



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 91 OF 2016

MUKWANO DISTRIBUTORS LTD.....PLAINTIFF/RESPONDENT

VERSUS

SEURI LEGUSI SANOYE.....DEFENDANT/APPLICANT

RULING

Introduction:

1. The Applicant approached this court vide a Notice of Motion dated 4th June, 2020 brought under Order 9 Rule 1, Order 22 Rule 22 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The following orders were sought:

a) That the Honourable Court to grant leave to the Defendant herein to change his representation.

b) That upon granting prayer (a) herein above the firm of M/S Musyoka Kimeu & Company Advocates be granted leave to come on record for the Defendant/Applicant in place of the firm of M/S Anyoka & Associates Advocates and further the Notice of Change of Advocates annexed to the instant Application be deemed as duly filed upon payment of the requisite court fees.

c) That the Honourable Court be pleased to set aside the ex parte proceedings, the consequent ex parte Judgment and all consequential orders in this matter.

d) That upon granting the prayer (c) hereinabove the Honourable Court be further pleased to order that the Defendant/Applicant has the unconditional leave to defend the claim and therefore the annexed draft Defence be deemed as duly filed and served upon payment of the requisite court fees.

e) That all costs of the Application be in the cause.

2. The Application was supported by the Affidavit deposed by the Defendant. The Defendant deposed that this matter proceeded ex parte notwithstanding the fact that he had filed a Notice of Appointment of Advocates; that he appointed an advocate immediately after being served with the Summons to Enter Appearance by advertisement and that the firm of Anyoka & Associates undertook to diligently defend the matter on his behalf.

3. The Defendant averred that he was served with a Decree dated 26th September, 2019 restraining him from any activities on the land known as L.R. No. 26700/3 comprised in grant L.R. No. 119942; that he inquired from his advocate who gave him an unsatisfactory answer that; he was not aware of the said order because the suit had not been heard and determined and that this prompted him seek for alternative legal representation.

4. It was deponed by the Defendant that a perusal of the court record indicated that the suit had proceeded for hearing and a Judgment rendered after he had failed to file a Defence; that he has a meritorious Defence and that the failure to file the same was not his fault but that of the advocate he had previously instructed.

5. It was deponed that a party ought not to be condemned unheard and more so when the said party demonstrates the desire to be heard as he did by promptly retaining an advocate; that the Plaintiff's claim is a nonstarter because it is a replica of an existing suit being ELC No. 229 of 2015 and that unless this court sets aside its Judgment, he will have been condemned unheard.

6. In the Further Affidavit sworn on 3rd September, 2020 by the Defendant/Applicant, the Defendant deponed that he appointed the firm of Anyoka & Associates Advocates to protect his interests in Machakos HCCC No. 238 of 2010; Machakos HCCC No. 45 of 2011 and this suit and that the said firm failed to diligently act for him in the instant matter despite there being an advocate-client relationship.

7. The Defendant deponed that his possession of the suit property was threatened vide the Decree of this court issued on 26th September, 2019; that the Defence raises the issue of ownership of the suit property and that he resides on the suit property with his family.

8. In response, the Plaintiff's Director deponed that the Defendant does not hold any registerable and or equitable interest in the suit property; that the title wielded by the Defendant is a forgery and is not reflected in the register held at the Lands Registry, and that the Applicant is not entitled to the suit property.

9. It was deponed by the Plaintiff's Director that from November, 2019 to January, 2020, they engaged the Defendant by requesting him to vacate the suit property through their office and through the Athi River Sub-County security committee; that it is then that they discovered that the Defendant was in fact not the occupant of the property and that the Defendant had illegally and unlawfully sold portions of the suit property to third parties who do not hold title documents whatsoever.

10. According to the Plaintiff's Director, on serving the said third parties and providing them with the verified Title Deed of the suit property, the occupants agreed to vacate the suit property, albeit dejectedly, that the said third parties indicated that they would seek legal redress as against the Defendant who had knowingly and illegally sold to them the suit property and that after the said third parties vacated the land, the Plaintiff proceeded to engage a contractor to construct a perimeter wall around the suit property to avoid any further encroachment.

11. It is the Plaintiff's case that despite being in possession of the suit property, the illegal actions of the Applicant are curtailing the Plaintiff's constitutional rights to own the suit property; that the orders sought by the Applicant and the Application in its entirety are overtaken by events and amount to a mere academic debacle as the Judgment and Decree have long been executed and that there is no prejudice whatsoever that will visit the Applicant as the meritorious Judgment and Decree of this Court have since been executed.

12. It was deponed that if the Court is inclined to re-open the case, the Defendant should be restrained from encroaching on the suit property and that the Court ought to compel the Applicant to deposit in Court security of costs at a minimum of Kshs. 1,500,000 to cushion the Plaintiff.

Submissions:

13. The Application was canvassed vide written submissions. Learned counsel for the Defendant/Applicant relied on the case of *Esther Wamaitha Njihia & 2 Others vs. Safaricom Ltd (2014) eKLR*, and submitted that the mistake of counsel ought not to be visited on the Applicant resulting in him being condemned unheard. It was submitted that the intended Defence raised triable issues that should be allowed on record. Reliance was placed on the case of *Gupta vs. Continental Builders Ltd (1976-80) 1 KLR 809*, amongst others.

14. In response, learned counsel for the Plaintiff submitted that the Judgement that was entered by the Court was a regular Judgment; that the Defence as attached on the Application does not raise any triable issues and that the only issue the Defence raises pertains the ownership of the suit property being L.R. No. 26700/3 which was the subject matter of the Judgment on record.

15. It was submitted that from the Defendant's/Applicant's own admission and conduct, he knows that he has no registrable interest or claim whatsoever on the said suit property. Reliance was placed on the case of *Job Kiloch vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, where the court stated as follows:

"What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

16. It was submitted by the Plaintiff's counsel that the issue of the conduct of the Defendant's previous advocates is a mere red herring; that it would be an abuse of the court process to reopen a case whose facts in issue were already determined through the long litigation process and that the delay in approaching the Court with this Application is inexcusable. Counsel relied on numerous authorities which I have considered.

Analysis and findings:

17. On record is a consent dated 1st July, 2020 that was filed in court on 13th July, 2020. In the said consent, it was agreed that the firm of Busaidy Mwaura Ng'arua & Co Advocates LLP come on record for the Defendant/Applicant in place of Anyoka & Associates Advocates. The consent was signed by both advocates. In the circumstances, prayer numbers 1 and 2 of the Application are allowed.

18. This suit was commenced by way of a Plaint dated 29th August, 2016. In the Plaint, the Plaintiff averred that by way of a transfer dated 30th April, 2015, it acquired land known as L.R. No. 26700/3 situate in Machakos County (*the suit property*).

19. In the Plaint, the Plaintiff averred that on or about July, 2015, the Defendant purported to produce a Land Rent Payment Request in respect to the suit property; that the Defendant purported that he had filed *Machakos HCCC No. 238 of 2010, Seuri Legusi Sanoye vs. Fellow Limited* in which he had obtained an ex parte injunction order and that the Defendant has never been registered as the proprietor of the suit property.

20. In the Plaint, the Plaintiff sought for an order of eviction of the Defendant and for a permanent injunction restraining the Defendant or his agents from encroaching, trespassing or transferring the suit property.

21. The record shows that on 20th September, 2016, the court allowed the Plaintiff to serve the Defendant with the summons to enter appearance by way of advertisement in one Daily Newspaper, which was done on 23rd January, 2017. Indeed, the Defendant has admitted that he saw the advertisement and instructed the firm of Anyoka & Company advocates, who were acting for him in other related matters.

22. The record shows that after this court allowed the Plaintiff's Application for injunctive orders, the Defendant's then advocates, Anyoka & Associates Advocates, filed an Application dated 6th November, 2018. In the said Application, the Defendant sought for an order setting aside the orders of injunction issued on 26th September, 2016, and for the extension of time to enter appearance and file a Defence.

23. The Application dated 6th November, 2016 was never prosecuted, and the same was dismissed by the court on 26th February, 2019 for want of prosecution. The suit then proceeded for hearing on 4th April, 2019 in the absence of the Defendant. On 3rd July, 2019, the court delivered its Judgment in which it allowed the Plaintiff's claim. It is the said Judgment that the Defendant is seeking to set aside.

24. The legal grounding for setting aside a Judgment in default is well founded under Order 12 Rule 7 which provides as follows

"where under this order Judgment has been entered or the suit dismissed, the Court, on application, may set aside or vary the Judgment or order upon such terms as may be just."

25. The Court's power in considering an Application to set aside an interlocutory Judgment is discretionary. In the case of *Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75*, the court held as follows:

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

26. In the same vein, the Court in the case of *Shah vs. Mbogo (1967) EA 166*, held that:

“This discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

27. In the case of *James Kanyiita Nderitu & Another [2016] eKLR*, the Court of Appeal stated as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the Defendant to file his Memorandum of Appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others.”

28. In *Richard Murigu Wamai vs. Attorney General & another [2018] eKLR*, while quoting the case of *Patel (supra)* observed that:

“That where there is a regular Judgment as is the case here, the court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is an issue which raises a prima facie defence which should go to trial for adjudication.”

29. Further, in the case of *Job Kiloch vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, the court stated as follows:

“What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

30. The Defendant in this matter has admitted that he was served with the Summons to Enter Appearance, and for reasons unknown to him, his then advocate failed to enter appearance nor file a Defence. That being the case, the Judgment that was entered by this Court is a regular Judgment.

31. To set aside the Judgment of the court, the Defendant must state the reasons for his failure to file his Memorandum of Appearance and Defence. The Court is also obliged to consider the length of time that has elapsed since the default Judgment was entered; whether the intended Defence raises a triable issue; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment.

32. The deposition by the Defendant that he instructed the firm of Anyoka & Company Advocates to enter appearance and file a Defence is supported by the fact that the said firm filed an Application dated 6th November, 2018 way before this matter was heard. However, the said advocate did not appear in court to prosecute the said Application, and the same was dismissed for want of prosecution.

33. Indeed, the Defendant having instructed an advocate to come on record, and having sworn an Affidavit on 6th November, 2018 explaining why his Defence should be allowed on record, it was expected that the said advocate would prosecute the said Application.

34. It is not clear to this court why the Defendant's former advocate did not cease acting for the Defendant if he did not wish to represent him subsequent to the filing of the Application dated 6th November, 2019. Indeed, this one of those few cases where the conduct or mistake of an advocate should not be visited on a party who was all along desirous in defending the suit.

35. The Defendant's interest in defending the claim herein is further exhibited by a suit he had filed, being *Machakos HCCC No. 238 of 2010*. Indeed, there seems to be another suit which was filed by the Plaintiff's predecessor in title, *Fellow Limited*, against the Defendant being *Machakos HCCC No. 45 of 2011*. The two suits are in respect to the suit property, and their fate is not known to this court.

36. Other than the two suits, there seems to be another suit being Machakos ELC No. 229 of 2015 in which the Defendant herein was enjoined as a party. Again, the fate of the suit is not known.

37. The explanation given by the Defendant as to why he did not enter appearance and file a Defence in this matter is plausible. Having given an advocate instructions, he expected the said advocate to follow through those instructions or to withdraw from acting for him, with notice to him.

38. Indeed, the mistake and conduct of an advocate, though negligent, may be accepted as a sufficient cause to set aside an *ex parte* Judgment. The Defendant's former advocate having failed to attend court, the Defendant should be allowed to engage another advocate, as he has done, and defend this claim, which seems to be convoluted with other pending claims.

39. I have perused the draft Defence and the annexures. The Defendant's claim is that he owns the suit property, which is the same claim that the Plaintiff is making. Indeed, the Defendant has annexed on his Affidavit a copy of the Grant that was purportedly issued to him in the year 2009.

40. The issue of which of the two titles is genuine is critical in this matter, and is a triable issue. That issue can only be determined upon hearing both parties and their witnesses. Indeed, considering that the Defendant or third parties are in occupation of the suit property, it is the duty of this court to give all parties an opportunity of being heard, before making a determination on the issue of ownership of the suit property.

41. The Defendant having given a plausible explanation why he did not file a Defence in this matter, and the draft Defence having raised a triable issue, I shall allow the Defendant's Application dated 4th June, 2020 as follows:

a) The Judgment delivered by this court on 31st July, 2019 and the Decree issued on 26th September, 2019 be and is hereby set aside.

b) Leave be and is hereby granted to the Defendant to file and serve his Statement of Defence and in any event within fourteen (14) days of the date of this Ruling.

c) Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE



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