



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

H.C.C.C. 315 OF 2013

JULIUS MWITHALII MEEME.....1ST PLAINTIFF

SABINA KARAUKI MEEME.....2ND PLAINTIFF

MORRIS KINYUA MEEME.....3RD PLAINTIFF

DAVID GITONGA MEEME.....4TH PLAINTIFF

PATRICK NKIRI MEEME.....5TH PLAINTIFF

ROBERT MIRITI MEEME.....6TH PLAINTIFF

PURITY MWENDWA MEEME.....7TH PLAINTIFF

VERSUS

JULIA KALANGI MBAABU.....DEFENDANT

R U L I N G

1. The Notice of Motion dated 12th July, 2016 seeks the following orders:-

a) Spent.

b) That this Honourable Court be pleased to set aside the interlocutory judgment entered on 7/8/2014 against the defendant, and all other subsequent orders issued thereafter.

c) That application /defendant be allowed to file and serve statement of defence and proceed to defend the suit.

d) That the Honourable Court be pleased to issue further orders as will be justifiable in the circumstances and in the interest of justice.

e) That costs be in cause.

2. The application is based in the grounds:-

i. That the application/defendant was never served with summons to enter appearance as purported.

ii. It's only fair that the said interlocutory judgment be set aside and the defendant be given an opportunity to be heard.

iii. The applicant /plaintiff has a good defence to the plaintiffs claim herein.

3. Applicant has also sworn a Supporting Affidavit (of 26.07.16) where she states that she doesn't know the Process Server Japhet M'Mukiiria. She also states that she has a good defence and she has annexed a draft thereof.

4. 1st Plaintiff is the one who filed a Replying Affidavit on behalf of the rest (Plaintiffs /Respondents). She avers that applicant is simply delaying the cause of justice as she has been indolent in bringing forth this application and that equity does not come to the aid of the indolent. Respondent further states that applicant was duly served and even visited the offices of Plaintiff's Advocates to seek legal representation (which request was declined).

5. On 09.05.17, directions were given for the application to be canvassed by way of Written Submissions. I have weighed all the arguments raised herein along with the cited authorities.

6. I find that the Return of Service by Process Server is dated 24.02.14. Interlocutory Judgment was then entered on 07.08.14. The present application was filed almost two years thereafter on 12.07.16.

7. Nowhere in the Applicant's Affidavit has she attempted to explain the delay. She has not given an explanation as to how she learnt about the matter and when. The delay is rather inordinate.

8. I also find that the process server has indicated that he effected service with regard to Summons to enter appearance at Irindii village in laare division because he knew applicant. Application denies knowing this process server. If that was true, why didn't the applicant request for cross examination of this process server on how he knows her. I do believe that the summons to enter appearance were properly served.

9. Notwithstanding the fore going, I am inclined to give applicant a chance to defend the suit on the following grounds;

1) Firstly, I find that the draft defence does raise triable issues. In particular this Court would be interested in establishing whether the issues raised in this suit were dealt with in a Succession cause cited as Meru H.C.C Succ No. 47/1990. The case of **Patel vs. E.A Congo handling Services Ltd C.A No. 2/1974**, even though cited by Respondent is quite relevant on this point, **that "the main concern of the court is to do justice to the parties....."** .

2) The second point to consider is that land matters are very emotive (as rightly submitted for and on behalf of the applicant). The nature and extent of justice (or injustice) handed down at a particular time in life is passed on to the generations to come. I am therefore in agreement with applicant's submission that in order to safe guard intergenerational equities, it is fair and just for the case to be settled on merits by giving all parties a chance to be heard.

3) Finally, I find that property rights are anchored under the Bill of Rights in the Constitution. Under article 20 (3) (b) **"in applying a provision of the bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom"**.

This Court would only be able to safe guard the litigants rights and interests to property if both sides are given an opportunity to be heard. This is what fairness is all about as stipulated under article 50 (1) of the constitution

10. I therefore allow the application on the following terms:-

1) The Amended draft defence is to be filed and served along with a paginated bundle of all the

documents that defence wishes to rely on and the list of statement of witnesses within 7 days from date of delivery of this ruling.

2) In the event that applicant doesn't comply within the 1st directive, then the application will stand as dismissed.

3) Respondents are at liberty to file an amended plaint (if any) within 7 days from dated of service of the defence, along with any documents and statements of witnesses.

4) The Applicant is to pay costs of the present application.

DELIVERED, DATED AND IN OPEN COURT AT MERU THIS 27TH DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Miss Nyaga h/b for Mr.Ondari for Defendant/ Applicant present

Hon. L. N. MBUGUA

ELC JUDGE