



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO.385 OF 2013

ROSE WANJIRU KAMAU.....PLAINTIFF/RESPONDENT

VERSUS

TABITHA N KAMAU

MARIA W. GATURA

MAGDALENE W CHEGE

(Sued as the official of Wamwangi

Githaimura Women Group)1st DEFENDANT/RESPONDENT

DENNIS NDEGWA WANJOHI2ND DEFENDANT/APPLICANT

RULING:

The application coming for determination before me is the Notice of Motion dated 12th September, 2013 brought by the 2nd Defendant/Applicant herein seeking for orders that:-

- a. *That the Court do review and vacate its orders of 23rd May, 2013 .*
- b. *That the Court do hear the application dated 20th March, 2013 intepartes and determine the same on merit.*
- c. *That the Plaintiff do pay the costs of this application.*

The application was premised on the grounds stated on the face of the application and on the Supporting Affidavit of **Denis Ndegwa Wanjohi**, the 2nd Defendant/Applicant herein.

These grounds are:-

- a. ***The 2nd Defendant/Applicant has never been served with any filed documents and was unaware of the existence of the suit.***
- b. ***The Plaintiff/Respondent was heard ex parte and orders were issued on 23rd May, 2013 which orders are adverse to the 2nd Defendant/Applicant.***
- c. ***Even the present application was left with a tenant in the suit premises which cannot be termed as service.***
- d. ***The 2nd Defendant/Applicant had before being made aware of this suit constructed on the suit premises and they said houses are occupied.***
- e. ***The 2nd Defendant/Applicant has good defence as he is the owner of the suit premises.***

On his supporting Affidavit, the applicant **Dennis Ndegwa Wanjohi** averred that he only come to know of this matter on 4th September, 2013 when he received from his tenant an application dated 27/8/2013 seeking for his committal to Civil jail for contempt of Court. He contended that he was never served with the application dated 20/3/2013 on 11/4//2013 as deponed by the process server, **Jeff Kisomo Bernard**. He further averred that the said Affidavit was a lie and full of falsehoods and if he had been served with the court documents he would have filed his response. He also averred that he is the owner of the suit premises and has always been in occupation and he has constructed buildings which are currently occupied by the tenants. He further deposed that before construction, he obtained approval from the County Council of Thika as evidenced by annexure DW1 and DW1A. It was his contention that if the court had been made aware of true facts of this case, it would not have issued the restraining order and further that he has good defence to this case as he is the lawful owner of the suit premises and it is only fair that the orders issued on 23/5/2013 be vacated and the matter be heard inter partes . Further that the Plaintiff would not suffer any prejudice by the orders sought.

The plaintiff herein opposed the 2nd Defendant's Notice of Motion. She contended that the 2nd Defendant was duly served with the court documents and he failed and/or ignored to enter appearance. Her averments were supported by the two Affidavits sworn by Jeff Kisomo Bernard, the process server who allegedly served the 2nd Defendant and Harrison Nyoike Kamande, the person who allegedly accompanied the process server on 17th June, 2013 when he went to serve, the 2nd Defendant with the court order and other documents.

The parties herein consented to canvass the Notice of Motion by way of written submissions which I have carefully considered. I have also considered the pleadings generally and the relevant law.

There is no doubt that on 20/3/2013, the Plaintiff/Respondent herein filed a Complaint, and a Notice of Motion dated 20th March, 2013 seeking for restraining orders against the Defendants. The matter came for inter partes hearing on 11/4/2013 when the applicant informed the court that the application had been duly served.

One **Magdalene Wakonyo**, appeared for 1st Defendant and sought time to file her Replying Affidavit. The Court granted her leave of 21 days to do so. However, 2nd Defendant was not in court. The matter was set for inter partes hearing on 23/5/2013. There is no doubt that the applicant filed an Affidavit of Service sworn by Jeff Kisomo Bernard indicating that the 2nd Defendant had been served.

On 23/5/2013, none of the Defendants were present and the Plaintiff/Respondent's Notice of Motion dated 20/3/2013 was not opposed. The said application was allowed in terms of prayers **No. "b"** and **"c"** for preservation of the suit property. Those are now the orders that the applicant/2nd Defendant seeks to have them vacated by this court.

The application is premised under **Order 12 Rule 7 of the Civil Procedure Rules 2010** which

provides as follows:-

“ Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

The applicant herein states that he was never served with the Notice of Motion and the court order thereafter. He alleged that he was only served with a Notice of Motion dated 27/8/2013 seeking for his committal to civil jail.

Order 12 Rule 7 of the Civil Procedure Rules gives the Court discretion to allow such prayer for setting aside or varying upon terms that may be just. In the case of **Shanzu investment Ltd Vs The Commissioner of lands, Civil Appeal No. 100 of 1993**, the Court held that:-

“ The court has a wide discretion to set aside judgment and there are no limits and restrictions on the discretion of the judge except if the judgment is varied , it must be done on terms that are just”. Further, jurisdiction to vary being a judicial discretion must be exercised judicially and these differ on the particular case. The facts for setting aside judgment are :-

- i. ***Defence on merit***
- ii. ***Prejudice***
- iii. ***Explanation for the delay”.***

The applicant alleges that the 2nd defendant was served with the Notice of motion but he failed to appear in court to oppose the same. The 2nd Defendant alleges that he was never served with any of the courts pleadings and he was not aware of the matter until 27th August 2013 when he received a Notice of Motion seeking an order to commit him to civil jail which had been served to one of his tenants.

In such a situation it would be very difficult for the court to ascertain who between the applicant / 2nd Defendant and Respondent is telling the truth. In the case of **Nimrod Vs Joseph Momanyi , Civil Appeal No. 35 of 1998**, the Court held that :-

“ In an application for setting aside Judgment, the court should look at the nature of the Defence even if there is no sufficient cause for non-attendance. A litigant should not be deprived of an opportunity of pressing his defence”.

I have considered the pleadings herein and I have noted that the applicant / 2nd Defendant has attached a draft defence to his Notice of Motion. He alleges that he is the lawful owner of the suit property and has even constructed on it. The applicant therefore has a Defence on merits.

The applicant has alleged that he has put up building on the suit land which currently has tenants. On 23/5/2013, the court issued restraining orders against him and the said orders would definitely be prejudicial to the

applicant. There is no evidence that the Respondent herein would be prejudiced by the orders sought.

The applicant has alleged that the delay in filing the opposition to the Notice of Motion dated 20th march 2013 was due to the fact that he was not served with the Notice of Motion in question. Though that fact is disputed by the Respondent's find the said explanation reasonable.

The application is also premised under Section 1A and 1B of the Civil Procedure Act which deals with the overruling objective of the Act. One of the overruling objectives is to ensure that civil disputes are resolved in a just manner. I find that the overruling objective would be served best if I allow the applicant's application.

Section 3A of the Civil Procedure Act also donates power to this Court to issue such orders that

would ensure end of justice. The end of justice herein would best be met if the ex parte orders that were issued on 23/5/2013 are set aside and the Notice of Motion dated 20th March, 2013 allowed to be heard inter partes and be determined on merit.

For the above reasons, the court allows the applicant/2nd Defendant's Notice of Motion dated 12th September 2013 in terms of prayers No. 2 and 3. The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered this **9th** day of **May, 2014**

L. GACHERU

JUDGE

9/5/2014

In the Presence of:-

M/s Otieno holding brief for **Mr.Kanyiri** for the Plaintiff/Respondent

Ishmael holding brief **Waithira Mwangi** for the 2nd Defendant/Applicant

Lukas: Court Clerk

L. GACHERU

JUDGE

9/5/2012