



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 67 OF 2012

LAMECH ONSONGO MARAGIAPLAINTIFF

VERSUS

ALEXINA KERIBO ACHACHI.....1ST DEFENDANT

JOSEPH OGWARO ACHACHI.....2ND DEFENDANT

PATRICK MOGIRE ACHACHI3RD DEFENDANT

RULING

1. The plaintiff initiated this suit against the defendants by way of a plaint dated 21st February 2012 and sought the following orders:-

a. An order for the eviction of the defendants from that parcel of land known as LR No. West Kitutu/Mwakibgendi/2196(hereinafter referred to as “the suit property”).

b. A permanent injunction to restrain the defendants from tilling and/or cultivating or in any way interfering with the suit property.

c. Costs of the suit.

d. Any other relief this court may deem fit to grant.

2. The plaintiff averred that, he was the registered proprietor of the suit property and that he purchased the property from one, Juma Ochwangi and Justinus Achachi Nyakoe. The suit property was a portion of the original parcel of land **LR. No. West Kitutu/Mwakibagendi/972** (hereinafter referred to as **Plot No. 972**). **Plot No. 972** was registered in the names of the said Juma Ochwangi and Justinus Achachi Nyakoe. The plaintiff stated that he had exclusive and absolute possession of the suit property from the year 1998 when he purchased the same until the year 2010 when the defendants without the plaintiff's consent and/or any justifiable cause jointly and severally entered the suit property and started tilling and/or cultivating the same thereby interfering with his possession of the property. The plaintiff stated that the defendants' entry onto the suit property was unlawful and illegal and that in spite of demand to the defendants to desist from the acts of trespass and waste on the suit property the defendants refused and neglected to oblige necessitating the institution of these proceedings. Despite the defendants being served with summons to enter appearance they neglected and/or failed to do so prompting the plaintiff to fix the suit for formal proof hearing on 25th November 2014 when though the defendants were served with a hearing notice as per the record, they failed to attend court and the hearing proceeded ex parte. The court rendered a judgment in favour of the plaintiff in terms of prayers (a), (b) and (c) of the plaint and ordered

the defendants to vacate from the suit land within 45 days of the date of judgment.

3. The plaintiff filed a Notice to Show Cause on 2nd March 2016 in execution of the decree and upon the defendants being served, they instructed the firm of G. J. M. Masese Advocate who filed the Notice of Motion application dated 7th April 2016 and which application is the subject of this ruling. The application expressed to be made under Sections 3 and 3A of the Civil Procedure Act and Order 10 Rule 11 of the Civil Procedure Rules inter alia seeks the following orders:

1. THAT the ex-parte proceeding culminating in the DECREE herein be set aside.

2. THAT pending the hearing and determination of this Application there be a stay of execution of the DECREE herein.

3. THAT costs of this Application be provided for.

4. The application was supported by a supporting affidavit sworn by Joseph Ogwaro Achachi, the 2nd defendant herein with written authority from his co-defendants. The defendants deponed that they have had a long running dispute with the plaintiff going back to the year 2000. The defendants have annexed a copy of judgment in Kisii CMCR. Case No. 2447 of 2000 where the 3rd defendant/applicant was acquitted of the charge of interfering with boundary features marked “**JOA**”. The 2nd defendant further deposed that land parcel **No. West Kitutu/ Mwakibagendi/972** was registered in the names of Joseph Juma Ochwangi and Justinus Achachi Nyakoe both of whom are now deceased. The 2nd defendant deponed that Achachi died in 2002 and Juma in 2003. The defendants aver that the deceased had not disposed any of their assets before their death and to their knowledge they aver no administrators have been appointed to administer the deceased estates. The defendants aver that land parcel **West Kitutu/Mwakibagendi/972** owned by the deceased may have been fraudulently subdivided to create land parcels **2196** and **2197**. The defendants aver that the transfer of land parcels **West Kitutu/ Mwakibagendi/2196 (suit property)** and **2197** which are currently registered in the names of the plaintiff and Meshack Chogoo Nyangena was fraudulent and aver they want to be allowed to file a counterclaim to prove that the parcels were fraudulently obtained after the death of the original owners. The defendants aver that it is only fair and just that the ex-parte proceedings resulting in the Decree herein be set aside and they (defendants) be allowed to enter appearance and file their defence and counterclaim.

5. The application was opposed by plaintiff who denied the defendants’ contention that they were not served with summons to enter appearance. The plaintiff deponed that in fact he is the one who took the process server to the defendants clan elder one (**Bosire Orwaru**) and that the said Bosire led the process server to the homes of the defendants where he effected service upon them as per the annexed copy of the affidavit of service dated 17th July 2012 filed by the process server marked as “**LOM1**”. The plaintiff further states that the defendants were subsequently served with hearing notices as per the copies of affidavits of service marked “**LOM2**”.

6. The plaintiff further termed the defendants contention that they have been on the suit property for over 20 years as untrue and further contended that the defendants only invaded the suit property in the year 2010. The plaintiff reiterated that the suit property was properly and lawfully transferred to him by the original owners (**Joseph Juma Ochwangi and Justinas Achachi Nyakoe**) way back in the year 2001 before their demise. The plaintiff further avers that the defendants have not placed any sufficient material before the court to warrant the court to exercise its discretion in their favour and views the defendants application as a means of delaying and/or obstructing justice to him as they only woke up when they were served with the Notice to Show Cause in execution of the court decree yet they were aware all the time of the pendency of these proceedings. The plaintiff urged that the defendants’ application be dismissed.

7. The parties argued the application by way of written submissions. The applicants filed their submissions dated 22nd September 2016 through their advocate G. J. M Masese Esq. On 27th September 2016. The plaintiff’s advocates Soire & Company Advocates had earlier filed their submissions dated

16th June 2016 on 25th July 2016. I have considered and reviewed the pleadings including the affidavits in support and in opposition of the defendants' application. I have also considered the submissions filed by the parties and the issue for determination is whether the defendants have satisfied the conditions necessary to warrant the court to exercise its discretion to set aside the ex parte judgment entered against them herein.

8. The defendants application is premised under Order 10 Rule 11 of the Civil Procedure rules 2010 which provides as follows:-

11. 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.”

From a reading of the above provision, the power of the court to set aside an ex parte judgment is discretionary and such discretion is wide and unfettered. The court however has to exercise the discretion judiciously and hence the exercise of such discretion will be dependent on the facts of each case. There cannot be a straight jacket set of conditions that a party has to satisfy in order to have an ex parte judgment set aside as the same will vary on a case by case basis. However the courts have over time developed guidelines and/or principles that ought to guide a court in considering such an application. The court will ordinarily not disturb a judgment that has been validly obtained unless the applicant demonstrates that he had a valid and/or reasonable defence and was prevented by some good reason from appearing to defend and further that he would suffer prejudice and/or injustice if the ex parte judgment is not set aside. The court would also consider whether the respondent stands to suffer any prejudice.

9. The court in the case of **James Wanyoike & 2 Others -vs- CMC Motors Group Ltd & 4 Others (2015) eKLR** stated thus:

“...The principles and tests for setting aside an ex parte judgment can be summarized as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment.

2. That the test for setting aside an ex parte judgment are:-

(a) Whether there is a defence on the merits.

(b) Whether there would be any prejudice on the plaintiff

(c) What is the explanation for any delay.”

The Court of Appeal in the case of **Mohamed & Another –vs- Shoka [1990] KLR 463** stated as follows in regard to the test to be adopted in considering applications to set aside default judgments:-

“The test for the correct approach in an application to set aside default judgement 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.”

10. In the present case having carefully considered the affidavit in support and in opposition, I am satisfied that indeed the defendants were served with summons to enter appearance. The affidavit of service made by the process server, Isaiah Miruka was vivid and contained graphic details as to how he served the defendants with summons. The defendants were identified to the process server by the defendants' clan elder, one Bosire Orwaru who was introduced to the process server by the plaintiff. The same process server served the defendants with subsequent hearing notices including the Notice to Show Cause why execution should not issue, which provoked the defendants resulting in the filing of the instant application. In my view the defendants want to reverse the wheels of justice when the blame rests on them for failing to appear after being served. I would in the premises dismiss the defendants' plea that

they were not served with summons.

11. As relates to whether the defendants have demonstrated a defence on merits to persuade the court to set aside the ex parte judgment and allow them to defend so that the case can be determined on merits, I have to state that I am not persuaded they have a reasonable defence. Never mind that the defendants did not annex a **“draft defence”** for the court to evaluate to see if it raises any triable issue. From the supporting affidavit it is evident that the defendants challenge the title held by the plaintiff on the spurious ground that the plaintiff must have acquired it fraudulently since as far as the defendants are concerned the original owners of land parcel 972 out of which parcels 2196 and 2197 were created did not dispose any portion or subdivide the land during their lifetimes. The claim by the defendants quite clearly is unsupported. By the defendants own statements the original owners died in 2002 and 2003 respectively. The mutation form produced by the plaintiff for land parcel **Kisii/West Kitutu/Mwakibagendi/972** effecting the subdivision of the same into parcels **2196** and **2197** dated 8th September 1999 was registered on 10th November 1999. The plaintiff was registered as owner of land parcel **West Kitutu/Mwakibagendi/2196** on 21st November 2001 and issued with a title deed on the same date. These events took place during the lifetime of the original owners and there is absolutely no basis for the allegations of fraud fronted against the plaintiff.

12. It is not enough for a party to casually allege or plead fraud in an affidavit or pleadings. The particulars of fraud have to be specifically pleaded and proved. Allegations of fraud is a serious matter as it borders on criminality and it behoves on the party alleging it to furnish particulars so that the opposite party is aware of the case he is required to answer. It is not inadvertent that the standard of proof in regard to fraud allegations is at a higher pedestal than proof on a balance of probabilities which is the standard in civil cases. It is because fraud is serious matter as it impugns the integrity of the person against whom it is made. In the case of **Rosemary Wanjiku Muriithi –vs- George Maina Ndinwa [Nyeri Civil Appeal No. 9 of 2014] eKLR** the Court of Appeal observed as follows:

“Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.”

13. The defendants in my view have not in the instant case demonstrated they have a legal interest in the suit property. They are not the administrators of the deceased and in my view they lack even the capacity to litigate on behalf of the deceased original owners of land parcel **West Kitutu/Mwakibagendi/972** and cororally parcel number 2196 a resultant subdivision thereof which is the subject matter of the suit.

14. The defendants Notice of Motion dated 7th April 2016 is devoid of merit and the same is dismissed with costs to the plaintiff.

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, 2nd and 3rd defendants

.....Court assistant

J. M. MUTUNGI

JUDGE