



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 293 OF 2014

**IBRAHIM MURIITHI MUTUGI (Suing as the
administrator and legal representative of the Estate of
MUTUGI NGURI KIMBIRU (deceased).....PLAINTIFF**

VERSUS

MARGARET WANGECHI KAROKI.....1ST DEFENDANT

JOHN MUNENE ANDEREA.....2ND DEFENDANT

RULING

On 20th March 2015, this Court delivered a judgment in favour of the plaintiff against the defendants declaring that land parcel No. MWERUA/KAGIO/522 belonged to the deceased father of the plaintiff one **MUTUGI NGURI KIMBIRU** and that the sub-division of the said land into MWERUA/KAGIO/714 and 715 was fraudulent and should be revoked. That judgment was obtained following an ex-parte hearing of the plaintiff's case on 9th March 2015 after interlocutory judgment had been entered against the defendants on 4th February 2015 after they allegedly failed to enter appearance or file any defence having been properly served with the plaint and summons herein.

On 2nd October 2015, the 1st defendant filed a Notice of Motion which is the subject of this ruling seeking the following orders:-

- a. That the judgment delivered on 20th March 2015, the evidence taken thereupto and all consequential orders in furtherance thereof be set aside.*
- b. That the 1st defendant be granted leave to enter appearance and file her defence as appropriate and the suit be heard inter-parte.*
- c. That costs of this application be paid by the plaintiff.*

The application which is premised on the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act Order 5 Rule 1 and 6 and order 10 Rule 11 of the Civil Procedure Rules** is based on the grounds set out therein and supported by the affidavit of the 1st defendant **MARGARET WANGECHI KAROKI**.

It is the 1st defendant's case that she was never served with the summons to enter appearance or the plaint

in this case and that the affidavit of one **COLLINS OMONDI** who described himself as a Court Process Server and who had sworn an affidavit dated 19th December 2014 alleging to have served both her and the 2nd defendant is not true because on the alleged date of service which was on 13th November 2014, she was not at Karatina and neither is she a spouse of the 2nd defendant as alleged in the affidavit of service. The 1st defendant further annexed to her application the death certificate of the 2nd defendant confirming that infact he died on 23rd February 2005 – annexure **MWK 2**.

In response, the plaintiff filed a replying affidavit in which he deponed, inter alia, that the application is frivolous, vexatious and an abuse of the Court process, that the 1st defendant has no locus to prosecute this matter as she is not the executor nor administrator of the Estate of the 2nd defendant and cannot therefore introduce documents concerning the 2nd defendant. That his father did not sell the land subject of this suit to the 1st defendant and no title deed has been annexed as proof of such sale. That the death certificate of the 2nd defendant was obtained in suspicious manner. That the judgment sought to be set aside has already been executed.

When the application came up for hearing on 20th March 2017, **MR. WAKABA** advocate held brief for **MR. AGONGA** advocate who had come on record on behalf of the plaintiff on 17th March 2017 in place of **MR. MOSI** advocate who was previously on record when the judgment sought to be set aside was obtained in favour of the plaintiff. **MR. WAKABA** sought an adjournment on the ground that **MR. AGONGA** had just come on record and needed time to familiarize himself with the case. **MR. GICHUKI** advocate for the 1st defendant informed the Court that **MR. AGONGA** was not properly on record as **MR. MOSI** who was previously on record had earlier sought and was allowed time to apply to cease acting for the plaintiff but had not done so. I refused to further adjourn this case and directed that I would deliver a ruling based on the parties' affidavits on record since the plaintiff had already filed a reply to the application.

I must first consider if the firm of **ABDUL AGONGA & ASSOCIATES** is properly on record on behalf of the plaintiff. It is clear that the plaintiff was previously represented by the firm of **MOSI & COMPANY** Advocates upto the time the judgment sought to be set aside was obtained on 20th March 2015. The firm of **ABDUL AGONGA & ASSOCIATES** Advocates only came on record on 17th March 2017. They are therefore not properly on record because **Order 9 Rule 9 of the Civil Procedure Rules** provides as follows:

‘When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.

It is clear that in this case, there has been no compliance with the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** as there is neither an application filed by the firm of **ABDUL AGONGA & ASSOCIATES** Advocates to come on record in place of the firm of **MOSI & COMPANY** Advocates nor any consent filed by the two firms. It was in light of the above that this Court on 20th March 2017 rejected an application by **MR. WAKABA** advocate seeking time to enable **MR. AGONGA** advocate to peruse the file. I therefore rule that the firm of **ABDUL AGONGA** Advocates are not properly on record for the plaintiff in this matter.

I shall now deal with the merits of the 1st defendant's Notice of Motion seeking to set aside the judgment dated 20th March 2015.

That judgment was obtained following an ex-parte hearing after interlocutory judgment had been obtained against the defendants on 4th February 2015 following an affidavit filed by one **COLLINS OMONDI** a clerk at the firm of **MOSI & COMPANY** Advocates dated 9th December 2014. In that affidavit, the

said **COLLINS OMONDI** describes how on 13th November 2014 he was accompanied by the plaintiff to Mwanda Shopping Center to effect service of summons and plaint on the defendants. In paragraphs 5, 6 and 7 of the said affidavit, he describes what transpired upon arrival at the said Mwanda Shopping Center Karatina in company of the plaintiff:-

5: “That the plaintiff made a phone call where he talked to someone and then informed me that the person he just talked to is the 2nd defendant of which we were to wait for him at Kwa Mercy Hotel”

6: That he came after 10 minutes and on meeting him, I introduced myself and explained the purpose of my visit. He confirmed to me that he is Mr. John Munene Anderea and that he was aware of the matter and the 1st defendant was his 2nd wife. I insisted to serve her in person and he excused himself to make a phone call and after 15 minutes, a lady came who he introduced as his wife the 1st defendant herein”

7: “That I thereafter served them at about 1.30 p.m. with the summons to enter appearance and copy of the plaint which they accepted but declined to sign on my original copies returned to this Honourable Court served but not signed”.

In rebutting the above averments, the 1st defendant has deponed that she was not in Karatina on the alleged date of service nor has she ever met **COLLINS OMONDI** and neither is she the wife of the 2nd defendant. Most significantly, she produced the death certificate of the 2nd defendant showing that infact he died on 23rd February 2005 meaning therefore that he could not have been served on 13th November 2014 as alleged. In response to that averment, the plaintiff took issue with the said death certificate stating that it was obtained “*suspiciously*” and the 1st defendant is not an administrator of the Estate of the 2nd defendant and therefore has no locus standi to prosecute this matter. The plaintiff admits that the 2nd defendant is infact deceased because in paragraph 5 of his replying affidavit, he depones as follows”

5: “That the 1st defendant/applicant has no valid authority or locus standi to prosecute this matter on behalf of the 2nd defendant as she is neither the Executor nor the Administrator of the Estate of the 2nd defendant hence has no authority to introduce documents that concern the 2nd defendant”

The plaintiff then proceeds to state that the death certificate is “*suspicious*”. The plaintiff has himself conceded that the 2nd defendant is deceased. Under **Section 83 (1) of the Evidence Act**, this Court is entitled to presume that the death certificate (annexture **MWK 2**) dated 6th November 2006 and signed by the District Registrar Kirinyaga District is a genuine document and therefore sufficient proof that the 2nd defendant died on 23rd February 2005 aged 74 years. There is no evidence that the said death certificate is a fraud. The plaintiff questions how the 1st defendant obtained the said death certificate. The simple answer to that question is that it is a public document and what is important is not how it was obtained but rather, whether it is relevant in this application. In **KURUMA KANIU VS REPUBLIC 1955 A.C 197**, the Privy Council held that “*the test to be applied both in civil and criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained*”.

It is therefore clear from the above that, contrary to the averment of **COLLINS OMONDI** to the effect that on 13th November 2014 he served both the 1st and 2nd defendants with the summons to enter appearance and plaint in this case, the 2nd defendant had infact died some 9 years earlier. That averment cannot therefore be true. Of course the process server would not have known that the person he served was not the 2nd defendant. He was misled by the plaintiff who purported to make a phone call pretending to be calling the 2nd defendant. The affidavit of service by **COLLINS OMONDI** is therefore clearly false and cannot be relied upon to support the interlocutory judgment dated 4th February 2015 or even the final judgment dated 20th March 2015 which must therefore be set aside ex debito justitiae. This is because, once an averment in an affidavit is confirmed to be false, then the whole affidavit must suffer the same fate of being discredited since the Court cannot determine which averments are true and which ones are false. This Court must therefore conclude that even the 1st defendant was not at Karatina on 13th

November 2014 as alleged by the process server and that averment is equally false. Swearing a false affidavit is a criminal offence. **Section 114 of the Penal Code** states that:

“Any person who swears falsely or makes a false affirmation or declaration before any person authorized to administer an oath or take a declaration upon a matter of public concern under such circumstances that the false swearing or declaration if committed in a judicial proceedings would have amounted to perjury, is guilty of a misdemeanour”.

I have said enough to demonstrate that the 1st defendant’s Notice of Motion dated 30th September 2015 and filed herein on 2nd October 2015 is well merited and must be allowed. The judgment dated 20th March 2015 must be set aside as a matter of right as it was premised on a false affidavit. Although setting aside an ex-parte judgment is at the discretion of the Court taking into account all the prevailing circumstances of each case, such discretion must be exercised on firm grounds. However, where there was no proper service as is the case herein, the Court has really no discretion in the matter and must set aside the resultant judgment as a matter of course – **KANJI NARAN VS VELJI RAMJI (1954) 21 E.A.C.A 20.**

Ultimately therefore, this Court makes the following orders:-

- 1. The judgment dated 20th March 2015 and the evidence taken thereupto and all consequential orders in furtherance thereof are hereby set aside.***
- 2. The 1st defendant is granted leave to enter appearance and file her defence as appropriate within 14 days of this ruling.***
- 3. The plaintiff shall have 14 days from the date of service to file any reply so that the suit can thereafter be heard inter-parte.***
- 4. The plaintiff shall meet the costs of this application as he was the one who misled the process server in effecting service on the wrong persons.***

B.N. OLAO

JUDGE

31ST MARCH, 2017

Ruling delivered, dated and signed in open Court this 31st day of March 2017

Plaintiff - absent

1st Defendant - present

2nd Defendant – deceased.

B.N. OLAO

JUDGE

31ST MARCH, 2017