



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO 12 OF 2012

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLE 22(1) (2) (3) (4);
ARTICLES 23, 48, 40(1), 48 AND 47**

AND

IN THE MATTER OF THE LAW OF SUCCESSION CAP 166 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND CONTROL ACT CAP 301 LAWS OF KENYA

SECTIONS 6, 8 AND 22

AND

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012 SECTIONS 24, 25, 26, 27, 68, 69,
80, 86**

AND

IN THE MATTER OF PLOT NO. MALINDI PORTION NO. 1757

AND

IN THE MATTER OF PLOT NUMBER GEDE/MAJIMBONI/162

AND

IN THE MATTER OF THE ESTATE OF GREMMO GIOVANNI (DECEASED)

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICITON
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

AND

IN THE MATTER OF THE ADVOCATE ACT CAP. 16 LAWS OF KENYA

BETWEEN

DAVIDE GREMMO.....1ST PETITIONER

DANIELE GREMMO.....2ND PETITIONER

SARA GREMMO.....3RD PETITIONER

VERSUS

MELINA BORA.....1ST RESPONDENT

REGISTRAR OF TITLES MOMBASA.....2ND RESPONDENT

LAND REGISTRAR, KILIFI.....3RD RESPONDENT

HON. THE ATTORNEY GENERAL.....4TH RESPONDENT

OMAR SALIM ABDALLA.....5TH RESPONDENT

LILY K. MUSINGA

WILLIAM O. WAMEYO

JACK W. MATHKA.....6TH RESPONDENTS

RULING

1. The Notice of Motion before me for determination is dated 19th April 2017. The Applicant Omar Salim Abdalla who is the 5th Respondent in the Petition filed herein on 9th October 2012 is seeking for Orders:-

3. THAT this Honourable Court be pleased to stay execution of the Judgment dated 23rd October 2015, the decree dated 27th November 2015 and all other consequential orders herein pending the hearing and determination of the suit.

4. THAT this Honourable Court be pleased to set aside the Judgment dated 23rd October 2015 and decree dated 27th November 2015 and does grant the Defendants/Respondents herein leave to defend this suit.

5. THAT the costs be provided for.

2. The Application is supported by the Applicant's affidavit sworn on 19th April 2017 and is premised on numerous grounds set out on the face thereof which are inter alia, that:-

(i) The Respondents especially the 5th Respondent were never served with the Summons to enter appearance or pleadings filed by the Petitioner.

(ii) The 5th Respondent purchased the suit property from one Melina Bora and has never been aware of this Petition.

(iii) That immediately he purchased the suit property, the 5th Respondent was served with an injunctive order stopping all dealings with the said property arising from HCC No 56 of

2011; Liana Tambuleli –vs- Melina Bora & 9 Others.

(iv) *That since then to-date the matter has never proceeded and the Applicant who is an innocent purchaser for value without notice stands to suffer irreparable loss as the suit property may be taken away from him.*

(v) *That the Applicant has a meritorious defence that raises several triable issue and should be allowed to defend the suit on its merits.*

3. The Petitioners are however opposed to the grant of the Orders sought. In Grounds of Opposition filed herein on 24th May 2017, the Petitioners list 13 Grounds on which they oppose the application as follows:-

1. That the Petitioner filed this Petition against the Respondent on 9th October 2012

2. That all the Respondents were served with the Petition and were accorded an opportunity to be heard

3. That the matter then proceeded for hearing and Judgment was delivered on 23rd October 2015

4. That it has been a whole 19 months since the Judgment was delivered.

5. That the said delay is inordinate and inexcusable and the same has not been explained.

6. That the 5th Respondent/Applicant is guilty of laches as he sat on his laurels for 19 months.

7. That equity aids the vigilant and not the indolent and the Applicant herein has no equitable remedy.

8. That the Advocate now on record for the 5th Respondent/Applicant is also the 6th Respondent in the Petition who at the time of filing the Petition was an Advocate in the firm of Musinga & Company Advocates the firm that is responsible for preparing the Sale Agreement for Plot No. Chembe/Kibabamshe/366 and also the transfer of the main subject of the Petition.

9. That the Advocates appearance in the instant application presents a serious conflict of law and representation.

10. That the Application is hinged on the proceedings of another matter that has issues that are extraneous to the instant Application and have no bearing to this case.

11. That the Application is therefore misconceived and/or misguided as it is meant to deny the Petitioners an opportunity to execute the decree dated 27th November 2015.

12. That the Application is thus an abuse of the Court process and it is brought before this Court with an intention of misleading the Court, to delay the Court process and also to delay justice to the Petitioner; and

13. That the Application is misconceived, mischievous and in bad faith, it is also frivolous and vexatious.

4. I have carefully considered the Application and the Grounds filed in Opposition thereto. I have equally considered the submissions placed before me by the learned counsels for the parties.

5. The law applicable in cases where a party seeks to set aside an ex-parte Judgment in default of appearance or defence is Order 11 Rule 11 of the Civil Procedure Rules. In **Philip Kiptoo Chemnolo and**

Mumias Sugar Company Ltd –vs- Augustine Kubede(1982-1988) KAR page 1036, the Court of Appeal while dealing with an Appeal against refusal to set aside an *ex parte* Judgment in default stated that:-

“ The Court has unlimited discretion to set aside or vary a Judgment entered in default of appearance upon such terms as are just in the light of the all facts and circumstances both prior and subsequent and of the respective merits of the parties.

6. In ***Shah –vs- Mbogo & Another(1967) EA 116***, it was stated that the object of clothing the Court with such discretion is to avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought(whether by evasion or otherwise) to obstruct or delay the cause of justice.

7. Overall, the effect of various judicial pronouncements on the subject is that where a defendant raises a reasonable defence to the Plaintiffs claim and the defendant has not been privy to obstruction of justice, the Court should exercise its discretion in favour of the defendant, even where the Judgment entered is regular.

8. Applying those principles to this case, the 5th Respondent contends that he has never been served with any summons or hearing notice for this petition. It is his case that he learnt about this case through his Advocate, Mr. Matheka who came to know of the same when browsing the Kenya Law Reports for an authority.

9. In response, the Petitioner states in the Grounds of Opposition that all parties to the suit were served with the Petition and were accorded an opportunity to be heard. It is further the Petitioners’ case that Judgment was delivered on 23rd October 2015 and the Applicant is guilty of laches as it has taken him more than 19 months from the date of the Judgment to file this application.

10. A perusal of the Court record shows that prior to the hearing and delivery of the Judgment as aforesaid, a process server by the name Morris Mwaruo Ngonyo managed to serve the 2nd, 3rd, 4th and 6th Respondents herein. The Respondents who were served indeed entered appearance and participated in the suit. On 6th June 2013, the Honourable Justice Angote upon an application being made granted Orders allowing the 1st Respondent to be served by way of substituted service. That advertisement was subsequently carried in the Standard Newspaper of 13th July 2013 and on 20th November 2013. While the name of the 5th Respondent/Applicant appears amongst the names of the parties, I did not find the order directing that he be served in that manner and/or one that was specifically directed to him to enter appearance and plead to the petition.

11. In my considered view, having denied that he was served and/or was aware about the existence of the Petition, it was incumbent upon the Petitioner to succinctly lay out the manner of such service instead of the generalized response given in the Grounds of Opposition filed herein.

12. Indeed while it is true that the Judgment herein was obtained a long time ago in 2015, the Petitioners did not demonstrate to this Court that they had attempted execution of the decree thereof and/or brought it to the attention of the Applicant. It is accordingly not possible to hold the Applicant as being guilty of laches and/or inordinate delay when no one had ever brought his attention to the decision of the Court.

13. The Judgment and decree entered herein allowed the Petitioner’s Petition which directed the 2nd Respondent to cancel entries made by itself and to confirm ownership of the property known as Plot Number Malindi Portion No. 1756 and Gede Mijombani 162 to the Estate of Givanni Gremo (deceased). The Petitioners herein are the children of the deceased. I note from the record that the Applicant herein claims to have bought the suit property from a lady known as Liana Tamburelli who claimed to have obtained letters of administration for the Estate of the Deceased by virtue of having been married to the said Givanni Gremo.

14. The Applicant contends that he is in possession of the suit premises since 2011 when he claims to

have purchased the same and stands to suffer prejudice if evicted therefrom. In the absence of any proof that he was served with summons and that he has tried to delay this matter, I find and hold that he is entitled to defend himself against the Petition as he has clearly proved that he has a triable issue as against the Petitioners.

15. That being the case, I find that there is merit in the application dated 19th April 2017. The same is allowed with costs.

Dated, signed and delivered at Malindi this 6th day of December, 2017.

J. O. OLOLA

JUDGE