



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

H.C. MISC. CIVIL APPLICATION NO. 77 OF 2009

GRACE WAMBUI KAMAU(Suing on behalf of

Riruta Satellite Women Group).....PLAINTIFF

VERSUS

PHILOMENA WAMBUI MUNGE.....

.....DEFENDANT

RULING

The Application and Response

The Defendant has filed an application by way of a Notice of Motion dated 20th February 2013 in which she is seeking the following orders:

1. That the decree of this Court made by Mbogholi Msagha J.on 5th March 2010 and issued on 11th March 2010 declaring that the Plaintiff herein had become entitled to be registered as proprietor of all that property known as Title Number Dagoretti/Riruta/S.68 by virtue of adverse possession be set aside.
2. That the Vesting Order of this Court made on 14th November 2011 by Koome J. (as she then was) and issued on 16th November 2011 vesting all the property known as Title Number Dagoretti/Riruta/S.68 to Grace Wambui Kamau, Teresia Wanjiru Murithi and Rosemary W. Gitondu as trustees of Riruta Satellite Women Umoja Group pursuant to the aforesaid Decree be set aside.

The Notice of Motion is supported by an affidavit sworn by the Defendant on 20th February 2013. The Defendant's grounds for the application are that she was allocated the suit property by the Commissioner of Lands, and paid the required consideration being a total of Kshs.28,400/=. She annexed copies of the payment receipts. The Defendant avers that the Judgment delivered by Mbogholi Msagha J. on 5th March 2010 was passed after ex-parte proceedings which were conducted without her knowledge. Further, that the said Judgment was passed on the erroneous ground that no Memorandum of Appearance had been filed by the Defendant, while in fact a Memorandum of appearance had been filed on 8th July 2009 by Ms Gitau Kariuki & Co. Advocate.

The Defendant further avers that the Vesting Order given by Koome J. (as she then was) on 14th November 2011 and issued on 16th November 2011 was similarly passed in ex-parte proceedings, which were conducted and concluded without her knowledge. Further, that the said Vesting Order was passed on the wholly erroneous ground that the Plaintiff's advocate had served the hearing Notice for the same date

on the Defendant's advocates by registered post, while in fact such service was unlawful and irregular because no leave had been granted by the court for any form of substituted service.

The Defendant stated that during the period of the suit especially from August 2009, Mr. Gitau Kariuki Advocate who had the conduct of the matter on her behalf fell critically ill resulting in long periods of hospitalization which resulted in his offices being closed. She relied on an affidavit sworn by the said Advocate on 20th February 2013. Further, that due to Mr. Gitau Kariuki's prolonged illness, he had recently allowed another firm of Advocates, M/s P. M. Kamaara Advocates to take over the conduct of this suit, and the Defendant annexed a copy of the letter of no objection in this respect written by Mr. Gitau Kariuki. The Defendant stated that she came to learn of the said Decree and Vesting Order when she received a letter from the Commissioner of Lands dated 27th November 2012 requiring her to surrender the Title Deed to the suit property to facilitate the implementation of the court order. She further stated that she thereafter made this application without unreasonable and/or undue delay.

The Plaintiff in a replying affidavit sworn on 26th June 2013 opposed the Defendant's application and stated that the Originating summons herein, supporting affidavit, the application for directions and hearing notice for the said directions were duly served on the Defendant's Advocate who had earlier filed a Memorandum of Appearance. Further, that on 30th October, 2009 a hearing date was taken ex-parte and the hearing date given at the Court Registry was 15th February 2010.

The Plaintiff claims that a hearing Notice dated the 5th day of October 2009 was served upon the Defendant's advocates on 6th November 2009, who acknowledged service by stamping and signing on the face of the plaintiff's Advocates copy of the said hearing notice. The Plaintiff annexed a copy of the said Hearing Notice bearing the received stamp and signature of the Defendant's Advocates. However, that notwithstanding having had 4 months' notice prior to the said hearing and the Court's judgment having been delivered 3 weeks after the hearing date, the Defendant after failing to attend the hearing, did not make any attempts to arrest the judgment of the court and has given no credible reasons for the said default.

The Plaintiff further stated that all attempts to serve the Defendant's Advocates with court process after 17th August 2010 at the physical address given in the Memorandum of Appearance being "Shankardass House, 4th Floor, Room 41, Moi Avenue" proved futile because the said Firm of Advocates had moved its offices to an unknown location. Further, that the Plaintiff was as a result constrained to effect service of court process upon the Defendant's Advocates by way of registered post on the Defendant's advocates disclosed postal address being P. O. Box 55301-00200 Nairobi. The Plaintiff annexed copies of the certificates of postage and accompanying Affidavits of service.

The Plaintiff averred that the orders of this Court have already been executed, at great cost to the Plaintiff, due taxes already paid based on the value given to the land by the Government, and that the Plaintiff will greatly be prejudiced if the orders sought herein are granted.

The Submissions

The Parties were directed by the court to file written submissions. The Defendant's counsel filed submissions dated 9th September 2013 wherein he relied on the principles for setting aside *ex parte* orders stated in **Shah vs Mbogo (1967) E.A 116** and **Nyanjugu Limited vs Barclays Bank of Kenya Ltd & Others Nairobi HCCC No. 207 of 2008** as to whether there was service or not, and if so whether the court should exercise its discretion to set aside an *ex parte* judgment to avoid injustice.

The counsel also submitted that the judgment and decree entered on 5th March 2010 herein was passed on the erroneous ground that no appearance had been filed by the Defendant's Advocate, and that the procedural errors of the said Advocate should not be visited on the Defendant who was an innocent party. The counsel relied on the decision in **Maina vs Muriuki (1984) KLR 407** in this respect. Lastly, the counsel argued that the Defendant had a good and arguable defence as the Plaintiff has not been in quiet continuous uninterrupted possession of the suit property for the statutory period of 12 years. The counsel

relied on various judicial authorities in this regard, and on the fact that the Defendant had previously filed a suit in 2007 in **Milimani CMCC No 9019 of 2007** against the Plaintiff which was later withdrawn.

The Plaintiff's counsel filed submissions dated 1st November 2013 and argued therein that the Defendant's Notice of Motion was not properly before the court, as it had been brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules which relates to setting aside of default judgments, yet the judgments granted herein were not default judgments. The counsel argues that the Defendant ought to have brought her application pursuant to the provisions of Order 12 rule 7 and Order 51 Rule 15 of the Civil Procedure Rules.

The counsel further argued that the service upon the Defendant's Advocates was in compliance with Order 6 Rule 3(1), 6(1) and 6(2) of the Civil Procedure Rules. He also submitted that the discretionary jurisdiction of this court to set aside a default judgment as stated in **Nyanjugu Limited vs Barclays Bank of Kenya Ltd & Others Nairobi HCCC No. 207 of 2008** is equitable in nature, and that the Defendant had come to court with unclean hands as she had not complied with court orders issued in CMCC 9010 of 2017 on 27th February 2007 as to payment of costs of the suit. Further, that the Defendant had been indolent in protecting her rights, and that as a result of the said indolence the orders of this court had already been executed and a new title issued to the Plaintiff with respect to the suit property.

The Plaintiff's counsel further submitted relying on the Court of Appeal decision in **Baiywo vs Bach (1986-1989) EA 27 (CAK)** that the Defendant lacked a good defence to warrant the setting aside of the orders of this court, and that her allegations are mere denials of the facts in this case. Further, that the Plaintiff had established through evidence given during the hearing that they had been in possession of the suit property since 1987.

The counsel also submitted that the Defendant must bear the costs of the non-compliance with procedure and indolence of her advocate, and relied on the decision in **Abraham Kiptanui vs The Delphis Bank Limited & Another, HCCC No. 1864 of 1999** in this regard. Lastly, the counsel submitted that the error in the judgment delivered on 5th March 2010 that the Defendant had not entered appearance can be cured as an accidental slip or omission under section 99 of the Civil Procedure Act.

The Issues and Determination

I have carefully considered the pleadings and submissions made by the parties herein. The preliminary issue to be decided is whether the Defendant's application is properly before this Court. The Defendant's Notice of Motion to set aside the judgment and vesting order granted herein is brought pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules. The said rule provides that where judgment has been entered under the Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. Judgment is entered under order 10 of the Civil Procedure Rules upon non-appearance and failure to file a defence by a Defendant.

I have perused the judgment by Mbogoli Msagha J. delivered on 5th March 2010, and it is stated therein that the Defendant was served by way of advertisement in the Daily Nation but did not enter appearance, and that the Defendant having been served and having elected not to defend the Originating Summons was to bear the costs of the suit. It is thus evident that this was a judgment predicated upon default of appearance and defence, and I therefore find that the Defendant's Notice of Motion is properly brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules.

The substantive issue therefore remaining to be addressed is whether the judgment and vesting orders granted herein can be set aside. The application of Order 10 Rule 11 in this regard has been the subject of various Court of Appeal decisions and I am guided by the decisions of the said Court in **Mbogo vs Shah (1968) E.A 93**, **Patel vs EA Cargo Handling Services (1974) EA 75**, **Pithon Waweru Maina vs Thuku Mugiria (1982-1988) 1 KAR 171** and **Waweru v Ndiga (1983) KLR 236**. The Court of Appeal in **Waweru v Ndiga (1983) KLR 236** reviewed and upheld its previous decisions on the application of Order 10 Rule 11 of the Civil Procedure Act, and held that this Court has unfettered discretion to do justice between the parties. Further, it was held that it may be just on the facts of a particular case to set

aside an *ex parte* judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but that the discretion should not be exercised to assist anyone to delay the course of justice. The Court of Appeal also stated that an application to set aside an *ex parte* judgment may be allowed if the court is satisfied that the summons to enter appearance were not duly served, or that a defendant was prevented by any sufficient cause from appearing when the suit was called for hearing.

In the present application there was appearance entered by the Defendant, but no defence was filed nor was their attendance by the Defendant during the hearing of the suit. The Plaintiff has brought evidence of an affidavit of service of the hearing notice of the Originating Summons filed herein, that was served on, and acknowledged by the Defendant's Advocate. The Defendant has submitted that her Advocate, Gitau Kariuki, was prevented by illness from attending the hearing and she brought as evidence an affidavit sworn by the said Advocate to this effect. She further submitted that the said Advocate later succumbed to his illness.

The Plaintiff admits that the Defendant's Advocate could not be located at his office after judgment was delivered, and that they then effected service of the application for the vesting order and its hearing notice by way of registered post. They attached affidavits of service to this effect sworn by Richard Maingi a process server, and Andrew K. Muchigi an Advocate, on 29th October 2010 and 14th November 2011, and to which were attached the certificates of posting. The Plaintiff argued that such service was proper and relied on Order 6 Rule 6 of the Civil Procedure Rules which provides as follows:

“(1) Documents may either be delivered by hand or by licensed courier service provider approved by the court to the address for service or may be posted to it.

(2) Where delivery is disputed a certificate of posting or other evidence of delivery shall be filed.”

It is my view that the Defendant has given sufficient reason as to why there was no defence filed or non-appearance for the hearing of the suit herein that led to the judgment delivered on 5th March 2010. She has provided the evidence of her Advocate's illness which was a factor outside her control, and she should not be penalized for the unfortunate circumstances that befell the said Advocate. This evidence is also corroborated by the Plaintiff who states that the said Advocate became unavailable. There will also be no undue prejudice suffered by the Plaintiff if the said judgment is set aside as they will still have the opportunity to present their evidence for consideration by the court.

It is also my finding that while the service of the application for the vesting order and hearing notice by registered post may have been proper service under Order 6 Rule 6 of the Civil Procedure Rules, the fact that the application of the vesting order was predicated upon the judgment delivered on 5th March 2010, it therefore follows that the fate that befalls the said judgment must necessarily also apply to the said vesting orders.

Arising from the foregoing reasons, I accordingly order as follows pursuant to the provisions of Order 10 Rule 11 and Order 11 of the Civil Procedure Rules, and the provisions of section 1A, 1B and 3A of the Civil Procedure Act:

1. That the judgment of this Court made by Mbogholi Msagha J. on 5th March 2010 and consequential decree issued on 11th March 2010 declaring that the Plaintiff herein had become entitled to be registered as proprietor of all that property known as Title Number Dagoretti/Riruta/S.68 by virtue of adverse possession be and is hereby set aside.
2. That the Vesting Order of this Court made on 14th November 2011 by Koome J. (as she then was) and issued on 16th November 2011 vesting all the property known as Title Number Dagoretti/Riruta/S.68 to Grace Wambui Kamau, Teresia Wanjiru Murithi and Rosemary W. Gitondu as trustees of Riruta Satellite Women Umoja Group pursuant to the aforesaid Decree be and is hereby set aside.
3. The hearing of this suit shall thereafter proceed *de novo* on its merits.

4. The Defendant shall file and serve their Replying Affidavit to the Originating Summons filed herein within 30 days of the date of this ruling and in default, the orders 1 to 3 hereinabove shall be vacated.
5. The Defendant shall meet the costs of the Notice of Motion dated 20th February 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____6th____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE