



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 486 OF 2011**

**PETER NJUGUNA GACHIE..... RESPONDENT/PLAINTIFF**

**VERSUS**

**ALICE KEMUNTO ONDIEKI..... 1<sup>ST</sup> APPLICANT/DEFENDANT**

**KENNEDY OBWAYA ONSONGO..... 2<sup>ND</sup> APPLICANT/DEFENDANT**

**RULING**

Coming up before me for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants Notice of Motion dated 14<sup>th</sup> August 2013 in which they pray for orders of stay of execution from executing the Decree granted on 12<sup>th</sup> July 2013, a temporary injunction restraining the Plaintiff from interfering with their rights of access, ownership and possession of the property known as NAIROBI/BLOCK 62/259 (hereinafter referred to as the “suit property”) pending the hearing and determination of this application and suit, that the final judgment entered on 12<sup>th</sup> July 2013, previous proceedings and interlocutory judgment be set aside and that the Plaintiff/Respondent be condemned to bear the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Defendant, Alice Kemunto Ondieki, sworn on 14<sup>th</sup> August 2013 in which she averred that the 5 storey building constructed by her does not stand on the suit property but rather on NAIROBI/BLOCK 62/258 in respect of which she produced a copy of a Certificate of Lease in her name. She averred that the suit property is adjacent to her said property. She further denied any knowledge of this suit until July 2013 after judgment had been delivered in favour of the Plaintiff. She further averred that according to survey plans of the area, the suit property was intended to remain as an open space to provide access or easement into her said property. She also averred that the sewer line runs within the suit property and that the same was not allocated to any individual. She further indicated that she has invested heavily in her property and that the Decree was prejudicial to her title and would cause her irreparable loss and damages. She also mentioned that she is servicing a loan of Kshs. 30 million borrowed from Co-operative Bank of Kenya Limited. She further denied having received any pleadings in this case.

The Application is contested. The Plaintiff, Peter Njuguna Gachie, filed his Replying Affidavit sworn on 22<sup>nd</sup> August 2013 in which he averred that the Defendants/Applicants have not come to court with clean hands and that equity does not aid those who come to court with unclean hands or who are indolent. He further stated that this suit was filed on 18<sup>th</sup> September 2011 and summons to enter appearance was

issued on 10<sup>th</sup> October 2011. He further averred that the Affidavit of Service of Titus Munyao, a licensed court process server, sworn on 6<sup>th</sup> December 2011 detailed the particulars of the time, date, place and method of service of the Plaint and Summons to Enter Appearance upon the Defendants and that the process server also set out in detail the demeanor and reaction of each defendant to service instantly. He further stated that interlocutory judgment was entered against the Defendants upon their failure to enter appearance or file a defense within the required period of time. He further stated that the suit proceeded for formal proof on 18<sup>th</sup> March 2013 and final judgment was delivered on 12<sup>th</sup> July 2013. He denied that the suit property was meant to provide an access into the Defendant's parcel of land. In support of that position, he produced the registry index map for the area indicating the positions of the suit property and the Defendant's plot showing that there were extensive roads of access available to the Defendants.

In response thereto, the 1<sup>st</sup> Defendant/Applicant filed her Supplementary Affidavit sworn on 12<sup>th</sup> September 2013 in which she averred that the suit property is a road reserve and that the Plaintiff's claim thereto is not tenable. She further stated that the suit property was intended for easement or access to her parcel and for utilities such as electricity power transformer erected thereon, sewage and water drainage. She further stated that attempts to conduct a search thereon have been fruitless as the suit property is non-existent.

In further response to that, the Plaintiff/Respondent filed his Further Affidavit sworn on 25<sup>th</sup> September 2013 in which he stated that the Defendants/Applicant's indolence lies in their having failed to enter appearance and defense within the requisite period of time despite the fact that service upon them was regularly effected. He further averred that the suit property is not a road reserve though a road reserve abuts the suit property. He stated that the suit property exists and is registered in his name as well as by both the Ministry of Lands and the County Government. He further intimated that his Certificate of Lease cannot be defeated. He attached a copy of the Certificate of Official Search thereof. He further indicated that whether or not the Applicants sought and obtained development permission for their own property being NAIROBI/BLOCK 62/258 is not a matter in issue in the suit herein.

The Defendants/Applicants as well as the Plaintiff filed their written submissions which have been read and taken into account in this ruling.

The Defendants/Applicants' first prayer was for an order of stay of execution restraining the Plaintiff from executing the *ex parte* Decree granted on 12<sup>th</sup> July 2013 pending the hearing and determination of this Application, suit, further directions and or orders of this Honorable court. The prayer was purportedly based on Order 10 rule 11 of the Civil Procedure Rules. However, that particular legal provision applies to applications to set aside or vary a judgment entered under that Order. The Defendants/Applicants' prayer was not to set aside or vary the judgment entered herein but rather that the execution of that judgment be stayed pending the hearing of this Application and suit. Clearly, there seems to be some confusion on the part of the Defendants in seeking this prayer. Firstly, the legal provision relied on does not fit or apply to that prayer. Secondly there is no suit to talk of as this suit has already been determined and judgment entered so there is no pending suit. Secondly, this Application is also not pending as this ruling shall determine the same. Accordingly, that prayer is hereby declined.

The Defendants/Applicants' second and third prayer seek for temporary injunctions to be issued against the Plaintiff. Temporary injunctions are interlocutory in nature and usually applicable in the context of a pending suit pending the full and final determination of a suit. In this particular case, judgment has already been entered and there is no pending suit. Accordingly, this court cannot issue the temporary injunctions requested by the Defendants/Applicants.

The Defendants/Applicants' other prayer is that the final judgment entered on 12<sup>th</sup> July 2013, previous proceedings and interlocutory judgment be set aside. The guiding legal provision in this matter is **Order 10 Rule 11** which provides as follows:

**“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”**

What terms are just in this case? It would appear to me that this matter revolves around my determination as to whether there was proper service of court process upon the Defendants or not. I have perused the Affidavit of Service sworn by Titus Munyao on 6<sup>th</sup> December 2011. A study of the said Affidavit of Service reveals that the 1<sup>st</sup> Defendant/Applicant was duly served with the pleadings both on her own behalf and on behalf of her husband, the 2<sup>nd</sup> Defendant. From where I sit, it seems quite unbelievable that the 1<sup>st</sup> Defendant denies having been served with court process as she has. It would appear to me that the 1<sup>st</sup> Defendant was duly served with court process in this case but chose to ignore the same hoping the case would somehow go away. I am therefore inclined to believe both the process server and the Plaintiff on this issue of service. Accordingly, I find that the Defendants were duly served with court process in this case and proceeded to ignore the same at their own peril. I therefore decline to set aside or vary the Judgment I entered in this case.

The upshot of the above is that I hereby dismiss this Application with costs to the Plaintiff.

**SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2014**

**MARY M. GITUMBI**

**JUDGE**