



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 77 OF 2009**

**LILIAN SAYO OGOLA.....PLAINTIFF**

**VERSUS**

**JACOB WAFULA MUSUNGU.....DEFENDANT**

**R U L I N G**

1. The defendant brought an application dated 19/10/2016 in which he seeks orders that:-

**(a) That this application be certified as urgent and service be dispensed with in the first instance.**

**(b) That pending the interpartes hearing of this application this Honourable Court be pleased to order a stay of execution of the judgement delivered on 11<sup>th</sup> of October, 2016.**

**(c) That upon the interpartes (sic) hearing of this application, this Honourable Court be pleased to order a stay of execution of the judgement delivered on the 11<sup>th</sup> October, 2016.**

**(d) That there be a stay of execution pending hearing and determination of the defendant's application dated 11<sup>th</sup> September, 2016.**

2. A total of 9 grounds are listed at the foot of the application the basis as the application. The application is supported by the sworn affidavit of Jacob Wafula Musungu. The affidavit states that the applicant instructed the Firm of D.L. Were & Co. Advocates to file an application to challenge the exparte proceedings of 15<sup>th</sup> September, 2016 which they did; that the said application was served on the counsel for the plaintiff; that the applicant attended court on the 17<sup>th</sup> October, 2016 for the hearing of the said application only to find that judgement had been delivered against him; that neither he nor his advocate were served with any judgement notice; and the applicant may suffer substantial loss because there is no stay and the plaintiff may proceed to execution.

3. A copy of the application dated 19/9/2016 is annexed as exhibit "JWM1". The application sought the following orders:-

**(i) That the application be certified as urgent service be (sic) dispensed with in the first instance.**

**(ii) That there be a stay of proceedings and/or further proceedings in this suit, pending hearing and determination of this application interpartes.**

**(iii) That there be a stay of proceedings of 15<sup>th</sup> September, 2016 against the defendant/applicant together with all the consequential orders made thereto be set aside.**

**(iv) That costs of this application be provided (sic) for.**

4. The affidavit in support of that application is sworn by Jacob Wafula Musungu. In that affidavit the deponent states that; he was made aware of the exparte proceedings in this suit when he went to the Environment and Land Court Registry to check on the progress of the case; that he learnt that the case had been taken to court for hearing; that he called his advocate on record to inform them and to inquire from them whether they had received any hearing notice; that his advocate called one Wanyama to try and persuade court to place the file aside to enable his advocate to come and address court on the issue of service; that nevertheless the case proceeded and the plaintiff testified; that the matter was scheduled for judgement rather than defence hearing thereafter despite the defendant's defence having been filed; that the defendant never received any notice of request for interlocutory judgement or notice of entry of the same; and that the defence raises triable issues and should not be overlooked. On those grounds, he avers, he should be accorded time to defend the suit and help the court determine it on merit.

5. Also attached to that application is an affidavit sworn by one Dorothy Otieno which states that: the deponent is an officer manager in charge of registry and day to day running of the firm of D.L. Were & Were Advocates; that part of her job description is to receive court documents; that she never received hearing notice for 15<sup>th</sup> September, 2016 from the firm of Kiarie & Co. Advocates; that she has never received a notice of entry of interlocutory judgement or any request for the same or indeed any other documents from Kiarie & Co. Advocates, that she learnt of the court proceedings (without stating which) when her boss inquired on 16/9/2016 whether "they" had received any court papers and if there were proceedings on 15/9/2016 the same were not overlooked by their office intentionally.

6. The application at hand is opposed by the plaintiff. Lilian Sayo Agola has filed an affidavit sworn on 7/1/2017. In that affidavit she states that; the application is incompetent, the reliefs sought would not obtain, the application was overtaken by events when judgement was read on 11/10/2016; that it is made under the wrong provisions of the law; that the applicant was served on 29/7/2016, for the hearing scheduled for 15/9/2016; that consequently D.L. Were & Co. Advocates came on record for the applicant; that neither defendant nor counsel appeared in court at the hearing held on the 15/9/2016; that the court was satisfied as to service and hearing proceeded; that the defendant came into court just as the court pronounced the judgement date; that the court advised him to take necessary steps to set aside the exparte proceedings; that service of the hearing notice upon the applicant is not denied; that no reasons are given as to why the defendant's counsel never came to court or why the defendant came to court late; that neither his counsel nor the defendant attended judgement on 11/10/2016; that it was not legally necessary to serve notice of judgement on defendant or his counsel as the defendant knew the judgement date; that the defendant was deliberately delaying the hearing of the suit as delay was working in his favour, him being in possession of the subject land; that before this, the defendant had failed to attend court on 22/9/2015 when his counsel applied for an adjournment on the basis that his client was not in court despite having been informed by his own advocate of the date and that counsel needed file an application to cease acting for the defendant; that after being served with the application for leave to cease acting, the applicant never attended court on 1/10/2015 when M/s. Onyancha & Co. Advocates were discharged from the duty of representing the defendant. Overall, the applicant is accused of acting in bad faith to delay the hearing of the suit.

7. So, is the applicant entitled to the orders he seeks in his application dated 19/9/2016?

8. For obvious reasons I will not seek to examine the question whether the application is brought under the proper provisions of the Law as Article 159 (2) (d) of the Constitution and the approach of this court towards that issue is that even where the improper provisions are quoted, this is merely a procedural defect which the court in its discretion may overlook.

9. Three main issues emerge in this application as follows:-

**(1) Was the judgement regularly obtained?**

**(2) Was it necessary to notify the plaintiff of entry of judgement?**

**(3) Did the defendant have a good defence on the record?**

**(1) Was the judgement regularly obtained?**

10. In the judgement dated 11<sup>th</sup> October, 2016 the court stated at paragraph 3:-

**“The defendant who was duly served with hearing notice was not present when the case proceeded. He only surfaced after the plaintiff had completed her evidence, and a judgement dated given. I verbally advised him to take necessary steps to have the proceedings set aside. The defendant filed an application seeking to set aside the *ex parte* proceedings. I returned the file to the registry with the remarks that the application should be served for interpartes hearing on a date to be given at the registry. The directions were given on 20/9/2016.**

**4. As I was going through the cabinet for files pending judgements I realized that I did not have this file. I called for it; when it was brought from the registry, I noticed that the defendant had not taken a date for hearing of his application hence the decision to write this judgement”.**

11. There would be no other reason for the defendant’s presence in court on 15/9/2016 other than that he knew of the hearing date. On the same date Mr. Kiarie had, before the hearing proceeded, informed the court that the defendant had been personally served as per the affidavit of service. Upon perusal of the record, there is an affidavit of service sworn on 2<sup>nd</sup> August, 2016 by one George Mumali who states that on 29/7/2016 he served the defendant with a copy of the attached hearing notice for the date 15/9/2016. The copy returned to court has the name of the defendant and a signature endorsed at its back.

12. Notably the defendant’s application dated 19/10/2016 omits the ground that the defendant was not served with the hearing notice for 15/9/2016. His supporting affidavit too does not allege that he was not served. He only states in the affidavit, without disclosing his source of information, that he was “*made aware of the ex parte proceedings in this suit when I went to the Environment and Land Court Registry on the 15<sup>th</sup> October, 2016 to check on the progress of the case*”. On that day, he states, he communicated with his advocate to try and save the situation but in vain, as the hearing still proceeded *ex parte*. This cannot be the truth because hearing proceeded on 15/9/2016 and not 15/10/2016. I do therefore find that the defendant was in court on 15/9/2016 because he had been properly and personally served on the 29/7/2016.

13. Should the defendant’s advocates have been served with the hearing notice for the hearing scheduled for 15/9/2016 also not withstanding service effected personally on the defendant? The affidavit of Dorothy Otieno sworn on 19/9/2016 in support of the defendant’s application denies service of any papers concerning this suit by Kiarie & Co. Advocates. It specifically denies service of the hearing notice for 15<sup>th</sup> September, 2016. However if the Firm of D.K. Were & Were Company Advocates were appointed at the earliest 31<sup>st</sup> August, 2016 as their notice of change of advocates reads, how could they expect to be served afresh while service of the hearing notice for 15/9/2016 had already been effected directly on the defendant while they were not yet on the record? I find that it was incumbent upon the defendant to provide the said advocates with the full details of all that had taken place before they were appointed. Without full disclosure the said firm could not ably represent the defendant in the matter, and the applicant may well be regarded as the sole author of his own misfortune in the circumstances. In stating this I do not wish to speculate on why the firm of the D.L. Were did not make the court registry their first stop upon appointment for the purpose of court file perusal, which would obviously have informed them that the hearing date had been taken by the Firm of Kiarie & Co. Advocates as early as 25/4/2016 before their appointment. In this regard I find that the conduct of both the defendants and his advocates is wanting. There is no good reason provided as to why the defendant could not attend court in time, or his

advocates were not at hand to represent him, on 15/9/2016. The *ex parte* hearing that took place on that day was proper. The court did not have any reason to adjourn the proceedings in view of the proper service and the readiness on the part of the plaintiff to proceed with her case. The Civil Procedure is clear on what is to happen in such circumstances. Order 12 Rule 2 states as follows, “if on the day fixed for hearing, after the suit has been called on for hearing outside the court only the plaintiff attends, if the court is satisfied (a) that notice of hearing was duly served, it may proceed *ex parte*. There was no violation of the right of the defendant to natural justice.

14. The defendant has emphasized on the fact that an application dated 19/9/2016 was filed in court. However it is clear from the record that between 19/9/2016 when the application was filed and the date of the judgement, no action of taking of a hearing date for that application is reflected on the court record, which begs the question; how was the hearing date for the application alleged in the affidavit of the defendant sworn on 19/10/2016 (i.e. the hearing date of 17/10/2016) arrived at? It is normal to endorse the taking of hearing dates into the court record, yet there is no explanation as to why the taking of this date was not endorsed onto the record. For that reason I am not satisfied that any hearing date was taken for the application dated 19/9/2016, and therefore the court was justified in preparing the judgement to avert any more delay in a case that was filed in the year 2009, especially when the plaintiff was not the cause of that delay.

## **2. Was it necessary to notify the defendant or his Advocates of the entry of judgement against the defendant?**

15. As has already been found, the defendant was present in court at the time of the date of judgement was set by the court. If his advocates were present they would have also taken note of the date. However they were not present; the very fact that the defendant’s advocates filed a notice of motion on 19/9/2016 supported by the defendant’s affidavit shows both counsel and client were aware of the hearing date, the proceedings on that date, and the setting of a judgement date. There is very little likelihood that a perusal of a file by an advocate or his competent agent to enable the filing of that notice of motion filed on 19/9/2016 could have omitted a reconfirmation of the judgement date which had been communicated in court to the defendant. I therefore find that there was no obligation on the court or the advocates for the plaintiff to inform the defendant or his advocates of the hearing date again.

## **(3) Did the defendant have a good defence that raised triable issues on the record?**

16. The defendants’ application now lies on the ground moribund; the only hope in its resuscitation has in the successful examination of whether the defendant has a good defence that raises triable issues, on the basis of which this court may exercise its discretion in favour of the applicant.

There was a defence filed on behalf of the defendant in this matter on 1/7/2009. Having found that there was properly service of the hearing notice it behoves the court to examine whether the defence raised any triable issues, the overriding being intent being that of doing justice to the parties.

17. The plaintiff’s case against the defendant was that; the defendant during or about the year 2008 for no lawful or justifiable cause moved into land **Title Number Trans-Nzoia/Cherangni/35** and forcefully and without the plaintiff’s permission remained on that land to date; that the defendant is a trespasser and should be evicted. A declaration was sought that the plaintiff is the legal owner of the land comprised in that title. A claim for mesne profits in the sum of Kshs.200,000/= upto the year 2009 and Kshs.100,000/= per year with effect from the year 2010 upto the date of judgement was included.

18. The defendant’s defence through Ms. Onyancha & Co. Advocates stated that he denied the alleged trespass; stated that no demand has been issued to him; denied that the plaintiff is entitled to mesne profits or eviction; alleged that the defendant is wrongly enjoined; claimed that he has been sued by another person over the same land; asserted that one Alphas Wafula is in occupation of the whole suitland; and that the defendant will pray for a stay of this suit in favour of the suit commenced against him. The reply to defence filed on 17/9/2009 reasserted that it is the defendant who is in occupation of the land and that the defendant is not a party to **Kitale HCCC No. 129 of 2007**. There was no response to this reply to

defence either by amendment of defence or otherwise.

**19.** Related to this issue is the subsequent notice of motion filed on 8/4/2010 seeking judgement against the defendant. Annexed to the affidavit in support thereto is a copy of a letter from the Chief, Makutano location, marked as “MKJ” addressed to the defendant giving the defendant 14 days to vacate the subject land. By the date of the hearing the defendant had not filed his list of documents, bundle of documents, and his own statement of witness statements. Besides Ms. Onyancha & Co. Advocates who were granted leave to cease acting for the defendant cited the defendant’s communication to Mr. D.N. Onyancha that he does not need the firm’s representation.

**20.** In the circumstances, the applicant’s last hope now falls as I find that the defendant’s defence does not raise triable issues. I also find that the conduct of the defendant has been calculated to delay the hearing of this case for as long as possible, hence the change of advocates, his self representation, his failure to attend court in time for the hearing, and his failure to set aside the proceedings of 15/9/2016 despite being granted an opportunity to do so by this court and now this application.

The delaying of justice engendered by normal observance of the rules of procedure is already severe enough for any party whose desire is to urgently reach a conclusion of their litigation.

**21.** This court will not condone the willful conduct of a party who, at the expense of another, seeks to delay the wheels of justice while enjoying possession what the judgement found to be of the plaintiff’s land.

**22.** The consequences of setting aside the judgement dated 11/10/2016 would be adverse to the plaintiff/respondent, who was keen to bring the litigation to an end. Besides it would operate against the proper workings of our justice system, which is seeking to relieve itself of case backlog brought about mostly by litigants who conduct themselves in the manner the defendant has done in the current case.

**23.** I find no merit in the defendant’s application dated 19/10/2016 and I hereby dismiss it with costs to the plaintiff/respondent.

Dated, signed and delivered at Kitale on this **13<sup>th</sup> day of March, 2017.**

**MWANGI NJOROGE**

**JUDGE**

Ruling read in open court in the absence of parties who were duly notified but failed to attend.

Court Assistant - Isabellah.

**MWANGI NJOROGE**

**JUDGE**

**13/3/2017**