



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 253 OF 2012

MUHIA MUCHIRI NG'ANG'APLAINTIFF

VERSUS

JULIUS WAHINYA KANGETHE & 5 OTHERS.....DEFENDANTS

RULING

(Application to set aside ex-parte judgment; hearing date having been taken by consent of 1st and 2nd defendants; 1st and 2nd defendants and their counsel not appearing; hearing proceeding and judgment entered; for 3rd-5th applicants not entering appearance despite service; whether the judgment should be set aside; no reason to set aside the judgment but in its discretion court setting aside the judgment on conditions; possession of land in dispute to be handed over to respondent and costs be paid as condition for setting aside judgment).

1. There are two applications before me, one dated 3 March 2016 filed by the 1st and 2nd defendants, and the second that dated 16 March 2016 filed by the 3rd, 4th and 5th defendants. In both applications, the applicants seek orders to set aside the judgment which was entered on 17 February 2016 pursuant to a hearing in which the applicants failed to attend. In a nutshell, the applicants now want that judgment to be set aside and the matter to be heard afresh with their participation. A little background will shed light on these two applications and to the nature of the case before me. I had given the background in my judgment of 17 February 2016, and I hope to be forgiven for reproducing the same in the paragraphs that follow hereunder in much the same fashion that I did in the said judgment.

2. This is a very old case commenced by way of plaint way back in the year 1988 and was originally filed at the High Court in Nairobi as Nairobi High Court Civil Suit No. 1012 of 1988. The original plaintiff was one Mariah Wangari Muhia (Maria) who was substituted for the current plaintiff Muhia Muchiri Nganga, who is her son. The substitution was made on 6 July 2001 for the reason that the original plaintiff had become old and unable to pursue the case. The case as filed in the year 1988 was against one defendant, who was named as Kangethe Wahinya. The original plaint pleaded that Maria was the registered proprietor of the land parcel described as Plot No. 231 Mkungu Settlement Scheme. It was claimed that Kangethe Wahinya had taken possession of about 10 acres of the plaintiff's land. The prayers sought in the original plaint were for orders of injunction to restrain Kangethe Wahinya from the plaintiff's land and damages for trespass.

3. Kangethe Wahinya entered appearance and filed a Defence on 12 May 1988. He pleaded that he is the owner of the land Plot No. 214 situated in Nandarasi Settlement Scheme. He averred that the plaintiff's land lies in Mkungu Settlement Scheme and that in between the two Schemes lies a road and that he has never crossed that road to trespass into the plaintiff's land as claimed.

4. The matter appeared to the many judges who handled the matter to be a boundary dispute and was on quite a number of occasions referred to the District Land Registrar Nyandarua, to determine. But despite several orders directed at the District Land Registrar, no formal determination was ever filed, or at least, I have not seen one.

5. The original plaint was amended on 12 November 2007. The reason for the amendment was that the defendant's Plot No. 214, now fully described as Nyandarua/Nandarasi/214 had been subdivided by the defendant into 10 other parcels which were now registered in the names of Julius Wahinya Kangethe and his wife Juliana Wahinya Kangethe. I later came to learn at the hearing of the case, that Julius is the son of Kangethe Wahinya and that Kangethe Wahinya had died. The subdivisions were identified as the land parcels Nyandarua/Nandarasi/22301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2377 and 2378. It was claimed that part of the defendants' original land parcel Nyandarua/Nandarasi/214, had absorbed 10 acres of the plaintiff's land and that the defendants thereafter subdivided it into the several plots. The prayers in the amended plaint were extended to seek a cancellation of all the titles of the defendants which fall within the plaintiff's land. The plaintiff also sought orders of eviction from 10 acres which he believes fall within Maria's land parcel No. Mkungi/213.

6. In the course of time, the file was transferred to the Nakuru High Court and with the establishment of the Environment and Land Court, it was transferred to this court, the Environment and Land Court sitting in Nakuru. The hearing of the matter commenced before me on 9 July 2015. The plaintiff testified in chief, and in the course of his evidence, it emerged that some of the land parcels that resulted from the subdivision of the original land parcel No. Nyandarua/Nandarasi/214 had been transferred to sons and daughters of Kangethe Wahinya. I directed that the plaint be amended to include all proprietors before embarking on cross-examination.

7. Pursuant to this, a further amended plaint was filed on 20 July 2015. The Further Amended Plaint introduced four other defendants, namely Catherine Gathoni Kogi, Monicah Wambui Kangethe, Nganga Kangethe, and Kinyanjui Kangethe, bringing the total number of defendants to six. The acreage claimed to have been encroached and taken over by the defendants was also amended to read 12 acres instead of 10 acres. The case of the plaintiff remained that Wahinya had taken over part of the plaintiff's land parcel No. Mkungi/213 so that it became part of the land parcel Nandarasi/214. It is stated that the subsequent subdivisions were done maliciously while the matter was pending in court. The plaintiff also added a prayer for mesne profits for the portion of his land occupied by the defendants.

8. Despite being served, the 3rd to 6th defendants did not enter appearance. Neither did any of them, or the 1st and 2nd defendants and their counsel M/s Kahari & Kiai Advocates, appear in court on 20 January 2016, when the matter proceeded for further hearing, despite the hearing date having been taken by consent. On this day, the plaintiff continued to give further evidence in chief and closed his case. I gave 17 February 2016 as the date for judgment and directed that the defendants be served with a judgment notice.

9. A judgment notice was duly served but on 17 February 2016, none of the defendants appeared to take judgment. I delivered judgment on 17 February 2016 as scheduled. In the judgment I found that the plaintiff had proved that Maria's land parcel No. Nyandarua/Mkungi/230 had been encroached by the defendants to the extent of 12 acres. I found that the titles of the defendants have been carved out of this land parcel owned by the plaintiffs. I made a finding that the proper acreage for the original of the defendants' land was 18 hectares and not 23.1 hectares as it now is. I also found that this extra acreage was hived off the plaintiff's land. I made the following final orders :-

1. That the defendants' titles to the land parcels Nyandarua/Nandarasi/2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2377 and 2378 be cancelled forthwith and upon cancellation of these mentioned titles, the defendants' land do revert back to the land parcel Nyandarua/Nandarasi/214 with its original proprietorship.

2. That I hereby declare that the land parcel Nyandarua/Nandarasi/214 is 18.0 hectares or thereabouts and in any event, that said land ought to be confined within the previously existing

Nandarasi Settlement Scheme which scheme is defined in the original survey maps published by the Survey of Kenya in April 1983 and produced in this case as plaintiff's exhibits numbers 5 and 6, and should not extend to the previously existing Mkungi Settlement Scheme.

3. That the Registry Index Map be amended to align itself with the judgment herein.

4. That I declare the defendants to have trespassed into the plaintiff's Plot No. 213 situated at Mkungi Settlement Scheme by about 12 acres or thereabouts and I order them to vacate forthwith from the said land, and confine themselves to the land parcel Nyandarua/Nandarasi/214 as defined in order 2 above.

5. The plaintiff is awarded the sum of Kshs. 2, 352,000/= as against the defendants jointly and/or severally together with interest from the date of filing of suit till settlement in full.

6. The plaintiff shall have costs as against the defendants jointly and/or severally.

10. On 3 March 2016, the first of these applications was filed. It is an application filed by the law firm of Njuguna, Kahari & Kiai who are advocates for the 1st and 2nd defendants. Within the application, the applicants sought to have an interim order of stay of the judgment pending inter partes hearing of the application. I observed that the applicants had been participating in the matter and was only prepared to give an interim stay of execution of the judgment, subject to the applicants depositing half of the monetary award of Kshs. 2, 352,000/= within 14 days. I did give an interim order of stay for 14 days, but thereafter, continued stay would be subject to deposit of the half of the monetary award. This money was not deposited. On 16 March 2016, the second of these applications was filed. In their application, they alleged that they had never been served. I gave them benefit of doubt and ordered an unconditional stay of execution as against them pending inter partes hearing of the application.

11. In the application dated 3 March 2016, the two applicants (the 1st and 2nd defendants) have stated that they own the land parcels Nyandarua/Nandarasi/2308 and 2307 respectively and that they have titles to the same issued to them. It is said that the applicants were until 30 November 2015 represented by the firm of Kahari & Kiai Advocates which ceased to exist as the partners of the said firm teamed up with a new partner by name of P.C Njuguna to form the firm of Njuguna, Kahari & Kiai Advocates. It is stated that on 21 October 2015, the applicants' former advocates sent a clerk to fix a hearing date. It is also averred that no judgment notice was served upon them. On the hearing date of 20 January 2016 which was taken by consent, it is explained that the Advocates' Clerk did not diarise the date and that the 1st and 2nd defendants were not aware of the said date. It is said that the defence raises triable issues. The supporting affidavit is sworn by Mr. Joseph Waithaka Kahari, one of the partners of the firm representing the 1st and 2nd defendants, and Mr. Julius Wahinya Kangethe, the 1st defendant/applicant. They have elaborated on the above grounds. Mr. Kahari has deposed that the hearing date of 20 January 2016 was not communicated to him by counsel who held his brief who he has mentioned to be Mrs. Wanjiru Mwangi (although the record shows that it was Ms. Wanjiru Njuguna). He has stated that his clerk who it is insinuated was in court, failed to diarize the matter. He has deposed that for the hearing to proceed in the absence of the 1st and 2nd defendants was a gross violation of the principles of natural justice and their right to be heard. It is also deposed that their right to own property as given under Article 40 of the Constitution has been violated. On 17 February 2016, he got a call from one Mr. Karanja advocate, who informed him that the case was coming up for judgment. On 18 February 2016, he instructed Mr. John Njuguna an associate in his firm to peruse the court file and he discovered that judgment had been entered. It is deposed that the affidavit of service sworn by Mr. Waiganjo Mwangi Advocate for the plaintiff, is inadmissible. In his affidavit, Mr. Kangethe has more or less reiterated the above and asserted that they have good title to the land.

12. On the application dated 16 March 2016, its main basis is that the 3rd - 5th defendants were never served. The body of the application states that it is supported by the affidavits of Catherine Gathoni Kogi and Nganga Kangethe. I have however only seen the affidavit of Catherine Kogi. She has stated that she is a bona fide purchaser for value and that she only got to know of the matter after judgment.

13. The application is opposed by the affidavit of Muhia Muchiri Nganga. He has deposed inter alia that the he himself directed his brother Grishon Nganga Muhia to direct the process server, a Mr. Wanjohi, to the 3rd - 6th defendants. He received confirmation from both Mr. Wanjohi and his brother, that service has been effected. He has deposed that he was present on subsequent occasions when the 3rd-6th defendants were served. He does not believe that the defendants have any good defence.

14. I took in the written and oral submissions of counsels for the applicants and respondent and I have taken note of them. Of significance was the submission of Mr. Waiganjo for the respondent, that because the 1st and 2nd defendants did not abide by the conditions of stay, the decree was executed as against them. This was confirmed by Mr. Mwachiro for the 1st and 2nd defendants/applicants who submitted that they could not comply due to financial hardship.

15. The common thread in both applications is that the defendants wish to set aside the ex-parte judgment herein. They have of course given their reasons as noted above. On the part of the 1st and 2nd defendants, I do note that the hearing date was taken by the consent of their advocate. I do not see how the change in proprietorship of the law firm of M/s Kahari & Kiai could have in any way made counsel not to appear at the hearing of the matter. It is admitted that when the hearing date was taken, a clerk from the office of the said law firm was present. It is however claimed that he did not diarize the matter. Mr. Kahari in his supporting affidavit, deposed in paragraph 7 of his affidavit, that the date was not communicated to them (meaning the law firm I presume) but I am not sure what sort of communication he expected when his very own clerk attended court. It was said that the matter was not diarized, but no copy of the diary was ever exhibited by Mr. Kahari to demonstrate the entries therein. Neither has Mr. Kahari stated what he did after he sent his clerk to Nakuru on 21 October 2015. Did his clerk give him a report on what transpired in court ? Did he ask his clerk for a report since it is him who sent his clerk to court ? These pertinent questions are not addressed by Mr. Kahari in his affidavit and my own feeling is that Mr. Kahari has not given the full picture of what exactly transpired. I do not see how he could possibly have given money to his clerk to travel to Nakuru and yet not inquire on whether his clerk did travel and what information his clerk gave him on inquiry. I do not believe for one moment, that Mr. Kahari was not aware of the hearing date of 20 January 2016.

16. It was argued that this was a mistake of counsel. I don't buy it. Where were the 1st and 2nd respondents in all this ? When the matter first proceeded on 9 July 2015, they were present in court. It was their duty as the litigants to keep track of their case. They do not appear to have bothered to contact their counsel to find out what may have transpired after that. It should always be remembered that cases are for the litigants, not the counsels. The litigant has a duty to keep tabs on his/her case.

17. Mr. Kahari and his client have argued that there is a constitutional right to be heard. True, every person has a right to be heard. But that right to be heard was given, only that the 1st and 2nd applicants failed to exercise it, by absenting themselves at the hearing of the suit. They cannot blame anyone but themselves. It is also argued that their right to property has been violated. I do not see the place of this argument. The issue at hand is a property dispute. Whoever loses such a dispute after a hearing cannot be heard to complain that by the loss, his constitutional right to property has been violated. Indeed, it is a ridiculous argument. The other issues raised in the affidavit are that there was no proper proof of the claim for damages, but to me, that is an issue that can be pursued on appeal.

18. In short, I am not convinced on the reasons given by the 1st and 2nd applicants seeking to set aside the judgment on record.

19. On the applications by the 3rd - 5th defendants, I have considered their argument that they were not served with summons. I have read the very elaborate replying affidavit by the plaintiff stating that they were served in his presence. No supplementary affidavit was filed to rebut the depositions of the plaintiff. My view is that the 3rd - 5th defendants were properly served. They decided to ignore the summons and subsequent mention notices. They can only blame themselves. There is really no good reason as to why I should set aside judgment for a party who has been given ample opportunity to come to court but has deliberately failed to take that opportunity.

20. In all honesty, I do not see any basis for setting aside the judgment. I have every reason to decline these applications. That said, I do take seriously the right of every party to be heard. I am prepared to hear the applicants but I will place conditions on this.

21. I do note that when I gave the order for stay, I directed the 1st and 2nd applicants to deposit half of the decretal amount. They could not do so. Indeed it was stated that they are financially constrained. It does appear that they are not in a position to meet any financial aspect of the judgment in the event that the plaintiff is still successful after hearing the defendants. Their continued stay on the land will therefore prejudice the plaintiff, as the plaintiff, in the event that he remains successful, may not benefit from the claim for mesne profits. There is no purpose being served in the applicants' continued stay on the land for they cannot meet any award for damages. I therefore order the 1st and 2nd applicants to vacate the land parcels Nyandarua/Nandarasi/2307 and 2308 forthwith and hand over possession to the plaintiff as a condition for setting aside this judgment. They must vacate the two land parcels and hand over possession to the plaintiff within the next 30 days, and if they fail to do so, the judgment delivered on 17 February 2016 will stand. If they do hand over possession, the plaintiff will remain in possession for the duration of this case. If they do not, then as I have mentioned, the judgment of 17 February 2016 will stand and may be executed by the plaintiff.

22. I feel that it is also appropriate in the circumstances of this case, that I give the same condition for the setting aside of the judgment in respect of the 2nd - 5th defendants. I am prepared to set aside the judgment but subject to them vacating the land parcels that are registered in their names. If they do not hand over possession within the next 30 days, then the judgment against them as delivered on 17 February 2016 will stand and the plaintiff will be at liberty to execute it.

23. I have not seen any application to set aside by the 6th defendant. The judgment as against the 6th defendant therefore stands and may be executed by the plaintiff.

24. On costs, it was the applicants' fault that they did not attend court. I therefore give costs of this application to the plaintiff. Considering that the plaintiff has labored to attend court and has no doubt spent enormous resources, in my discretion, I order each applicant to pay to the plaintiff thrown away costs of Kshs. 20,000/= within the next 30 days. If these are not met alongside the order ceding possession, then the judgment will stand and may be executed against any party in default.

25. The judgment of 17 February 2016 is therefore hereby set aside on two conditions. First is the condition on giving vacant possession of the premises, and second is the condition on payment of thrown away costs. These conditions to be met in 30 days. In default, the judgment to stand and may be executed against the party in default.

26. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 9th day of November 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Waiganjo for the plaintiff/respondent

Mr. Baragu present for the 1st and 2nd defendants/applicants

No appearance on the part of M/s Chuma Mburu & Co. advocates for the 3rd - 5th defendants/applicants

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU