



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO.925 OF 2016 (formerly 1130 OF 1999)**

**PETER CHANIA MAGERE.....PLAINTIFF**

**VERSUS**

**JOHN NJUGUNA NDUATI.....1<sup>ST</sup> DEFENDANT**

**SAMUEL NDUATI.....2<sup>ND</sup> DEFENDANT**

**NDIRANGU KARANJA.....3<sup>RD</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. This is a Ruling in respect of a *Notice of Motion* dated **25<sup>th</sup> November 2015**, which sought the following orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. That pending the hearing and determination of this application and/or further orders, this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants and/ or the intended defendants either by themselves and/ or their authorised agents, servants, employees or otherwise whomsoever from harassing, intimidating, and/ or threatening the Plaintiff and his duly appointed attorney and/or from charging ,mortgaging, alienating, seeking advertising for sale, registering, transferring to themselves and/or other third parties the ownership and possession of all that property known as LR No. 36/VII/436 situated in Eastleigh within Nairobi City County and/or dealing with the said property in any manner detrimental to the Plaintiff's interest.**

**5. That this Honourable court be pleased to set aside the orders made on 8<sup>th</sup> November 2010, and all the consequential orders thereto and reinstate the Plaintiff's suit for hearing on merits.**

**6. That upon grant of prayer 5 herein above, this Honourable court be pleased to add Duram Hussein Mudobe and Mohammed Kasim Mohamud as defendants herein.**

## **7. That costs of this application be provided for.**

2. The application herein has been preceded by a long and chequered history. The suit herein was filed by one **Peter Chania Magere** who had a power attorney from **Mwathi Kitheka** who was the registered owner of plot known as **LR No.36/VII/436** situate at Eastleigh in Nairobi (suit land) **Peter Chania Magere** (Magere) is said to have been a son in –law of **Mwathi Kitheka** (deceased) . At some stage, in 1994, Magere received instructions from the deceased who wanted the suit land sold at **Kshs,5,000,000/=**.

3. Magere then contacted the first defendant **John Njuguna Nduati** (Nduati) to sell the property and have the proceeds deposited in the firm of M/s Wakahiu & Co. Advocates. Nduati deposited some amounts in the advocates account but in other occasion he deposited cheques which were returned unpaid.

4. Despite Nduati not remitting the entire purchase price, he transferred the suit land into his name and gave power of attorney to the second defendant who is his father who proceeded to receive rental income from tenants in the suit land. Nduati later transferred the suit land to the third defendant. This is what prompted Magere to file this suit against the three defendants on **8<sup>th</sup> June 1999**. Magere sought a number of reliefs among them breach of contract and general damages.

5. After going through a formal proof which at one point was set aside after a judgement had been delivered, Magere finally had an ex-parte judgement in his favour this time as legal representative of the estate of the deceased who had initially given him a power of attorney. The judgement in favour of Magere was delivered on **30<sup>th</sup> September 2002**. The judgement among other reliefs directed that the suitland which had been transferred to the third defendant be re-transferred back to the personal representatives of the deceased.

6. The third defendant made an application seeking to set aside the ex-parte judgement. The application was duly served upon the advocates for Magere who sent a lawyer to court during the hearing and applied for adjournment on the ground that Mageres’s lawyers intended to cease acting for him. The application was rejected by justice Aluoch as she then was. The third defendant’s application was allowed with the result that the ex-parte judgement in favour of Magere was set aside and the registration in favour of Magere was revoked. This application was allowed on 25<sup>th</sup> October 2006.

7. The first and second defendant later moved the court to have the plaintiff’s suit dismissed on grounds that they had never been served with summons as stipulated in the Civil Procedure Rules. The third defendant made a separate application seeking to have Magere’s suit dismissed for want of prosecution. The two applications were heard and in ruling delivered on 8<sup>th</sup> December 2010, the respective applications were allowed and the suit against them was dismissed.

8. It is after a period of (5) five years since the Plaintiff’s suit was dismissed that Magere donated a power of attorney to **Jane Wambui Karwenju** to have the dismissed suit reinstated. When this application was placed before justice Mbogholi Msagha, the judge allowed the firm of Kamwendwa & Co. Advocates to come on record and for **Jane Wambui Karwenju** to represent Magere on account of power of attorney granted to her by Magere .The intended fourth and fifth defendant were also allowed to file replying affidavit to the present application.

## **APPLICANT’S CONTENTION**

9. The applicant contends that after Magere obtained judgement in his favour, he received constant threats from the Defendant/Respondents until he decided to go to his rural place where he stays. That his advocates then **M/s Amena Amendi J & Co. Advocates** were allowed to cease acting for him unprocedurally and that he did not have access to newspapers and as such he could not have seen an advertisement in the Daily nation regarding the intention of his advocates to cease acting. That he had no reason to go to his advocates offices after he obtained judgement in his favour and his advocates did not inform him that the judgement which had been given in his favour had been set aside.

10. The applicant further contends that, Magere is likely to lose the suit land which is currently estimated over **Ksh.40,000,000/=** shillings. That failure to defend the applications was due to mistake of his former advocates.

### **FIRST AND SECOND DEFENDANTS CONTENTION.**

11. The first and second Respondents contend that Magere's suit was dismissed after service of the hearing Notice through advertisement in the press. That Magere is guilty of delay. The suit was dismissed over five years ago and an application to have it reinstated is being made late.

### **THIRD DEFENDANT'S CONTENTION**

12. The third Defendant/Respondent is said to have sworn an affidavit in reply to the application on 7<sup>th</sup> March 2016, but I cannot see that affidavit in the file.

### **THE INTENDED FOURTH AND FIFTH DEFENDANTS CONTENTION.**

13. The intended fourth and fifth Respondents contend that the fourth Respondent was a tenant in the suit premises between 1998 and 2009 and used to pay rent to the third Respondent. In 2009, the third Defendant wanted to dispose of the suit land. He approached the fourth and fifth Respondents who agreed to buy the suit land from him. After the suit land was transferred to the fourth and fifth Respondents, they demolished the old premises on the suit land and put up a new seven storey building, which they have leased out to tenants.

14. That at all times the fourth and fifth Respondents have been putting up the seven storey building no one came up to claim the property. That they are innocent purchasers for value without Notice and that the applicant has come up to claim the suit land after it has been extensively developed.

### **ANALYSIS**

15. I have carefully gone through the applicant's application, the opposition thereto by the first, second fourth and fifth Respondents as well as submissions by counsel for the parties. I have noticed that the parties herein have got dates of various proceedings wrong. This is perhaps because of the age of the matter and partly because of failure to properly peruse the court file. For instance, the date when justice Aluoch as she then was delivered her ruling was on **25<sup>th</sup> October 2006**, and not on **25<sup>th</sup> November 2006**, as the applicant deponed in paragraphs 7 and 8 of the supporting affidavit. The Ruling dismissing the plaintiff's suit was on **8<sup>th</sup> December 2010**, and not **8<sup>th</sup> November 2010**. This is just to point but a few. There are many other dates which parties have not got right. However be that as it may, I will determine this application on its merits.

16. As I have already indicated herein above, some of the prayers have already been spent. The prayer to allow the Firm of **M/s Kamwendwa & Co. Advocates** to come on record was allowed when the application was first placed before Justice **Mbogholi Msagha**. The applicant herein was also allowed to plead and act for **Magere** on the basis of a power of attorney donated to her by **Magere**. The third defendant's advocates have taken issue with the donated power of attorney. They argue that a holder of a power of attorney cannot delegate it to another.

17. What the third Defendant's advocate have forgotten is that once **Mwathi Kitheka** who donated the power of attorney to Magere died, she went with that power and as such **Magere** could not purport to act on it. It ended by virtue of the death of the donor. This is why **Magere** had to amend the Complaint and plead that he was now claiming as a personal representative of the estate of the deceased. The issue of **Magere** delegating his power of attorney to the applicant does not therefore arise.

18. The issue of whether the Firm of **M/s Amena Amendi J & Co. Advocates** were properly allowed to cease acting for **Magere** does not really matter at the moment. If the applicant feels that the manner in which **Magere's** lawyers came out of record was not proper the records shows that M/s Amena Amendi J

& Co. Advocates had been given leave to serve by substituted service. They were subsequently allowed to cease acting when the matter was placed before the Principal Deputy Registrar on 16<sup>th</sup> June 2010. The fact remains that as at the time the first second and third respondents filed their respective applications seeking to have the plaintiff's suit dismissed *M/s Amena Amendi J & Co. Advocates* had come out of record. An order was made that Magere be served by advertisement in the press. This was done and when Magere did not file his replying affidavit, the matter proceeded ex-parte and orders dismissing Magere's suit were subsequently give in a Ruling delivered on **8<sup>th</sup> December 2010**.

19. There are two issues which should be determined in this application. The first is whether the orders of **8<sup>th</sup> December 2010**, should be set aside and secondly whether the fourth and fifth intended defendants ought to be enjoined in this suit if it will be revived.

*Whether the orders of 8<sup>th</sup> December 2010, dismissing the Plaintiffs suit should be set aside.*

20. Setting aside of ex-parte orders is an exercise of discretion by the court. This discretion should be exercised judiciously having regard to the circumstances of each case. In the instant case, Magere had filed this suit on **8<sup>th</sup> June 1999**. He amended his claim on **5<sup>th</sup> March 2002**, following the demise of the deceased. He obtained judgement in his favour on **30<sup>th</sup> September 2002**. This judgement was set aside on **25<sup>th</sup> October 2006**.

21. Magere's lawyer was represented in Court when the Judgement was set aside. The applicant claims that the lawyer for Magere did not inform him of the setting aside of the Judgement and that Magere never bothered to go to his lawyer's office as he knew that he had a judgement in his favour and that therefore there was no need to go to his lawyer's office. Magere's lawyers were allowed to cease acting for him on **16<sup>th</sup> October 2010**. Magere's lawyers had been granted leave to serve him through advertisement in the press on **21<sup>st</sup> January 2010**. There is no evidence that Magere was not served as directed by the court. I am therefore not able to conclusively say whether he was served or not. However as I said herein above, the manner in which Magere's lawyer came out is periphery to the issues at hand.

22. Here is a claimant who had a judgement in his favour. The suit land had rental premises. This judgment is set aside. The Court is now being told that Magere retreated to his rural home because of the threats from the defendants. There is no mention as to why no one bothered to go and take the rent from the premises. Magere in his pleadings had said that he contracted the first defendant to sell the suit land and that before the first defendant could complete payment he changed ownership of the suit land into his name.

23. There is no mention as to how much the first defendant had paid to Mwathi Kitheka's advocate's office. The alleged bounced cheques are not exhibited anywhere. Notwithstanding these serious allegations, Magere did not bother to follow up his case. He claims that newspapers were not accessible to him. This is a litigant who has treated a serious litigation in a casual manner.

24. There is evidence that the suit land has been developed and there lies a seven storey building put up by the fourth and fifth intended defendants. Does it mean that during the process of construction, Magere or any other person did not bother to visit the suit land to see its condition?. Magere sat on his rights. I do not think that he deserves discretion of the court. He delayed coming to court and the delay has not been convincingly explained. The suit was dismissed in a lawful way. The advocates who were acting for him had come off the record and that is why he was served by way of advertisement in the press.

25. There must be an end to litigation. Parties cannot be allowed to bring cases to Court and never bother to check on their progress. Magere had instructions to sell the property. He acknowledges that there was some monies deposited in the account of advocates of *Mwathi Kitheka*. Whether this money was remitted to the recipient or not is a mystery which can only be unravelled by *Magere*. *Magere* does not say how much was paid and how much was outstanding. A lot has since happened. The suit land has been transferred to the fourth and fifth intended defendants.

26. I have read the decisions cited by the applicant's advocate on what the court should consider when exercising its discretion to set aside an ex-parte order or judgement. In as much as I agree with these decisions I do not think that Magere deserves exercise of this courts discretion. He has not been open on what went on with the property. There could be something Magere is hiding. The applicant is not being candid as to the whereabouts of Magere . It is just being claimed that he retreated to his rural home following threats from the defendants. It is strange that a person who can be entrusted with sale of a property through a power of attorney can himself later as a personal representative give power to other people to follow up an issue as serious as this matter. I decline to exercise discretion to set aside the orders of 8<sup>th</sup> December 2010.Whether the fourth and fifth intended defendants ought to be enjoined in this suit.

27. It will be superfluous to address this issue in view of the fact that I have declined to set aside the orders given on 8<sup>th</sup> December 2010.

28. The applicant had prayed for orders of injunction. What has emerged from the pleadings herein and the affidavit is that the applicant misled the court on 8<sup>th</sup> December 2015, when she obtained temporary injunction to last until the hearing and determination of the application. The injunction orders were given on the basis that it is the applicant who had the original title to the suit land and that it is the applicant who was in possession. This is not true because it is the fourth and fifth intended defendants who had purchased the suit land and had already put up a seven storey building on it.

### **CONCLUSION.**

29. Even if the suit herein was to be reinstated, no injunction would issue as the suit land had been put up for sale and any damages which would have been suffered by the applicant would have been compensatable. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the three Respondents as well the intended fourth and fifth Defendant/ Respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this *13<sup>th</sup>* day of *March 2017*

**E.O .OBAGA**

**JUDGE**

In the presence of :-

Applicant who is in person though represented by a lawyer who is not present.

M/s Waweru for Mr Kinga for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Court Assistant :Kevin

**E.O .OBAGA**

**JUDGE**