



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 620 OF 2013

ELIJAH NJERU MUGO.....1ST PLAINTIFF

PATRICK KINYUA SAMUEL.....2ND PLAINTIFF

VERSUS

NJIRU SAMWEL M'RWINGO.....DEFENDANT

RULING

There are two applications pending to be determined in this ruling. The first one is the defendant's application dated 9th May 2014 and premised under the provisions of **Order 22 Rule 6, Order 12 Rule 7, Order 10 Rules 11 and 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act** seeking the following prayers:

- (a) Spent.**
- (b) Spent.**
- (c) Pending the hearing and determination of this application, there be a stay of execution of the judgment delivered on 12th March 2014 and all consequential orders.**
- (d) The defendant/applicant be granted leave to file a defence out of time.**
- (e) The costs of this application be in the cause.**
- (f) Such further or other order be made as may deem just to this Honourable Court.**

That application is based on the grounds set out therein and is also supported by the affidavit of **NJIRU SAMWEL M'RWINGO** the defendant herein. I shall revert to both later in this ruling.

The second application is by the plaintiffs and dated 22nd May 2014 and is premised under the provisions of **Section 78 (2) of the Land Registration Act 2012** and seeks the following prayers:

- 1. That this Honourable Court be pleased to issue an order for the removal of the restrictions placed in the register of land parcel No. KAGAARI/KANJA/1011 to enable the registration of mutation and transfers to give effect to the decree and judgment of this Honourable Court dated 12th March 2014.**
- 2. That upon issuance of the said orders, the same be served upon the Land Registrar Embu**

County for registration on the appropriate register and compliance.

3. That costs of this application be provided for.

That application is based on the grounds set out therein and is also supported by the affidavit of the 1st plaintiff **ELIJAH NJERU MUGO** also sworn on behalf of the 2nd Plaintiff **PATRICK KINYUA SAMUEL**.

On 6th December 2016 it was agreed that the two applications be canvassed by way of written submissions which were subsequently filed by the firms of **MOGENI & CO.** Advocates for the defendant and **KIAUTHA ARITHI & CO.** Advocates for the plaintiffs.

To appreciate the two applications better, it is necessary to summarize the history of this case as far as is relevant for the applications at hand.

On 27th June 2013, the plaintiffs filed this suit seeking the main prayers that the defendant who is their brother holds land parcel No. KAGAARI/KANJA/1011 (the suit land herein) in trust for them and two acres thereof should be transferred into their names and the defendant should execute all the necessary instruments for the transfer and in default, the Deputy Registrar of this Court do execute such instruments. According to the record, the defendant only entered appearance but failed to file a defence to the suit and on 29th October 2013, the matter proceeded to formal proof and by a judgment dated 12th March 2014, orders were issued as per the plaintiff's plaint and a decree was drawn. The judgment and decree are the subject of the defendant's application dated 9th May 2014.

On the other hand, in a bid to frustrate that judgment, the defendant has connived with his daughters namely **EDDAH NJIRU**, **STELLAH NJIRU** and **ROSE NJIRU** who have now placed a restriction on the suit land restricting all dealings with the said parcel without their consent. That is the subject of the plaintiffs' application dated 22nd May 2014.

I shall first consider the defendant's application dated 9th May 2014. Although it refers to this Court's judgment dated 12th March 2014, the said judgment was infact delivered on 12th February 2014. That is a typographical error. Secondly, the application itself does not seek as one of the prayers the setting aside of the said judgment yet it seeks a stay of execution thereof. It is however premised vide the provisions of **Order 10 Rules 11 and 13 of the Civil Procedure Rules**. **Order 10 Rule 11 of the Civil Procedure Rules** specifically deals with setting aside ex-parte judgments. I will therefore treat this application as seeking both the setting aside of this Court's judgment dated 12th February 2014 and all the consequential orders flowing therefrom and also for leave to file a defence out of time.

From the grounds set out therein and the affidavit of the defendant, it is his case that although he was served with the summons to enter appearance by the plaintiffs on 4th July 2013 and did infact enter appearance on 18th July 2014 (should be 2013), he had been served with summons to appear before the Mariakani Principal Magistrate's Court on 22nd July 2013 in a traffic case where one Raphael Katana had been charged with the offence of causing the death of the defendant's son John Nyaga through dangerous driving. That the traffic case was scheduled for hearing on 22nd July 2013 but was adjourned to 27th July 2013 and it was not until 5th September 2013 that the defendant testified. It was because of that appearance at Mariakani Court that he was un-able to travel to Embu for this case or even file a defence in time. Thereafter, he was served with the hearing notice for 11th September 2013 but on his way to the Court, he was informed that the Court was not sitting. He was not served with any other hearing notice or entry of the judgment until he saw the plaintiffs with surveyors on the suit land which he denies holding in trust for the plaintiffs adding that as the sole beneficiary of the Estate of his late father, the suit land was registered in his names following the confirmation of grant in **RUNYENJES COURT SUCCESSION CAUSE No. 18 of 1976**. Among the documents annexed to that application is a Bond to Attend Court in respect of a traffic case at Mariakani Court and a defence.

In opposing the application, the 1st plaintiff **ELIJAH NJERU MUGO** swore a replying affidavit on behalf of the 2nd plaintiff **PATRICK KINYUA SAMUEL** in which he deponed, inter alia, that the

application is an afterthought since summons were served and accepted by the defendant and further, the Bond to attend Court at Mariakani Court does not show the Case No. and that Bond was also for 22nd June 2013 and not 22nd July 2013 as alleged by the defendant. That having entered appearance on 15th July 2013, there is no reason why the defence was not filed within 15 days. That the proceedings of the traffic case at Mariakani Court have not been annexed and in fact the defendant never lost any son in a traffic accident. That the defendant should have annexed a defence and the plaintiffs have already moved to the Land Control Board to execute the judgment etc. The other issue deponed therein touch on the evidence of the main case which is not relevant for purposes of this application.

This Court no doubt has the power to set aside an ex-parte judgment or order. The path taken by the Courts in that regard is well captured in the following passage from **GEETA SHAH & OTHERS VS OMAR SAID MWATAYARI & ANOTHER C.A CIVIL APPEAL No. 46 of 2008** where the Court stated thus:

“The principles to be considered by the Court in determining whether or not to set aside a default judgment are well settled. Where it is established that there was no proper service, the Court has no option but to set aside such judgment ex debito justitiae (see KANJI MAVAN VS VELJI RAMJI 1954 21 E.A.C.A 20). In such a case, the Court has no jurisdiction other than to set aside the ex-parte judgment. Where it is established that the defendant was served, the Court has unfettered discretion to set aside the default judgment provided that in so doing, no injustice is occasioned to the opposing party. Such discretion is intended 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 course of justice – see SHAH VS MBOGO 1967 E.A 116. Of course the discretion given to the Court, though unfettered, must, like all such discretions, be exercised judiciously and not upon the whims of the Court nor capriciously. However, in a case where the summons was properly served and therefore the ex-parte judgment is regular, the Court, in the exercise of its discretion does not end there. It is enjoined, in a case where draft defence is annexed in the application, to consider the draft defence and if having considered it, it comes to the conclusion that the draft defence raises matters that require the Court’s investigation or put otherwise if the draft defence annexed to the application for setting aside raises arguable issues or triable issues, then the Court is required to exercise its discretion in favour of setting aside the ex-parte judgment even though it is regular”.

A defence that raises triable issues need not necessarily be one that will ultimately succeed. It need only raise issues that are bona fide and need to go to trial – **OLYMPIC ESCORT INTERNATIONAL & OTHERS VS PARMINDER SINGH SANDHU & ANOTHER 2009 e K.L.R.** See also **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75.** I am equally guided by **Article 50 (1) of the Constitution** to the effect that:

“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”.

Guided by the above principles, it is the defendant’s case that though served with summons and having entered appearance, he was engaged in Mariakani Court attending to a traffic case where his son was a victim. It is correct as deponed by the plaintiff that the proceedings in that case were not availed. However, it is not suggested that the Bond to attend Court which is annexed to the defendant’s affidavit is not a genuine document. For my part, I am persuaded that indeed the defendant had been summoned to attend the Principal Magistrate’s Court at Mariakani on 27th June 2013 to testify in a case of causing death by dangerous driving against one Raphael Katana. That Bond to attend Court (annexture NSI 2) was subsequently extended to 22nd July 2013. It is worth noting that the defendant had entered appearance in person on 18th July 2013 a few days before his scheduled Court appearance at the Principal Magistrate’s Court at Mariakani on 22nd July 2013 which is quite a distance from this Court. The defendant has also deponed that when he was served with the hearing notice for 11th September 2013 when the case came up for formal proof, he was on his way to Court when the 1st plaintiff called to

inform him that the Court was not sitting. The record herein confirms that indeed this suit was first listed for formal proof on 11th September 2013 but did not proceed and was listed for 29th October 2013 when it proceeded. It is however not clear why the defendant did not attend Court on 29th October 2013 yet there is an affidavit of service confirming that he was duly served with the hearing notice on 12th October 2013. The evidence before me demonstrates that the ex-parte judgment obtained by the plaintiffs herein was a regular judgment. Nonetheless, this Court has the discretion to set it aside on terms that are just. I am not convinced that the defendant seeks, through deceit, evasion or otherwise, to obstruct or delay the course of justice. I have also looked at his defence (annexture **NSI 6**). He denies holding the suit land in trust for the plaintiffs claiming that they only emerged in the year 2001 some 34 years after the title thereto had been transmitted to the defendant following confirmation of grant. Triable issues are disclosed which ought to go to trial. In my view, there are sufficient grounds to warrant setting aside the ex-parte judgment herein but on terms as are just. The only prejudice that will be occasioned to the plaintiffs is the delay, if they ultimately succeed, in having their portions of the suit land registered in their names. An order for costs will suffice. The defendant's application dated 9th May 2013 will therefore be allowed but on terms which I will set out shortly.

With regard to the plaintiff's application dated 22nd May 2013, it seeks the main order that the restriction placed on the suit land by the defendant's daughters **EDDAH, STELLAH** and **ROSE NJIRU** is only meant to frustrate the execution of this Court's judgment. In his affidavit in support of the application, **ELIJAH NJERU MUGO** the 1st plaintiff has deponed, inter alia, that following this Court's judgment dated 12th February 2014, the plaintiffs have obtained the necessary Land Control Board consent to subdivide the suit land pursuant to that judgment yet the defendant's daughters named above have now placed a restriction on the same. The defendant filed grounds of opposition to the said application describing it as misconceived as there is an order staying execution of the said judgment. As the said judgment and all consequential orders have now been set aside, there is nothing to execute. That notwithstanding, there is really no reason placed before me either by the defendant or his daughters to explain why the restriction was placed on the suit land on 26th March 2014 as shown on the Green card to the suit land. The Court can only conclude that the said restriction was meant to frustrate the judgment of this Court. The Court hereby orders the removal of that restriction but will make orders for the preservation of the suit land pending trial.

Ultimately therefore and upon considering both applications, the Court makes the following orders:

(A) The defendant's Notice of Motion dated 9th May 2013 is allowed in the following terms:

- 1. The judgment dated 12th February 2014 is set aside together with all consequential orders.***
- 2. The defendant shall pay the plaintiffs thrown away costs assessed at Ksh. 20,000 within 30 days of the delivery of this ruling.***
- 3. The defendant shall file and serve his defence within 15 days of the delivery of this ruling.***
- 4. The defendant shall also meet the costs of this application.***
- 5. In default of (2) above, the said judgment shall revert and the plaintiffs may proceed and execute it.***

(B) The plaintiffs' Notice of Motion dated 22nd May 2013 is allowed in the following terms:

- 1. The restriction placed on the suit land by EDDAH MUTHANJE NJIRU, STELLAH MUTHONI NJIRU and ROSE NJERI NJIRU is mischievous and an abuse of the Court process. It is hereby ordered to be removed forthwith.***
- 2. To protect the suit land, there shall be no dealings of any kind to be registered against title to land parcel No. KAGAARI/KANJA/1101 until this suit is heard and finally determined.***

3. The defendant shall meet the costs of this application.

As the suit land is situated within the jurisdiction of the Environment and Land Court Embu, let this file be transferred and taken to that Court for further orders as to hearing. Mention before Hon. Angima J. on 25th September 2017 for directions.

B.N. OLAO

JUDGE

28TH JULY, 2017

Ruling delivered, dated and signed in open Court this 28th day of July 2017

Ms Manyasa for Mr. Arithi for Applicants present

Mr. Mogeni for Respondent absent.

B.N. OLAO

JUDGE

28TH JULY, 2017