



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 388 OF 2017

FELISTA NJERI MUKOMA	-	PLAINTIFF
VS		
CATHERINE WANJIRU MWAURA	-	1ST DEFENDANT
BEATRICE WAIRURA KAMAU	-	2ND DEFENDANT
PETER MWAURA NDAMBUKI	-	3RD DEFENDANT
CRISPUS HINGA WANJIRU	-	4TH DEFENDANT

RULING

1. The Plaintiff filed suit against the Defendants on 12/1/97 seeking Orders inter alia that the lease agreement entered on 13/1/2016 in respect to property Kabete/Kabete/2057 is null and void and as well as an Order compelling the Defendants to refund the sum of Kshs.600,000/= paid to the Defendants as rent.

2. It is on record that the Defendants were served through the 3rd Defendant who visited the Plaintiff's advocate's offices on 7/2/17 and collected the summons and plaint ostensibly on authorization of the 1st Defendant, his mother, 2nd Defendant, his sister and the Defendant, his younger brother. The Defendants are mother and her 3 children.

3. It would appear that notwithstanding service, they failed to file Memorandum of Appearance and Defence within the stipulated period or at all. The Plaintiff filed a request for judgement on 27/3/2017. On 27/4/17 being satisfied that the Defendants were duly served with the summons to enter appearance together with Plaintiff, and noting that they have defaulted to so enter appearance within the stipulated time under law, an interlocutory judgement was entered in terms of prayer (b) of the plaint. The matter was then listed before me in Nairobi on 23/5/17 during the judiciary service for formal brief.

4. On the said 23/5/17 the Defendants advocate appeared and sought an adjournment to enable her file an application to set aside the interlocutory Judgement on the grounds that she had just been appointed and therefore needed time to peruse the file, set aside the interlocutory judgement and prepare a defence on behalf of her clients. The oral application was opposed and overruled by the Court that noted

that the defence Counsel had filed a Notice of Appointment on 17/5/17 and therefore had ample time to peruse the file and file appropriate application as she deemed appropriate, but she did not. The matter was then set for hearing at 12.30pm whereupon the Defence counsel elected to stay away.

5. The Plaintiff testified as a sole witness and the matter was awaiting judgement before the application was filled.

6. The Applicant's application dated 24/5/2017 seeks to set aside interlocutory judgement entered as well as the formal proof proceedings of the Court. The brief grounds are stated as follows:-

- a) This matter was set down for formal proof the Plaintiff having obtained interlocutory Judgement.
- b) The defendants/applicants have a good case with triable issues and a probability of success if allowed to file their defences. A draft defence is annexed to the application.
- c) That if the final judgement is delivered in this matter the defendants/applicants will suffer prejudice.
- d) That the delay in filing the defence has been occasioned by circumstances beyond the defendant's control. And no summons to enter appearance was served on the Defendants.

It is supported by the affidavit of the 1st Defendant sworn on her own behalf and that of the Co-defendants.

7. Confirming that she was served on February 2017 whereupon she approached the counsel who had drafted the lease agreement and were only able to meet her on 25/3/17 who turned them away. That in between they went to the District Commissioner's office to seek redress but were advised to seek the services of Counsel to represent them in Court.

8. That on the 16/5/17 they instructed Ms. E W Kamuyu. The learned Counsel urged the Court on behalf of her clients to grant their prayers on the ground that they have a good case with a probability of success. She annexed the draft defence in support of their plea. That the Plaintiff stands to suffer no prejudice if her motion is granted.

9. The Respondents Counsel filed a Replying Affidavit on 26/9/17 terming the Applicants application misconceived, misguided and fatally defective in law. That the Defendants are guilty of laches as despite being duly served in February 2017 did not file any defence till the Interlocutory Judgement was entered.

10. That she found fault in the conduct of the Counsel that despite being present in Court on 23/5/17 she did not appear in Court at 12.30 pm when the case was scheduled for formal proof notwithstanding that she was present in the morning when the matter was given time allocation.

11. Further that the draft defence raises no triable issues and that the Plaintiff testified and relocated to United States of America and will not be available for hearing of the case. That the evidence of the Plaintiff ought to be retained on the Court record in any event.

12. Parties were directed to file written submissions by 17/10/17 however the Defendants chose not to comply with the said directions. The Plaintiff filed her written submissions which I have considered carefully in arriving at the ruling.

Analysis and determination

13. As to whether the Defendants were served with the summons to enter appearance, it is acknowledged by the Defendants on record that they were duly served with the summons on the 7/2/17 and did not get a lawyer until the 25/3/17. The summons clearly stipulate that a memorandum of appearance must be filed within 15 days of receipt of notice and in default judgment may be entered in their absence. They clearly ignored the 15 day period in the said summons and only went to Court in May 2017. The reasons for the inordinate delay, though explained are not cogent. That the challenge occurred in instructing the lawyers as well as seeking help at the D.C's office before being redirected to the services of counsel to defend the claim in Court. That notwithstanding a prudent person would elect to seek another lawyer in the circumstances and within the stipulated time. It is also on record that the new counsel filed a notice of appointment 5 days before the hearing on 23/5/17. It is therefore not true that she had just been put on record as she claimed.

I therefore find and hold that the Defendants were duly served and did not enter appearance or file defence within the stipulated time.

14. Are there triable issues in the defence" Having found that the interlocutory judgement was regularly entered the next issue that I need to interrogate is whether the Defendants have a triable issue which would raise a prima facie defence which should go to trial. A triable issue is expressed by a party with particulars in the plaint and denied by another party with particulars of the defence. It is alleged in the plaint that the defendants had no legal power to enter into the lease agreement in respect to an estate of a deceased person. Consequently, they were not legally obliged to also receive the sum of 600,000/- in respect to the estate of the deceased person without a grant of letters of administration. Both allegations are matters of both law and fact. It is admitted by the defendants that indeed they entered into the said agreement and received Kshs 600,000/- being rent from the premises without the power to do so in that they only obtained letters of grant of administration for the deceased's estate on 20/2/17 long after they signed the agreement in 2016. The question then is what is triable in the face of such an admission. The answer is none.

15. I must add here that setting aside judgment is at the discretion of the Court. In such an application a party is appealing to the conscience of the Court so that the Court feels bound judicially to exercise his or her discretionary power in favour of the party. From the foregoing the rules for setting aside judgment have not been met and I make orders as follows;

- a. The application is devoid of merit and the same is dismissed.
- b. Costs shall be to the Plaintiff/Respondent.

DELIVERED, DATED AND SIGNED THIS 14TH DAY OF DECEMBER, 2017

J.G. KEMEI

JUDGE



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