



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 174 OF 2014

MWANAJUMA ALI BUWA.....1ST APPLICANT

TWALIB A. RUGUNDA.....2ND APPLICANT

BAKARI ABDALLA YUWA.....3RD APPLICANT

-VERSUS-

**ZAINULABIDIN YUSUFALI DAR (suing as personal rep. of the Estate
of YUSUFALI ADAMALI DAR).....1ST RESPONDENT**

**BURNAHUDDIN SADIQALI GULAMHUSEIN (suing as personal rep.
of the Estate of SADIQALI GULAMHUSEIN).....2ND RESPONDENT**

MUSTAFA YUSUFALI ABDULHUSEIN.....3RD RESPONDENT

LAND REGISTRAR, KWALE.....4TH RESPONDENT

RULING

1. The defendants have moved this Court vide their application dated 14th November 2016 and filed in Court on 17th November 2016. The Defendants/Applicants seeks to set aside the orders made by this Court on 21st May 2015 on basis of want of service. The orders were issued pursuant to the plaintiffs' application dated 10th July 2014. The applicants accuse the process server of perjury and they pleaded that the said orders be set aside in the interest of justice since the applicants have been denied the opportunity to enjoy the fruits of their judgment in Misc Case No 201 of 2011.

2. In support of the application is the affidavit of Bakari Abdalla Yuwa, the 3rd applicant. He deposed that the 1st applicant obtained a title deed in her name for Plot No Kwale/Msambweni A/1666 on 1st April 2014. That in October 2014 when he went to do a search at the land's registry, he discovered the Court Order issued on 21.5.15 which had been registered on this title. That it is through this process that he learnt of the existence of this case. He denied service and denied appointing Mr Were & Co Advocates to act on their behalf. The 3rd applicant deposed in paragraph 19 that because of the order, they have been unable to sell or improve the land and therefore urged the Court to set aside the orders issued on 21st May

2015.

3. The application is opposed by the 1st – 3rd Respondents/Plaintiffs. The Respondents filed a replying affidavit giving a narrative of how they acquired the suit property in paragraph 3 – 9. That they were apprehensive on how the applicants acquired title hence the reason they filed their application dated 10th July 2014. That they served the applicants with the application who subsequently appointed Mr Were & Co advocates to act for them. Consequently the applicants cannot disown him. The said Respondents also deposed that the 3rd applicant was also duly served. The Respondents also deposed that they were never parties to the case No Misc Case No 201 of 2011. It is their case that the orders should not be set aside.

4. The parties filed lengthy written submissions which I have read and considered. On perusing the file, I note that the application dated 10th July 2014 first came up on 15th July 2014 before Mukunya J who granted *ex parte* orders in terms of prayer 1 & 2 of the application. By the time I took over the matter, it was scheduled for hearing inter partes. It is therefore misleading for counsel for the applicant to submit that I granted the orders without setting a date for inter partes hearing. My part was to determine the application on merits and the same having not been opposed despite service was to confirm the orders as I did on 21st May 2015. These orders were extracted and signed by the deputy registrar on 27th May 2015.

5. On the question of setting aside the orders, the Court is usually guided by the principles laid out in the two renowned cases of **Shah vs Mbogo (1967) E. A 116** and **Patel vs E. A Cargo Handling Services Ltd (1968)** while exercising its discretion whether to set aside or not. In the two cases it was held that the primary concern of the Court is ***“to do justice between the parties, the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”***

Further the Court of Appeal in **Municipal Council of Meru vs National Housing corporation and 54 others** held that ***“in exercising discretion, the Court usually considers the reasons if any given for the default and the merits or otherwise of the case of the party against whom judgement was entered but is not limited to only those considerations.”***

6. In the instant case, Mr Were & Co advocates filed a notice of appointment of advocate on 30th July 2014 on behalf of the 1st & 2nd applicants. This was before the impugned order was made. The record does show that Mr Were did present himself before this Court on 8th December 2014 and had no objection to the extension of the interim orders. The Court went ahead to give them (now 1st & 2nd applicants) liberty to file a response to the application. Mr Were was subsequently served with notices as the record show but did not attend Court. In regard to service upon the 3rd applicant, the process server said thus in his affidavit of service filed in court: ***“That on the same day at about 4pm I proceeded to Rothman’s building, 1st Floor Kizingo area MSA County where the 3rd defendant Mr Bakari Abdalla Yuwa has an office. Where upon entry I found a gentleman who after introducing myself and purpose of my visit said that he is Mr Bakari Abdalla Yuwa. I served him with the documents which he accepted but declined to sign my copy which I return as duly served.”***

7. Mr Bakari Abdalla Yuwa has not denied that his offices are located in the building described by the process server. The 1st and 2nd applicants have also not shown by way of correspondence sworn affidavit to indicate that they never instructed Mr Were & Co advocates to act for them. They ought to have approached the said Mr Were to swear an affidavit or do a letter notifying this Court that indeed he had no instructions. Mr Were advocate having appeared for them made the Respondents to believe that he had such instructions. Each time the case was fixed he was served and he received the process without protest. Accordingly I hold the argument that the notice of motion dated 10th July 2014 was not served as misplaced.

8. On whether the parties have suffered injustice, the order issued is as follows:

“Pending the hearing and determination of this suit, the defendants by themselves, their agents, servants and or employees be and are hereby restrained from alienating, selling, charging, leasing, transferring, wasting, disposing or in any way dealing with the parcel of land known as Kwale/Msambweni A/1666.”

First the order is not conclusive as the suit is yet to be determined. Secondly the order is intended to preserve the suit property pending determination of this suit. Therefore the applicants still have room to defend the suit and or take any steps towards having this suit determined. They still have room to be heard as the orders issued are interlocutory.

9. In my view setting aside the said orders will result in delay in the just determination of this matter. I find no plausible reason why I should set them aside given the applicants were properly served but chose not to oppose the application dated 10th July 2014. They have a remedy of being heard by filing a defence to the plaint and participating in the hearing of the main suit. Therefore I find no merit in the present application dated 14th November 2016. I hereby dismiss it with costs.

Dated, signed & delivered at Mombasa this 12th day of July 2017

A. OMOLLO

JUDGE