



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 24 OF 2015

IN THE MATTER OF PLOT NO. MN/1/399 – TITLE NO. C.R. 7876

AND

IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE PLAINTIFFS
HAVE OBTAINED OWNERSHIP OF THE ABOVE SAID PARCEL OF
LAND BY WAY OF ADVERSE POSSESSION

AND

IN THE MATTER OF: SECTION 7, 13, 17, 37 AND 338 OF THE LIMITATION OF
ACTIONS ACT CAP (CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 1 RULES 11, 13 & 14 ORDER 37 RULES 7, 8, 11, 13
AND 14 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: SECTIONS 59 AND 61 OF THE REGISTRATION OF TITLES
ACTCAP 281 LAWS OF KENYA AND ANY OTHER RELEVANT
ENABLING PROVISIONS OF THE LAWS OF KENYA

BETWEEN

HAMISI OMAR JUMA

MWAMUYEE DAU NGALA

MWALUMBI MWANGATA & 150 OTTHERSPLAINTIFFS/RESPONDENTS

VERSUS

AMRALAI J. RAJSHI SHAH

PEDRO JOSE CONSTANCIO CLODROMO

SHEILEEN CHANDRA NAROTTAM SHAHDEFENDANT/APPLICANTS

RULING

1. The applicant moved this Court vide his application dated 1st December, 2014 seeking several orders. The main prayer is to set aside the Judgment and decree given on 18th September, 2014 and the applicant be granted unconditional leave to defend this suit. He also sought leave to join the Registrar of Titles as an interested party. The application is premised on the grounds on the face of it inter alia that the applicant is the current owner of the land in dispute parcel No. MN/I/399 having been registered on 6th March, 2012; he was never served with summons and he stands to suffer irreparable loss damage as his property would be taken without giving him an opportunity to present his case.
2. The application is also supported by three affidavits sworn by the applicant on 1st December, 2014, 27th February, 2015 and 23rd February, 2015 together with the annexures attached thereto. The applicant deposes that he has paid rates due on the plot over the years as per the receipts annexed. The original title for the suit plot was lost and he accordingly processed and was issued with a provisional title. The applicant deposed further that he has a good defence although no draft defence was annexed. In the supplementary affidavit, he tried to explain the name differences of Amritlal J. Rajshi Shah the first defendant in the suit. He also annexed documents from the Succession Cause No. 230 of 1985, Mombasa. Lastly he stated that the advertisement posted by the Plaintiffs was too tiny and could not be seen unless someone was looking for it. He urged the Court to grant him the orders.
3. The application is opposed by the plaintiffs/respondents through two affidavits in reply sworn by Mwalumbi Mwangala on 28th January, 2015 and 19th December, 2014. This respondent deposes that no proof has been made by the applicant that the grants in the succession causes bestowed the suit property to him. That property to the document of Assent was drawn by an advocate who is deceased and in any event the Assent is not a Court order. He deposed that service of summons was done by advertisement both in the Daily Nation and Standard newspapers. It is contended by the Plaintiffs that the applicant is seeking to reap where he has not sown as he is an imposter being fronted by other parties and he has no defence at all. They wondered why the applicant having applied for letters of administration in 1985 and 1988 waited until 2012 to carry out the registration of the land in his name. They urged this Court to dismiss the application.
4. The advocates orally submitted in Court. Mr. Sande for the applicant submitted that Judgment was entered on 18th September, 2014 after registration in favour of the applicant has been done. He submits that there was no proper service of summons to enter appearance or any pleadings and the applicant learnt of this case from the lands' registry. The applicants is of the view that summons should have been sent to the address provided in the file of the suit plot. Mr. Sande submits that since the applicant is the current registered owner of the suit parcel makes him have a good defence. That service by advertisement was directed to a wrong party and it was placed in classified section in very small print. The applicant is seeking an opportunity to be heard. He relied on the case of *Pithon Woweru Mania Vs Thuka Mugira (1983)eKLR* to support his submissions.
5. Mr. Ngiro Birir submits that there are two owners of this land and before filing this suit, they did a search. It is on the basis of the search that they filed their suit against the current defendants. Secondly service of STEA was put in both the Nation and the Standard newspapers which satisfied the Court to allow them to proceed. Further that the applicant has not explained how he acquired the ½ share of the 2nd defendant and the difference in the name of his grandmother does not give him a right to appear in this suit. Mr. Birir submits that documents annexed as SS1, 5 and 6 were all made after this suit was filed in violation of the doctrine of *hi pendens* therefore null and void. He also relied in the case of *Pithon Waweru supra* which he submits explained the principles of setting aside.
6. In setting aside ex parte Judgment, the Court is called to exercise its discretion. In the *Pithon Waweru* case supra, the Court of Appeal set out the principles governing the exercise of such discretion. The Court stated that the main concern of the Court is to do justice to parties and the Court will not impose conditions on itself that would fetter its discretion. The Court of Appeal went ahead to quote the decision in *Patel Vs E.A Cargo Handling Services Ltd. (1974) EA 75* in explaining that the discretion exercised is intended to avoid injustice or hardship resulting from accident, in inadvertence or excusable mistake/error but not assist a person seeking to obstruct or delay the course of justice. This was also the finding in *Shah Vs Mbogo (1967) EA 116*.

7. It was held in the Pithon Waweru case that the Court has no discretion where there has been no proper service. The Court said the nature of the action and the defence should be considered and whether the plaintiff can be compensated by way of costs and that to deny the subject a hearing should be the last resort of a Court. The difference with this case with the Pithon Waweru case is that the applicant herein is not a party to the suit. I will therefore consider whether this applicant meets these principles to warrant the orders sought.
8. It is not in dispute that the plaintiffs served the defendants via two newspapers. Mr. Birir submitted this advertisement was in reus not in persona. Mr. Saende submitted the same was too small not easily visible. Did the Plaintiffs therefore serve the STEA property as envisaged in the rules? The advert was placed in the Standard and Daily Nation newspapers of 22nd June, 2012. Both cuttings were annexed in the affidavit of service of Leonard Shimaka sworn on 26th September, 2012 and annexed to the request for Judgment. Under Order 5 rule 17(4) which provides for service by advertisement, the size is not provided for. Therefore whether the advert was too small or in the classified section does not invalidate it. The defendants served were the ones whose name appeared in the certificate of official search conducted at the time of filing suit. The service was thus proper and this Judgment can only be set aside on the basis of the Court's discretion.
9. The applicant has deposed that he has a good defence. No draft defence was annexed with this application for the Court to consider. In my view it is not enough to state that because you are an owner gives you a good defence to the claim especially in this instant where it is a claim for adverse possession. Such an omission in an instant where the applicant was not party to the suit whose Judgment is ought to be set aside is fatal. Further the applicant became registered owner on 6th March, 2012 after the suit was filed thus presenting him an uphill task that indeed he would have a good defence in a claim for adverse possession.
10. The applicant annexed document SNS 15 and 16 being grant in respect of the estate of Anntben Premchard Nathuu Shah. He also annexed documents to show that the said Anntben P.N. Shah is one and the same person as Amralal J. Rajshi Shah the last being the maiden name of the 1st defendant. However the two documents did not confer ownership of the suit property to the applicant. Mr. Birir questioned this and I believe the applicant ought to have established this fact. The Plaintiffs also questioned how the applicant acquired the ½ share of the 2nd defendant in the suit property. There is no explanation given in the affidavit evidence or the submissions. All these missing links together with the absence of draft defence makes it hard for the Court to exercise discretion in favour of the applicant in considering the ***“nature of and the circumstances of the case”***.
11. The applicant having obtained certificate of grant of letters of administration of the estate of the 1st defendant on 12th June, 1998 with due diligence ought to have transferred the suit property in his name before the filing of this suit. I do therefore find that exercise of discretion under ***“to avoid injustice resulting from accident or inadvertence or excusable mistake”*** available to him. In total sum, I do not find this application to meet any of the principles for setting aside ex parte Judgment. Consequently the application dated 1st December, 2014 is dismissed with costs to the plaintiffs/respondents.

Ruling delivered, dated and signed this 12th day of June 2015.

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A. OMOLLO

JUDGE

In the presence of:-

Learned Counsel for the Plaintiff/Respondent.....

Learned Counsel for the Defendant/Respondent

Court clerk