged the Court to allow the application for the interest of justice and fairness.

The application is contested by the Plaintiff/Respondent who filed a **Replying Affidavit** on **5th April 2018** and averred that she is the registered owner of the suit plots **Thika Municipality Block 2/1030 & 1031**. She also averred that the suit herein was filed on **4th February 2013**, and the Defendants were served with **Summons to Enter Appearance** on **20th February 2013**. However, though the Defendants participated in the interlocutory application, they failed to file their Defence. The suit was thereafter set down for formal proof and though the Defendants' Advocate was served with **Hearing Notice** for **23rd May 2017**, he failed to attend court and so did the Defendants. Thereafter Judgement was entered in favour of the Plaintiff/Respondent and that the said application is misconceived. She urged the Court to dismiss it.

The application was canvassed by way of **written submissions** which this court has carefully considered. The court too has considered the general pleadings and the court records in totality and will ender itself as follows:-

The Defendants/Applicants have anchored this application under various provisions of law. The basic ones are **Sections 1A, 1B, 3A and 63(e)** of the **Civil procedure Act**.

Basically **Sections 1A & 1B** deals with the overriding objective of the Act which empowers the court to facilitate the **just, proportionate, expeditious** and **affordable** disposals of matter before it and which matters are governed under the said Act.

Further, **Section 3A** donates the inherent power to court to make such orders that are necessary for the end of justice and to prevent abuse of the court process.

As the Court embarks on determination of the instant application, it will take into account the above provisions of law and also the provision of **Article 159(2)(d)** of the **Constitution**.

It is apparent that the Defendants herein did not file their Defence though they were served with **Summons to Enter Appearance** and they even participated in the prosecution of the interlocutory application filed by the Plaintiff. The Court subsequently ruled on the said application and ordered that **status quo** to be maintained. However, the Defendants/Applicants have averred that they have put up development on the suit properties and it is apparent that they did not adhere to the **Status Quo Order** issued by the Court on **23rd May 2014**. The Court can therefore hold that they are in Contempt of Court Order.

Further, the Court directed that parties were to comply with Order 11 within a period of **30 days** from **23rd May 2014**. The Defendants failed to do so and therefore the Plaintiff was justified in setting the matter down for hearing as provided by Law. See **Order 10 Rule 9** which provides:-

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

Further, it is apparent that **Norman Otieno Advocate** received the Hearing Notice on **12th May 2017**, and indicated that the said Notice was received **under protest** because **Mr. Otieno** would be in **Gatundu Law Courts** then. Though **Mr. Otieno** alleges that the said Notice was served on his Firm instead of **Mutuli Associates**, it is apparent in Paragraph 4 of his affidavit that he has averred that the Counsel handling the matter was to be away in **Gatundu Law Courts** for a matter earlier fixed. It is therefore an admission that **Mr. Otieno** was indeed the one handling the matter.

Further, even if **Mr. Otieno** received the **Hearing Notice under protest**, he did not send anyone to hold his brief and the Defendants were also not present in court. Since no Defence has been filed from **2013**, it is possible that the Defendants herein had lost interest in the matter especially given that they had not adhered to the **Status Quo Order** issued on **23rd May 2015**.

The Defendants/Applicants have sought for setting aside of the proceedings of **23rd May 2017** and the subsequent **Judgment** entered on **13th October 2017** and that they be allowed to file their Defence. However, no draft Defence was attached to the instant application and this Court cannot hold and find that the Defendants/Applicants herein have a plausible Defence with triable issues. See the case of **Gateway Insurance Co. Ltd...Vs...Mohammed Athman Mjahid, Civil Appeal No.180 of 2001**, where the Court held that:

“Where there is no draft Defence annexed to the application for setting aside exparte Judgement under Order IXA Rule 10 of the Civil Procedure Rules, the court is not expected to consider the nature of the Defence involved and it is left in a situation where all it has to do is to decide whether or not the Judgement has been regularly entered”.

Further, the reasons given for failure to attend court are not convincing given that even if the Advocate handling the matter was indeed engaged in **Gatundu Law Courts** which is subordinate to this Court, then the Defendants should have been present in court to show their seriousness and interest in the matter.

The Defendants/Applicants have alleged that the setting aside of **Judgement** herein would not prejudice the Plaintiff at all. However, it is instructive to note that the suit herein was filed in **February 2013** and this is a matter that is over **5 years** and ought to have been finalized by **31st December 2018**. Indeed the matter herein was finalized on **13th October 2017**.

The Plaintiff had waited for a period of **4 years** to obtain the said Judgment. She had done all that was regular as provided by the **Civil Procedure Act and Rules**. However, the Defendants failed to file their Defence and also failed to attend court. Further they failed to comply with the **Status Quo Order** that was issued on **23rd May 2014** and thus they are in Contempt of Court Order. The Defendants have not come to court with clean hands and they should not expect to benefit discretionary orders of the court.

The Plaintiff is in possession of **Certificate of Lease** issued on **5th July 2012**. She has waited for a long time to enjoy ownership of the said suit properties. By setting aside a regular **Judgement** that was entered in her favour, the said orders would be prejudicial and would go against the tenets of **Sections 1A & 1B** of the **Civil Procedure Act** wherein the Court is called upon to facilitate a **just** and **expeditious** disposal of the matters before it. Further by setting aside the said **Judgement**, the said act would not be in tandem with affordable resolution of disputes before the court.

Justice is both to the Plaintiff and the Defendants. The Defendants had all the opportunities from **2013** to **2017** to file their Defence. They failed to do so and they would now wish to deny the Plaintiff the enjoyment of the fruits of her **Judgement** by seeking to have the proceedings of **23rd May 2017** and the subsequent **Judgement** of **13th October 2017** in favour of the Plaintiff set aside. The Court finds the Defendants'/Applicants' instant application is an abuse of the court process and is not merited.

Therefore, the Court finds that as provided by **Section 3A** of the **Civil Procedure Act**, the necessary orders herein that would ensure end of justice is met and which would prevent abuse of the court process is the one of disallowing the instant application.

Consequently, the Court finds that the instant *Notice of Motion* dated *1st February 2018* is *not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent*.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Madegwa holding brief for Mr. Kamiro for Plaintiff/Respondent

Mr. Karuga holding brief for Mr Otieno for Defendants/Applicants

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/11/2018