



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 150 OF 2013

KIMINISI OLE NGENDA.....PLAINTIFF

VERSUS

MATAIYA KANTAI.....1ST DEFENDANT

NEYIO KANTAI.....2ND DEFENDANT

R U L I N G

1. The plaintiff vide a plaint dated 2nd April 2013 filed in court on 3rd April 2013 averred that he was at all material times the registered owner of all that parcel of land known as **LR No. Trans Mara/Moita/503**(hereinafter referred to as "**the suit property**"). The plaintiff sought the following reliefs:-

- a) A declaration that the plaintiff is the registered and / or lawful owner of LR. No. Trans Mara/Moita/503 ("the suit property") measuring 15.82 ha.**
- b) An order of eviction against the defendants, heir servants and/ or agents from the suit property.**
- c) Permanent injunction restraining the defendants by themselves and/or their agents, servants and /or anyone claiming under them from entering upon, re-entering, trespassing onto, cultivating, grazing on, building structures, cutting down trees, interfering with and/or in any other manner dealing with the suit property and any portion thereof.**
- d) General damages for trespass.**
- e) Interest on (d) at court rates.**
- f) Costs of the suit together with interest thereon.**
- g) Such further and/ or other relief as the court may deem and expedient to grant.**

2. The plaintiff averred that he purchased the suit property from one, John Mutetia who was the registered owner and that following the purchase the suit property was transferred and registered in his name on 20th December, 2012. The plaintiff averred that in the month of February 2013, the defendants entered into the suit property without his permission or authority and commenced cultivation thereon and the 2nd defendant erected a structure on the suit property and started residing therein. The plaintiff contended that the defendants activities aforesaid have deprived him of the use of the suit property and the benefits

attendant thereto necessitating the institution of the instant suit.

3. The defendants on their part entered appearance and filed a joint statement of defence on 9th May 2013. The defendants denied the plaintiff's claim in its entirety and contended that John Mutetia had no valid title to the suit property that he could pass to the plaintiff. The defendants stated that they had adversely occupied and possessed the land for a period of over 12 years consequently extinguishing John Mutetia's title to the land and thus denied the plaintiff's claim that they trespassed onto the suit premises in 2013. When the suit came up for hearing on 30th June 2015, neither the defendants nor their advocates attended court. The court after satisfying itself that indeed the defendants had been served with a hearing notice, proceeded to hear the suit *ex parte*.

4. In its judgment, the court observed that although the defendants had contended in their statement of defence that they are in occupation of the suit property as of right having acquired the same by adverse possession, they placed no evidence before the court in support of that contention. On the other hand, the court observed the plaintiff's evidence was not controverted by the defendants. The court entered judgment against the defendants in favour of the plaintiff in terms of prayers (i), (ii), and (iii) of the plaint dated 2nd April 2013.

5. The defendants have now filed a Notice of Motion application dated 18th May 2016 under Orders 12 Rule 7 and 51, Rule 1 of the Civil Procedure Rules 2010 for orders that:-

1. THAT the *ex parte* judgment entered herein on the 4th of April 2016 and all consequential orders be set aside so that the suit can be heard *inter partes*.

2. THAT costs be in the cause.

The application was supported by a supporting affidavit by the 1st defendant with the authority of the 2nd defendant. The defendants averred that in early May 2016 they got information from their advocate on record P.N Kiarie Advocate that judgment had been entered *ex parte* on the 8th of April 2016.

6. The defendants averred that upon contacting their advocate previously on record, the said advocate stated that he had not been served with a hearing notice for 30th June 2015 when the suit was heard and the advocate has sworn an affidavit on record verifying the fact. The defendants stated they would have attended court for the hearing if they had notice of the hearing. The deponent under paragraph 9 of the supporting affidavit depones:-

9. That I and the co-applicant are the ones in occupation of the land comprised in title No. Transmara/Moita/503 (the suit property herein) and in Kisii HCCC No. 226 of 2012. I am seeking the ownership of the suit property by way of adverse possession.

It is the defendants' case that the *ex parte* judgment is extremely prejudicial to them since it has ordered their eviction from the suit property hence rendering their pending suit overtaken by events.

7. The defendants' previous advocate **Elizaphan Mokaya Bogonko** swore an affidavit in support of the defendants/applicants application and has denied that advocate Oguttu Mboya served him with a hearing notice on 26th February 2015 as indicated in the filed affidavit of service dated 30th June 2015. The said previous advocate further denied his office was served with a hearing notice by G4S Courier Services stating further that they had at any rate ceased to act for the defendants who had withdrawn instructions from them and therefore if any service had been effected on their firm they would have notified the respondents advocates that they no longer had instructions to act for the applicants.

8. The application was opposed vide a replying affidavit dated 19th July 2016 by the plaintiff's advocate. The plaintiff's advocate has termed the two supporting affidavits above as misleading. He has further contended that the previous counsel for the defendants was duly served with the hearing notice relating to

the scheduled hearing on 30th June 2015 and that Mr. Bogonko himself took possession of the hearing notice and indeed dispatched the same to his offices for acknowledgement and embossment of a stamp. He however, contended that the clerk of the said counsel who took who had been instructed to take the same to the offices of the said advocates never returned back the stamped copy to him and as a result, he left Busia Law Courts without the acknowledged copy.

9. The advocate further deposed that since he had not received an acknowledgement of the hearing notice from the defendant's previous counsel, his office sent another hearing notice vide G4S Courier Service on the 12th day of June 2016. He attached copies of the forwarding letter, certificate of postage, hearing notice and affidavit of service to that effect marked as **JMO2(a), (b)**. He further contended that the hearing notice sent via G4S was never returned back to his office. He further contended that the defendant's previous advocate having conduct of this matter was equally served with the Notice for delivery of judgment issued by the Honourable Deputy Registrar of this Honourable Court yet they have declined to acknowledge to such service. He attached a copy of the Notice of delivery of judgment marked "**JMO3**".

10. It is thus the plaintiff's case that the defendants were duly aware of the scheduled hearing date and consequently there is no tenable reason to warrant the setting aside of the ex parte proceedings. The application was argued by way of written submissions. The applicants' submissions were filed on 2nd September 2016 while the respondent's submissions were filed on 31st October 2016.

11. After considering the application by the defendants together with the affidavits sworn in support and in opposition and the parties written submissions the issue for the court to determine is whether on the material placed before the court and the circumstances of the case, the court ought to exercise its discretion in favour of the defendant/applicants and set aside the ex parte judgment and allow the defendants to defend the suit.

12. In the instant application the applicants seek to have the ex parte judgment entered against them set aside. The power of the court to set aside is discretionary. The court has unfettered, unlimited and unrestricted jurisdiction to set aside and ex parte judgment. (See the cases of **James Wanyoike & 2 Others –vs- CMC Motors Group Ltd & 4 Others [2015] eKLR**, **Patel –vs- E. A Handling Services Ltd [1974] E. A 75**, **Shah –vs- Mbogo [1967] E. A 166**, **Shabbir Din –vs- Ram Parkash Anand [1955] 22 EACA 48**, **Mohamed & Another –vs- Shoka [1990] KLR 463** and **Tree Shade Motors Ltd –vs- DT Dobie & Another [1995-1998] 1 E. A 324**)

13. Under Order 12 Rule 7 pursuant to which the instant application has been made a court may set aside or vary the judgment or order upon terms as may be just. It provides thus:-

12(7) Where under this order judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

In the case of **Patel –vs- E. A Cargo Handling Services Ltd [1974] E. A 75** the court held as follows:-

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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 wider discretion given to it by the rules.”

The court in the same case went on to observe thus:-

“That where there 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 a defence that must succeed. It means a “triable issue” that is on issue which raises a prima facie defence which should go to trial for adjudication.”

14. In the case of **Shah –vs- Mbogo [1979] EA 116 at page 123 Harris, J.** Stated the rationale for exercise of discretion thus:-

“I have carefully considered in relation to the present application the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex parte. 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 a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

The Court of Appeal in the case of **Mohammed & Another –vs- Shoka [1990] KLR 463** suggested a guide for a court to follow when considering an application to set aside an ex parte judgment when it stated thus:-

“The test for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.”

15. The various cases that I have referred to above clearly set out the principles that a court needs to apply in considering applications to set aside an ex parte judgment such as the one before me. The common thread in applications to set aside an ex parte judgment is that the court has a wide, unfettered and unrestricted discretion save that the jurisdiction should be exercised judicially and on terms that are just and that the facts and circumstances of each particular case should be taken into account. In setting aside ex parte judgments broadly the test is whether there is a defence on merits; whether prejudice may result; and in case of delay the explanation for the delay.

16. In the instant case the defendants/applicants previous advocate on record has denied being personally served with a hearing notice by Mr. Oguttu Mboya the plaintiff’s Advocate at the Busia Law Courts contending that he could not recollect being served with such notice and arguing that if he had been served he would have acknowledged service by signing. The plaintiff’s advocate, Mr. Oguttu Mboya for his part states that, Mr. Bogonko the defendants counsel retained the copies of the hearing notice for purposes of having the same rubber stamped at his office but that the duplicate copy had not been returned to him by the time he departed from the Busia Law Courts.

17. The plaintiff’s advocate further stated that he served a second hearing notice on the defendants’ advocates by transmitting the same through G4S Courier Service on 12th June 2015. The defendants’ advocates then on record averred that the hearing notice sent through G4S Courier Service was not received by his law firm. He stated that the secondary notice was sent to **“M/s Bogonko Otanga & Co. Advocates, G4S Building Box 766 Busia”** while his firm’s proper address is at **“Busia Business Center”**. While the issue of service is highly contested it is probable that the secondary hearing notice may not have been delivered to the defendants advocate’s firm as clearly the defendants’ advocates’ physical address from the record was not at **“G4S Building”** at which the cover letter was sent. The memorandum of appearance gives the physical address for Bogonko Ootanga & Co. Advocates as **“Busia Town Hall 1st, Floor”** and the defence gives the address as **“Busia Business Centre”**. The courier transmission did not carry the telephone contact of the defendants advocates firm with the result that there is no verification that the parcel was infact delivered to the defendants advocates offices. As regards the hearing notice allegedly served on Mr. Bogonko advocate within the Busia Law Courts, that may infact be the case but as the plaintiff’s counsel states the notice was despatched to the defendants advocates firm to be rubber stamped. It is not clear who was sent to get the hearing notice rubber stamped and hence it cannot be ascertained whether infact the copies of the hearing notice got to the defendants advocates office so that they could be rubber stamped. Mr. Bogonko advocate denies being served and hence one cannot wish away the doubt that he may not have been served.

18. The defendants advocate has further averred that at the time the plaintiff’s advocate states he served the hearing notice on him he had ceased to act for the defendants and that if he had truly been served he would have informed the plaintiff’s counsel appropriately and would have advised counsel to serve the

defendants directly. Considering the totality of all the evidence and circumstances I entertain a doubt that the defendants advocate on record had been served with a hearing notice and further even if it had been established the defendants advocate had in fact been served the evidence suggests the defendants were clearly not made aware of the hearing date of the suit. The defendants by their filed defence claim the title of John Mutetia who sold the land to the plaintiff had been extinguished on account of the defendants' adverse possession of the suit property and that he had no title to pass to the plaintiff. The defendants claim ownership to the suit land as adverse possessors and state that they have a pending suit namely Kisii HCCC No. 226 of 2012 where the suit land is the subject matter. In my view the defendants have a defence that raises triable issues and in the interests of fairness and justice should be permitted to defend the suit.

19. In the case of **Tree Shade Motors Ltd –vs- DT Dobie & Another [1995-1998] 1 E. A 324** the court held as follows:-

“Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex parte judgement aside.”

20. In the circumstances of this matter, I am persuaded the defendants genuinely want to defend the suit and the instant application is not an attempt at obstructing the course of justice. The defendants have stated that they had no notice of the hearing on 30th June 2015 when the hearing proceeded ex parte and that if they had notice, they would have attended court for the hearing. I believe them. I will accordingly exercise my discretion in favour of the defendants and will set aside the ex parte judgment entered herein together with all consequential orders made pursuant thereof. The defendants Notice of Motion dated 18th May 2016 is accordingly allowed and the ex parte judgment dated on 4th April 2016 and delivered on 8th April, 2016 is hereby set aside.

21. The plaintiff is awarded **“thrown away”** costs of kshs. 10,000/= as against the defendants.

22. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

..... Court assistant

J. M. MUTUNGI

JUDGE