



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1210 OF 2014(O.S)

PETER KAROBIA RIBIRO.....1ST APPLICANT

MUNYWE RIBIRO MUNYWE.....2ND APPLICANT

VERSUS

MARY WAMBUI MUNGAI.....1ST RESPONDENT

REGISTRAR OF TITLES KIAMBU COUNTY.....2ND RESPONDENT

RULING

What is before me is the 1strespondent's application by way of Notice of Motion dated 18th March 2015 in which the 1strespondent has sought an order for the setting aside of the orders that were made herein by Onguto J. on 6th October 2014 allowing the applicant's Notice of Motion dated 11th September 2014. The applicant's brought this suit by way of Originating Summons dated 11th September 2014 seeking the determination of among other issues, whether the applicants have acquired all that parcel of land known as LR. No. Kiambaa/Ruaka/639 ("suit property") by adverse possession and a permanent injunction restraining the 1strespondent from transferring, trespassing on, entering, remaining on or in any other way interfering with the suit property and/or the applicant's quiet possession and enjoyment thereof. Together with the Originating Summons, the applicants brought an application by way of Notice of Motion dated 11th September 2014 seeking a temporary injunction to restrain the respondents from transferring, trespassing or entering, remaining on or in any way dealing with or interfering with the suit property and/or the applicants' quiet possession and enjoyment thereof pending the hearing and determination of this suit.

The applicants' application which was brought under certificate as urgency was certified as urgent and fixed for hearing on 18th September 2014. When the application came up for hearing on 18th September 2014, the respondents did not appear. The advocate who appeared for the applicants informed the court that the respondents had been served. According to the affidavit of service by Josiah Munene a process server of this court sworn on 17th September 2014, he served the applicants' Notice of Motion application dated 11th September 2014 upon the 1strespondent on 12th September 2014 at about 10:00a.m. at the 1strespondent's Supermarket at Ruaka Town. The hearing of the applicants' application did not proceed on 18th September 2014 because the applicants' advocates were not ready to argue the same. The application was adjourned to 6th October 2014. When the application came up on 6th October, 2014 for hearing, once again, the respondents did not appear. After the court satisfied itself that the respondents

had been duly served with the application, it allowed the applicants' advocate to proceed with the application the absence of the respondents notwithstanding. In allowing the hearing of the application to proceed, the court accepted the affidavit of Kim Kimanzi a process server of this court sworn on 6th October, 2014 which was filed in court on the same date in which he stated that on 18th September 2014 he served the 1st respondent with a hearing notice for the application dated 11th September 2014 at the 1st respondent's beauty salon known as Monalisa situated at Ruaka Town. The court after considering the applicant's application, allowed the same as prayed on the same date of 6th October 2014.

It is this order allowing the applicants' application for a temporary injunction which the 1st respondent has sought to set aside in the application before me. The 1st respondent has contended that she was never served with the application dated 11th September 2014 and that the affidavits of service on the basis of which the applicants were allowed to argue the said application ex parte are false. The 1st respondent has contended that she has a good defence to the said application. The 1st respondent has contended that she learnt of this suit when she went to Kiambu Resident Magistrate's Court to attend Civil Case No. 228 of 2014 between the parties. The 1st respondent has contended that she is the registered owner of the suit property and that there have been numerous suits between the parties which have all been determined in favour of the 1st respondent. The 1st respondent has contended that the applicants' application which was allowed by the court on 6th October 2014 was an abuse of the process of the court.

The 1st respondent's application was opposed by the applicants through a replying affidavit sworn by the 1st applicant on 21st May 2015 in which the 1st applicant has deposed that the 1st respondent's application has been brought after inordinate delay. The 1st applicant has deposed that the 1st respondent moved Kiambu Chief Magistrate's court in Civil Case No. 228 of 2014 on 17th September 2014 seeking orders to evict the applicants from the suit property after being served with the pleadings herein. The 1st applicant has deposed further that it is after the Kiambu court proceedings were stayed after the court was served with the order issued herein that the 1st respondent moved to this court with the present application. The 1st applicant has deposed that the 1st respondent was all along aware of the orders which were issued herein on 6th October 2014 and that she had publicly vowed not to comply with the same. The 1st applicant has denied that there have been previous cases concerning the suit property between the parties herein.

On 21st September 2015 the court directed that the 1st respondent's application be argued by way of written submissions. The applicants filed their submissions on 4th November 2015 while the 1st respondent's advocates indicated to the court that they did not wish to file any submissions.

I have considered the 1st respondents application together with the affidavit filed in support thereof. I have also considered the applicants' affidavit filed in opposition to the application. Finally, I have considered the applicants' written submissions. Under order 51 rule 15 of the Civil Procedure Rules, this court has unfettered discretion to set aside the order that was made herein on 6th October 2014 ex parte. The discretion must however be exercised judiciously. It was up to the 1st respondent to satisfy the court that she deserves the exercise of this court's discretion. On the material before me, I am satisfied that the 1st respondent was indeed served with the application dated 11th September, 2014 but chose for reasons only known to herself not to attend court. Apart from claiming that the affidavits of service that were filed herein by the two process servers, Kim Kimanzi and Josiah Munene are false, the 1st respondent did not challenge the contents of the two affidavits in any material respect. The two process servers have stated clearly the date, time and places where they served the 1st respondent. The 1st respondent has not denied that she was at the places where she is said to have been served. The 1st respondent had indicated in her affidavit that she would cross-examine the said process servers on their affidavits. That was never done. I am also not persuaded that the 1st respondent has a very good defence to the applicants' application which was argued on 6th October 2014 and allowed by the court. As I mentioned at the beginning of this ruling, the applicants' herein have sought an order that they have acquired the suit

property which is registered in the name of the 1st respondent by adverse possession. The applicants' who have alleged that they have occupied the suit property with their families for several years claimed that they were threatened with eviction by the 1st respondent while this suit is pending. It is on account of that that they sought a temporary injunction to maintain the status quo pending the hearing of their claim over the suit property. The 1st respondent has not indicated the nature of the defence which she has to the applicants' adverse possession claim. I have also noted that the orders sought to be set aside were made on 6th October 2014 while the present application was made on 10th March 2015, four (4) months later. No explanation has been given by the 1st respondent for the delay in bringing the application. The 1st respondent who claims to have become aware of these proceedings when she went to attend to another case at the Chief Magistrate's Court at Kiambu has not stated the date when she became aware of the proceedings herein. I am in agreement with the applicants that a delay of 4 months in bringing an application to set aside an ex parte order is in the circumstances inordinate.

Due to the foregoing, I am of the view that the 1st respondent does not deserve the exercise of this court's discretion. The 1st respondent's application dated 18th March 2015 is therefore not for granting. The same is accordingly dismissed with costs to the applicants.

Dated and Delivered at Nairobi this 20th day of May, 2016

S. O. KONG'O

JUDGE

In the presence of

N/A for Applicants

N/A for Respondents

Kajuju Court Assistant