



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 123 OF 2013

WILLIAM KOIPITAT MAYON.....PLAINTIFF

VERSUS

SAMOEI OIENAKI KUKU.....1ND DEFENDANT

ANTHONY ATANGA KUTWA.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th October 2014 in which the Defendants/Applicants seek for the following orders:

1. Stay of execution of the decree herein;
2. Pending the hearing and determination of this suit, the court be pleased to issue a temporary injunction order restraining the Plaintiff from trespassing, wasting, damaging, alienating, removing, disposing off, selling, parting with possession or interfering with the parcels of land known as Kajiado/Kaputiei North/68294 -68303 (the "suit properties");
3. That this Honourable court be pleased to set aside judgment delivered on 9th May 2014;
4. That the cost of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 2nd Defendant, Antony Atanga Kutwa, sworn on 28th October 2014 in which he averred that he was not aware of this suit until he got someone to purchase the suit properties when the Plaintiff threatened him with a panga claiming that he was encroaching on his land. He further averred that the Plaintiff's actions prompted him to carry out a search at the Ministry of Lands where he learned that this court has issued a decree stating that the suit properties belong to the Plaintiff. He further averred that he instructed his lawyers who confirmed to him that this suit was heard ex parte on 25th February 2014 pursuant to an affidavit of service dated 18th February 2013 sworn by the Plaintiff and another sworn by Francis Maina dated 22nd August 2013. He added that Judgment in this suit was entered on 9th May 2014 and a decree extracted on 26th May 2014. He further averred that while this suit was commenced by way of Originating summons on 19th February 2013, summonses were not served personally to him or the 1st

Defendant despite the fact that the 1st Defendant and the Plaintiff are neighbours. He annexed a copy of a letter from the Chief to attest to this fact. He further averred that the Plaintiff obtained an order authorizing him to serve by way of substituted service by misleading the court that he did not know the Defendants in order for the suit to proceed without their participation. He added that the Plaintiff could readily access them but chose not to. He averred that the interlocutory judgment entered against them should be set aside for improper service. He further added that the matter proceeded to formal proof and again they were not served with the hearing notice personally due to falsehoods peddled by the Plaintiff regarding their availability. He added that he is the registered proprietor of the suit properties since the year 2007 after purchasing the same from Sanirei Olepaki Kuku, the 1st Defendant herein while the parcel was not yet subdivided and was identified as Kajiado/Kaputiei North/3910. He added that in the year 2013, he decided to subdivide the whole parcel into 10 portions of 5 acres each without any interference from the Plaintiff. He stated further that he sought consent to subdivide from the Land Control Board which was approved and he went ahead to subdivide without any interference from the Plaintiff. He further added that after subdivision, he applied for the ten title deeds in his name which he obtained. He annexed copies of those title deeds. He further averred that he is surprised by the turn of events owing to the Judgment entered into this case. He urged the court to allow this Application in the interest of justice.

The Application is contested. The Plaintiff, William Koipitat Mayon, filed his Replying Affidavit sworn on 4th November 2014 in which he averred that the Originating Summons dated 24th January 2013 was served as ordered by the court on the Defendants by way of substituted service. He annexed a copy of the order and the advertisement. He further added that he does not know the Defendants nor where they reside. He further added that being resident in the same location does not mean that he knows the Defendants. He further added that the Defendants proceeded to subdivide the suit properties in order to defeat the orders issued in his favour. He urged the court to reject this Application.

The 1st Defendant/Applicant, Antony Atanga Kutwa, filed his Further Affidavit sworn on 29th June 2015 in which he averred that the Plaintiff is just malicious and out to abuse the process of the court because he filed a suit against his other neighbor asking for orders of adverse possession using the same grounds and same issues. He added that he has since recorded a complaint at the CID Offices to which investigation is ongoing. He annexed a copy of the Investigation Report which indicates that the Plaintiff was never a resident on the suit properties as he alleged. He further averred that the Plaintiff's mother is not buried in the suit properties as alleged. The 1st Defendant/Applicant also filed a Further Affidavit sworn on 13th October 2015 in which he averred that he complained against the Plaintiff at the Kajiado CID Headquarters for falsely lying under oath to the court that he was a resident of the suit properties which is false. He added that the investigation was concluded and the same is with the office of the Director of Public Prosecution, a copy of which he annexed. He further stated that if the court is satisfied that there was no service of the pleadings as is the case in this matter, then the Judgment should be set aside and the matter proceed to hearing afresh. He reiterated that he had no notice of the proceedings in the court and that the orders have unjustly caused him undue hardship and difficulties regarding his property the subject matter of this suit.

Both the Defendants and the Plaintiff filed their respective submissions.

The foremost issue that I must determine is whether or not to set aside the Judgment delivered by this court on 9th May 2014. This was an ex parte judgment arising out of a formal proof. The applicable law is to be found in **Order 10 rule 11** of the Civil Procedure Rules, 2010 which states 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.”

This provision no doubt gives a Judge a wide latitude in deciding whether or not to set aside an ex parte judgment as in the case here. For guidance, I look to the decision of **Dufus P. in Patel vs. EA Cargo Handling Services (1974) EA 75** where he stated as follows:

“The main concern of the court is to do justice to the parties, and court will not impose

conditions on itself to fetter the wide discretion given to 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.”

In the instant suit, the issue is that the judgment is ex parte and not a regular judgment. The Defendant/Applicants main argument is that though the Plaintiff was in a position to access them by virtue of living in the same location, the Plaintiff instead opted to exclude them from participating in this suit by deliberately seeking to serve them with process through substituted service instead of personal service. For further guidance, I will rely on the decision of Hon Justice Isaac Lenaola in Kenya National Union of Teachers Meru Branch versus Michael Kungu Kigia (2006) where he stated as follows:

“When setting aside an ex parte judgment I understand the exercise of that power to be one to be so exercised so that every party has the right to be heard and to have its day in court. I also understand that it should not be exercised to assist a party bent on delay or evasion of clear responsibility, or party acting to obstruct the cause of justice..”

Having regard to the totality of the circumstances in this suit, I do form the overall impression that the Plaintiff could have indeed succeeded in serving the Defendants personally if effort had been made. The bona fides of the Plaintiff therefore comes into question. The court is given wide latitude in determining whether to set aside an ex part judgment. In this suit, I strongly feel that the Defendants should be given their day in court and should be given their chance to present their case before this court can conclusively determine the issue of the ownership of the suit properties. To that extent therefore, I hereby proceed to set aside the Judgment delivered on 9th May 2014 as well as the consequent decree and any other orders emanating therefrom. I direct that the matter proceed to pretrial procedures to prepare the way to a fresh trial of this suit.

The Defendants/Applicants have also sought an order of temporary injunction to prevent the alienation of the suit properties by the Plaintiff. I do not believe any evidence has been presented before this court to indicate that the suit properties have as yet been transferred into the name of the Plaintiff. For now, I do order that the status quo currently prevailing be maintained until the hearing and determination of this suit. Costs in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY 2017.

MARY M. GITUMBI

JUDGE