



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 1269 OF 2014

GEOFFREY KIPYEGON MOI.....PLAINTIFF/RESPONDENT

=VERSUS=

LINET MINANGI MSHAMBA.....DEFENDANT/APPLICANT

RULING

Coming up for determination is the Defendant's application dated **29th May 2015**, seeking an order that the order issued on **15th October 2014**, be set aside and the application dated **29th September 2014**, be heard afresh. The application is premised on grounds that the Defendant was never served with court summons, application, or pleadings and that she only came to learn of the proceedings from the current registered owners **M/s Chiraq Builders Limited**. Further, that the documents used by the Plaintiff to convince the Court are forgeries and therefore it would be in the interest of justice that the orders be set aside.

The Defendant swore an affidavit in support of the application wherein she deposed that she was the registered proprietor of **LR 209/12419**, until **15th April 2014**, when she transferred the same to **Chiraq Builders Limited**. The Defendant denied ever being served with the summons and pleadings and therefore had no knowledge of the suit. It was her deposition that she was contacted by the representative of the company who showed her a copy of the court order. Upon making enquiries at the registry she learnt about the suit and therefore the present application. The Defendant contended that the orders were obtained fraudulently and without the court having the full benefit of all the facts.

This application was opposed by the Plaintiff who swore a Replying Affidavit on **15th October 2015**. The Plaintiff denied the allegation of material non-disclosure of the material facts as he has no intention of misleading the court in any way. It was his deposition that the injunction orders were granted on merit and therefore the application is a waste of the court's time and ought to be dismissed with costs.

This application was further canvassed by way of written submissions which the Court has carefully read and considered. The Defendant herein seeks an order that the interim orders of injunction granted by this court (Nyamweya J.) be set aside for two reasons. First, she avers that she was not served with the application as alleged by the process server and secondly, she is no longer the proprietor of the property having transferred the same to **Chiraq Builders** on **15th April 2014**.

Setting aside of a court order is matter of judicial discretion and is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. I have sought guidance in the decision by the

Court of Appeal in the case of Maina v Mugiria as follows:

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, 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 course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.

c)

d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji (1954) 21 EACA 20.)

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith v Middleton [1972] SC30)”.

It is evident that the dispute between the parties is that of ownership of the suit property. Both parties have annexed title documents to the property registered in their favour save that the Defendant claims to have transferred her interest thereto to a third party and that she is not in possession thereof. I have carefully perused the Defendants documents in support of her allegation of disposal of the property to a third party. Annexed to her affidavit is a copy of a letter of consent from the Commissioner of Lands to transfer the suit property dated **10th July 2013**. This letter alone is not conclusive proof that the Defendant has disposed of her interest over the suit property. This court cannot ascertain whether the transfer was actualized as the Defendant did not avail a signed transfer and lodged for registration. It is my finding that the Defendant has failed to establish that she relinquished her interest over the suit property to a third party.

On the issue of service of the application, the principle restated in the case of Maina v Mugiria (supra) is clear, the court has no discretion where it appears that no proper service was effected. In the instant application, service of the application has vehemently been denied by the Defendant. **Stephen Waititu Kimani**, the process server detailed how he effected service upon the Defendant in his affidavit of service sworn on **14th October 2014**. The relevant portions of the said affidavit are as follows:

“THAT on the same day I proceeded to City Hall Annexe 10th Floor where the Defendant has an office. Upon arrival, I found a receptionist to whom I introduced myself and the purpose of my visit. She then directed me to another office where I found the defendant.

THAT, thereafter I explained the purpose of my visit and I proceed to effect service of the said summons, application, plaint and order which was accepted but refused to acknowledge receipt by signing or stamping on my copy.”

Warsame J. (now JA.) amply outlined what amounts to proper service in the case of National Bank of Kenya vs. Peter Oloo Aringo Kisumu HCCC No. 91 of 1998:

“In order for the Court to validate a mode of service other than personal, which is mandatory, the persons alleging proper service must have and prove in his return of service or otherwise the following: -

i. The time when service was effected on the said person.

ii. The manner in which the summons were served.

iii. The name and address of the person identifying the person served.

iv. The exact place where the service was effected.

v. Whether or not the person served is known to the person the summons is meant for if the person is not known to the process server.

vi. If no personal service, the person should indicate the relationship between the person served and the person summons were directed at.

vii. The source of information in vi above must be stated.

viii. That he required his signature and response.

Non-compliance with any command of the above would make any such service fatally defective and if there is no proper service there can be no regular judgement..... The process server ought to explain the purpose of visit and the effect of the document served, so that the person served is able to comprehend his action and/or omission on third party.”

Juxtaposing the principles hereinabove and the affidavit sworn by the process server, it is evident that the latter fell short. I say so because the process service did not expressly state which office he went to on 10th Floor of City Hall Annex building. The process server did not offer the name of the receptionist who ushered him to the Defendant’s office. On her part, the Defendant denied having an office in City Hall. On this basis, this court remains unconvinced that service was effected upon the Defendant. Having found that service was not proper and in view of the principle that the court has no discretion where it finds that there was no proper service, the Court is inclined to allow the Defendant’s application and therefore hereby set aside the orders made on **15th October 2014**.

The Defendant further prays that the Plaintiff’s application be heard afresh. This would obviously follow in view of the setting aside of the injunction orders. It is however, noteworthy that this court is called upon to dispense justice in a timely manner using all available resources efficiently. Time, is a valuable resource and is what informs my resolution to determine the application afresh without parties taking another date to make further submissions.

I have before me each party’s position well-articulated in their affidavits together with supporting documents. It would be, in my considered view, a waste of judicial time to ask the parties to file further affidavits just to reiterate what is already on record. Both parties have titles to the suit property. It is however trite that when ownership of property is disputed, it is not enough to wave an instrument of title. One must establish the root of title that the same was acquired legally and validly since whereas title is conclusive evidence of proprietorship, the same can be challenged on the basis of fraud, illegality, or acquisition of title through a corrupt scheme. See the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009** held that ;-

“where a party’s certificate of title is under challenge, it is not enough to wave the instrument of title as proof of ownership but prove the legality of how he acquired the title”.

Having now carefully considered the instant Notice of Motion and the submission therein, the Court find that the order commending itself in the circumstances is that of a **status quo** to the effect that none of the parties shall carry out any development, dispose off, charge, or in any way alienate the suit property pending the hearing and determination of the suit or until further orders of this court. Since possession thereof is also in dispute, both parties are directed not to be in occupation thereof.

Further Parties are hereby directed to comply with order 11 of the Civil Procedure Rules and take a hearing date for trial without undue delay.

Costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered this 2nd day of December, 2016

L.GACHERU

JUDGE

In the Presence of

M/s Mburu holding brief Mr Ndeda for the Plaintiff/Respondent

Mr Andoro for the Defendant/Applicant

Vincent : Court clerk

Court:

Ruling read in open Court in the presence of the above stated advocates.

L.GACHERU

JUDGE