



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 177 OF 2011

ALI SWALEH MWANGULA.....PLAINTIFF/APPLICANT

-VERSUS-

CYRIL MANSFIELD & 2 OTHERS.....DEFENDANTS/APPLICANTS

RULING

1. The application dated 11th November 2015 is filed under the provisions of section 1A, 1B and 3 of the Civil Procedure Act and Order 5 rule 6, Order 10 rule 11 and Order 51 rule 1 of the Civil Procedure Rules. It seeks the following orders ;

1. Spent

2. The Applicants be joined as parties to these proceedings

3. Spent

4. Spent

5. That the judgement entered on 30.7.2013 and the resultant order issued on the 12.8.2013 be set aside *ex debito justitiae* and all other orders, proceedings and registrations subsequent thereto be vacated.

6. The Court do issue leave to the Applicants to file their respective defences to this suit.

7. The Court do make further orders as they deem fit.

2. The application is supported by the grounds on the face of this motion and the affidavit of Jonathan Stewart Coulson. The 2nd Applicant claims ownership of the mentioned parcels of land in ground one of the motion having purchased them from the 1st Applicant. He averred that the plaintiff has never been in occupation of the said properties. Further that this suit was filed on 24.6.2011 against the defendant who passed on in December 1988. They aver of having a good defence to the suit.

3. In the supporting affidavit, the Applicants gave a background on how they acquired the suit property. They have also annexed title deeds for their parcels of land Kwale/Diani Beach/739, 740, 741, 742, 743 and 744. They asked the Court to grant the orders as prayed.

4. The Plaintiff/Respondent was given an opportunity to file his response to the motion but failed to do so. The application as it stands is unopposed on facts presented by the Applicant. Both parties filed written submissions. I have looked at the submissions of both parties. The Applicant submitted that plot No Kwale/Diani Beach/202 was closed on subdivision and creation of several plots inter alia the Applicants plots.

5. The Applicants aver that the suit properties were sold to the 1st Applicant by the administrator of the estate of Defendant's estate. He raised the issue whether the plaintiff was in occupation of the suit properties which is a matter to be considered during the trial and not in an application to set aside *exparte* judgement.

6. The plaintiff on his part submitted that he properly served the Defendant as provided under Order 5. He also submitted that he proved his claim for adverse possession which is not a matter to be dealt with at this stage. He relied on the case of **Telkom Ltd vs John Ochanda & 996 Others (2014) eKLR** to buttress the point that this Court is *functus officio* and the orders sought should not be granted.

7. In considering whether to set aside an *exparte* judgement, the Court in exercising her discretion is required to look at whether ;

- Whether there was proper service on a defendant
- There is any triable issue on the proposed defence
- Whether the application is set to obstruct or delay the cause of justice
- The best interests to meet the ends of justice or to do justice to all the parties.

This position was explained in the cases of **Shah vs Mbogo (1968) E A 93 and Patel vs E. A Cargo Handling (1974) E A 75**

8. The applicants were not parties to the judgement proposed to be set aside. However they submit that the resultant orders in that judgment affects them. The Applicants contends that there was no proper service on the estate of the defendant's estate. There is evidence from the judgement on record and the file that the Defendant was served by way of advertisement in the newspaper. This is proper service as provided for under Order 5. Whether the defendant was deceased at the time of service raises a matter to be determined in a full hearing if the Plaintiff was aware of such death at the time of filing this suit.

9. On the question of triable issues, the Applicants have annexed title deeds which they submit was a subdivision of plot No. 202. The Plaintiff's claim was premised on the title No. 202. Therefore there is a triable issue raised by the supporting affidavit and documents annexed whether Kwale/Diani Beach/202 existed when this suit was filed or not. Second issue is whether there are two parallel titles. The Applicants have also disputed the fact that the Respondent was in occupation of the land in question to sustain a claim for adverse possession.

These facts raised in the affidavit in support of the motion were not challenged. I do not find anything to demonstrate that this application was filed to obstruct or delay the cause of justice. It would serve the end of justice that both parties are afforded an opportunity to present their case to enable this Court reach a just determination of this matter.

10. Once a judgement is entered this Court still has capacity to set aside such judgement on terms that are just under order 10 of the Civil Procedure Rules. Therefore it is misleading for the Respondent to submit that this Court is *functus officio* to grant the orders sought. In the result I do find merit in the application dated 11.11.2015 in the following terms ;

- i. **The Applicants be and are joined as 2nd and 3rd Defendants in these proceedings**
- ii. **That the judgement entered on 30.7.2013 is hereby set aside and the Defendants allowed to defend this suit.**
- iii. **The registration of the Plaintiff is however not cancelled. The same to await the outcome of the main suit to prevent incurring any unnecessary costs but he is directed not to interfere**

with the title he is holding

- iv. This order do apply to the notice of motion application dated 17th February which has sought similar orders. The applicants therein Car & General (K) Ltd and Giro Commercial Bank Ltd be and are hereby joined as 4th & 5th defendants.**
- v. The plaintiff to amend his plant to include these parties and serve them within 14 days. Thereafter all the defendants do file their defences within 15 days of being served with the amended plaint**
- vi. All parties to bear their respective costs of the applications.**

Ruling dated and delivered at Mombasa this 28th day o f April 1016

A. OMOLLO

JUDGE