



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI

CIVIL CASE NO. 308 OF 2015(O.S)

PETER SAKALA..... APPLICANT

VERSUS

EMBAKASI RANCHING COMPANY LTD.....1STRESPONDENT

CATHERINE NYAGA.....2ND RESPONDENT

RULING

The applicant brought this suit by way of Originating Summons dated 21st April, 2015 seeking the determination of the following questions:-

1. Whether the applicant has acquired title to all that parcel of land known as LR Block 105 Plot No. 5532 (hereinafter referred to as “**the suit property**”) by adverse possession having been in uninterrupted possession and occupation thereof for a period in excess of 12 years.
2. Whether the land registrar Nairobi should be ordered and directed to delete the names of the respondents as the owners of the suit property and in place thereof register the plaintiff as the absolute owner of the said property.

The Originating Summons was supported by the applicant’s affidavit sworn on 21st April 2015 in which he stated that he entered and occupied the suit property in the year 1988 while he was working with the 1strespondent’s predecessor and proceeded to put up his residence thereon. He stated that he has remained in uninterrupted occupation of the suit property since then until recently when he learnt that the respondents were making attempts to allocate the suit property to a third party. He stated that he has become entitled to be registered as the owner of the suit property by adverse possession on account of his quiet and undisturbed occupation thereof for a period of over 12 years.

Together with the Originating Summons, the Applicant filed an application by way of Notice of Motion dated 21st April, 2015 under certificate of urgency seeking a temporary injunction restraining the respondents from interfering with his quiet occupation and possession of the suit property pending the hearing and determination of the Originating Summons. The application was brought on the grounds that the applicant has enjoyed quiet possession and occupation of the suit property since 1988 and that the 2nd respondent had invaded the suit property and attempted to destroy the structures and a house that the applicant had put up thereon. He claimed further that the 2ndrespondent had commenced construction on the suit property notwithstanding his occupation thereof. The applicant contended that he was threatened with eviction unless the court issued the injunction that he had sought. The applicant annexed to his affidavit photographs said to have been taken on the suit property showing the developments that he has carried out thereon.

The applicant's application came up for hearing *ex parte* on 21st April, 2015 before Onguto J. when it was certified as urgent and the applicant directed to serve the same for inter-partes hearing on 5th May, 2015. In the meantime, the court granted an interim injunction in terms of prayer 2 of the application. When the application came up for hearing interpartes on 5th May, 2015, there was no appearance by the respondents. After satisfying himself that the respondents were served with the application, Mutungi J. before whom the application was listed allowed the application as unopposed.

On 22nd May 2015, the applicant filed another application of the same date seeking orders that the O.C.S Ruai Police Station do enforce the orders that were granted by Mutungi J. on 5th May 2015 aforesaid and that the 2nd respondent be ordered to demolish the wall that she had erected on the suit property pending the hearing of this suit. The application was brought on the grounds that the court order that was issued on 5th May 2015 restraining the respondents from interfering with the applicant's quiet possession of the suit property had been served upon the respondents and that in defiance of the said order, the 2nd respondent had continued to harass the applicant by erecting a stone wall around the suit property to restrain the applicants access to the property. The 2nd Respondent had also put up a house on the suit property hurriedly whose purpose was to defeat the said court order. The applicant's second application was certified as urgent on 26th May, 2015 by Mutungi J. who directed that the same be served for interpartes hearing on 9th June, 2015.

When the application came up for hearing inter-partes before Mutungi J. on 9th June 2015, once again, the respondents did not appear and the court having satisfied itself that they were indeed served with the application dated 22nd May 2015, allowed the said application and directed the O.C.S Ruai Police Station to ensure that the 2nd Respondent does not continue with any further development on the suit property.

This last order seems to have woken up the 2nd Respondent from slumber. The 2nd respondent moved the court by way of Notice of Motion application dated 1st July 2015 seeking to set aside the court order that was given by Mutungi J. on 5th May 2015 and an injunction to restrain the applicant from trespassing, destroying, alienating, selling, charging, changing, disposing of, leasing, operating and/or in any other way interfering with the suit property pending the hearing and determination of this suit. The 2nd respondent also sought an order that the applicant be compelled to remove a canopy from his house which is protruding across the perimeter fence to the suit property. This is the application which is the subject of this ruling. The application was supported by the affidavit of the 2nd respondent sworn on 1st July 2015. The Application was brought on the grounds that the orders of 5th May, 2015 were obtained by the applicant fraudulently and through misrepresentation of facts. The 2nd respondent contended that she was not served with the application in which that order was made and that the applicant does not reside on the suit property but on a road reserve next to it. The 2nd respondent denied that the applicant has been in continuous and uninterrupted occupation of the suit property.

In her affidavit in support of the application, the 2nd respondent stated that she is the widow of one, Isaac NjugunaMwangi who is the registered owner of the suit property. She stated that Isaac NjugunaMwangi ("deceased") died on 18th January, 2012. The deceased had purchased the suit property from one, Elizabeth NjokiWanjiru in the year 1992 and was issued with a share certificate in the year 1998. The 2nd respondent stated that they have been using the suit property for farming purposes since then. She stated that the applicant had rented a quarry on a parcel of land next to the suit property on which he used to mine building materials until the quarry was closed after which he put up a temporary structure on a road reserve adjacent to the suit property. She denied that the applicant's said structure is on the suit property. The 2nd respondent stated that the applicant did not serve her with the court documents soon after filing this suit and that the affidavits of service on the strength of which the court issued various orders herein were all false. She maintained that the order sought to be set aside was obtained by the applicant fraudulently and through misrepresentation.

The 2nd respondent annexed to her affidavit among others; a copy of the death of certificate of the

deceased, a copy of the share certificate that was issued by the 1st respondent to the deceased and, photographs showing developments on the suit property and the structure said to have been put up by the applicant on a road reserve next to the suit property.

The 2nd respondent's application was opposed by the applicant through grounds of opposition dated 10th July 2015 and replying affidavit sworn on the same date. In his grounds of opposition, the applicant contended that the 2nd respondent's application is defective in law and is not properly before this court. In his replying affidavit, the applicant contended that the 2nd respondent was duly served with the court documents and was all along aware of these proceedings. The applicant contended that the 2nd respondent has come to court with unclean hands and as such is not deserving of the orders sought.

The 2nd respondent's application was argued by way of written submissions. The 2nd respondent filed her submissions on 25th September 2015 while the applicant filed his submissions in reply on 18th November, 2015. I have considered the 2nd respondent's application together with the applicant's grounds of opposition and replying affidavit that were filed in opposition thereto. Finally, I have considered the submissions by both parties and the authorities cited in support thereof. Order 40 rule 7 of the Civil Procedure rules provides that:-

“Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”

Order 51 rule 15 of the Civil Procedure Rules on the other hand provides that:-

“The court may set aside an order made ex parte.”

It is clear from the foregoing provisions of the Civil Procedure Rules that this court has unfettered discretion to set aside the order that was issued herein on 5th May, 2015 by Mutungi J. ex parte. In the case of **Pithon Waweru Maina Vs. Thuku Mugiria (1982 – 88) 1 KAR 171 Potter JA** stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or upon failure of either party to attend a hearing;

“This is another case concerning the exercise of the judicial discretion under Order 9A, rule 10 and 11 and Order 9B r8 (which are in the same terms) of the civil procedure (revised) Rules 1948, to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law. Firstly, as was stated in Patel Vs. EA Cargo Handling Services Ltd. (1974), EA 75 at 76C and E. There is no limit or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules.” Secondly, as Harris J. said in **Shah vs. Mbogho (1976) EA 116 at 123B**, **“This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”** That judgment was approved by the court of appeal in **Mbogo Vs. Shah (1968) EA 93** and in **shabbir Din Vs. Ram Parkash Anand (1955) 22EACA 48 Biggs JA** said at page 51 **“I consider that under order 9 r 20 the discretion free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellants legal advisers even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted depends on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”**

The foregoing principles although laid down in applications that were seeking the setting aside of default judgments, would in my view apply to applications seeking the setting aside of ex parte orders like in the

present case. What I need to determine therefore, is whether in the circumstances of this case, I should exercise my discretion in favour of setting aside the *ex parte* orders that were made herein on 5th May, 2015 by Mutungi J. What are the facts of this case? As I have stated at the beginning of this ruling, the applicant brought this suit seeking a declaration that he has acquired the suit property by way of adverse possession and an order for the property to be registered in his name. The applicant claimed that he has occupied the suit property for uninterrupted period of over 12 years. Together with the Originating Summons, the applicant brought an application seeking, a temporary injunction to restrain the respondents from interfering with his quiet possession of the suit property. In this application, the applicant claimed that the 2nd respondent with the permission of the 1st respondent was trying to occupy the suit property and to commence construction of a house thereon an action that would interfere with his possession of the suit property. The applicant was granted an *ex parte* interim injunction on 21st April, 2015 and directed to serve the applicants for inter partes hearing on 5th May, 2015. According to the affidavit of MeshackOlando, a process server of this court, he served the 2nd respondent with the Originating Summons and the Notice of Motion application dated 21st April 2015 on 30th April 2015 at 12:00 noon on the suit property. The said process server has stated that he contacted the 2nd respondent through her cell phone number 0722371072 and they agreed to meet on the suit property at 12.00 noon which is the time when he served her with the Notice of Motion application dated 21st April, 2015 that came up for hearing on 5th May, 2015 before Mutungi J. The respondent did not appear in court on 5th May, 2015 and the application was allowed as prayed. It is this order of 5th May, 2015 that the 2nd respondent is seeking to set aside. The 2nd respondent has contended that she was not served with the application dated 21st April 2015.

The 2nd respondent has contended that the contents of the affidavit of service referred to above are false and that the said affidavit was prepared by the said process server in conspiracy with the applicant with the aim of circumventing the cause of justice by having the application heard *ex parte* to the advantage of the applicant who is ill bent on grabbing the suit property. The 2nd respondent has contended that the applicant misled the court into granting the orders aforesaid, first, by falsely claiming that the 2nd respondent was served and secondly, by claiming that he is in occupation of the suit property. The 2nd respondent has contended that the applicant is occupying a road reserve adjacent to the suit property and not the suit property.

On the material before me, I am satisfied that the 2nd respondent was served with the Originating Summons herein and the injunction application dated 21st April 2015 which came up for hearing enter partes on 5th May, 2015. The process server MeshackOlando has given detailed information in his affidavit of service how he traced the 2nd respondent and served her with the Originating Summons and the application aforesaid. This affidavit has not been challenged in any material respect by the 2nd respondent save for the blanket allegation that the content thereof is false. The 2nd respondent has not denied that cell phone number 0722371072 is hers. She has also not denied that the said process server called her on 30th April, 2015 and that they met on the suit property. In the case of **Karatina Garments Ltd. Vs. Nyanarua (1976) KLR 94**, the court stated that:-

“Where one party to the proceedings denies having been served with a relevant document, it is proper for the court to look into the matters; if the court is faced with conflicting affidavits as to the alleged service of process it is proper that the deponents should be examined on oath in order to establish the truth.”

In this case, I have noted that the 2nd respondent had indicated in her affidavit that she wished to cross-examine the process server on the affidavit of service. The 2nd respondent did not seek leave of the court for that purpose and as such cross-examination of the process server was never pursued. Even if leave had been sought, I doubt if the court would have granted the same. Examination of a process server is only necessary where there are conflicting affidavits as to service which is not the case herein. As I have stated above, the 2nd respondent has not denied receiving a call from the process server on 30th April 2015

and meeting him at the suit property on the same day at 12:00 noon. She has not stated that she did not visit the suit property on that day or that she did not talk to or meet the process server. In the case of **Mirukavs. Abok& Another (1990) KLR 541**, it was held among others that:

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning service to show that his return is incorrect.”

In this case, I am of the view that the 2nd respondent has failed to discharge this burden. It is my finding therefore that the 2nd respondent was served with the application for injunction dated 21st April 2015 and as such the judge was entitled to proceed with the said application *ex parte* on 5th May 2015 when the 2nd respondent failed to appear in court. The order made by Mutungi J. on that day was therefore regular. The 2nd respondent is in the circumstances, not entitled to have the said order set aside *ex debito justitiae* on account of non service.

As I have stated above, the courts discretion to set aside *ex parte* judgments and orders is unfettered. It follows therefore that the mere fact that the 2nd respondent was served and chose for reasons only known to her not to appear in court alone cannot bar this court from exercising its discretion in her favour if it would serve the interest of justice to do so in the circumstances of this case. There is no evidence that the 2nd respondent failed to appear in court on 5th May, 2015 with a view to evade or obstruct the course of justice. There is also no evidence that the applicant would suffer serious prejudice or injustice which cannot be compensated for in costs if the orders sought are granted. In the case of **Philip Chemwolo& another vs. Augustine Kubede [1982]KAR1033 at 1040** Apaloo JA. stated as follows:-

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

The 2nd respondent has contended that the applicant is not residing on the suit property and that he misled the court that he is threatened with eviction from the suit property. The 2nd respondent has contended that the applicant has his residence or house on a road reserve which is adjacent to the suit property. The 2nd respondent has exhibited photographs showing the applicant's residence and the developments that the 2nd respondent has carried out on the suit property. The said photographs which have not been contested by the applicant show that the applicant's residence is between a road and a building which the 2nd respondent is putting up on the suit property. If it is true that the applicant's residence is not on the suit property, then I cannot see how the development being carried out by the 2nd respondent on the suit property would interfere with the applicant's quiet possession of the said residence. I am of the view that the 2nd respondent has a reasonable defence to the applicant's application dated 21st April 2015 that was heard *ex parte* which defence she should be given an opportunity to put forward. The 2nd respondent has contended that as a result of the said orders of 5th May 2015, the developments that she was carrying out on the suit property have stalled and as such the said order is inflicting great loss and prejudice to her. I am of the view that in the interest of justice, the 2nd respondent should be heard in the matter. Due to the foregoing, I am satisfied that in the circumstances of this case, sufficient reason exists that warrants the setting aside of the orders made herein on 5th May, 2015 by Mutungi J.

A part from seeking the setting aside of the said order of 5th May, 2015, the 2nd respondent has also sought an injunction to restrain the applicant from interfering with the suit property pending the hearing and determination of this suit. She has also sought a mandatory order to compel the applicant to remove a canopy which is protruding from his house to the perimeter fence that the 2nd respondent has put around the suit property. I have noted that the 2nd respondent has not filed a replying affidavit to the Originating Summons. In my view therefore, there is no basis for these reliefs at this stage. I am therefore not inclined

to grant the same in the present application.

The upshot of the foregoing is that the 2nd respondent's application dated 1st July 2015 succeeds in part and is allowed on the following terms:-

1. The orders made herein on 5th May, 2015 are hereby set aside together with all consequential orders that were made pursuant thereto.
2. The 2nd respondent is granted leave to file a replying affidavit and/or grounds of opposition to the applicant's application by way of Notice of Motion dated 21st April 2015 within 14 days from the date hereof.
3. The parties shall take a hearing date for the application dated 21st April 2015 at the registry on a priority basis.
4. Pending the hearing and determination of the said application dated 21st April 2015 inter partes as aforesaid, the respondents shall not demolish or destroy the applicant's structures, house or residence said to be situated on the suit property or in any way interfere with his occupation and possession thereof.
5. The order issued in paragraph 4 above shall not prevent the 2nd respondent from continuing with the construction of the two (2) houses whose construction she had commenced on the suit property save that the construction works shall not interfere with the applicant's residence aforesaid.
6. The 2nd respondent shall pay to the applicant the cost of this application assessed at Kshs.15,000/= within seven (7) days from the date hereof.

Delivered, Dated and Signed at Nairobi this 22nd day of January, 2016

S. OKONGO

JUDGE

In the presence of

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the Applicant