



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 265 OF 2016

JOHN MUTHEE NGUNJIRIPLAINTIFF

VERSUS

ALI IBRAHIM.....DEFENDANT

R U L I N G

1. Hearing in the instant suit proceeded *ex parte* before Munyao, J on 14th January 2019 in the absence of the defendant who apparently had failed to enter appearance in spite of being served. Judgement in the matter was delivered on 7th March 2019 in favour of the plaintiff. A decree issued and costs were taxed against the defendant. Execution proceedings were taken out by the plaintiff to recover the taxed costs. The defendant was served with a Notice of proclamation in execution of the decree and that provoked the Defendant to file the instant application the subject of this ruling.

2. The defendant's Notice of Motion dated 5th May 2019 expressed to be brought under Order 10 Rule 11 and Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (a) (b) and (d) of the Constitution prays for an order of stay of execution of the decree; an order setting aside judgment entered against the defendant on 7th March, 2019 and all consequential orders therefrom; and that the defendant be granted leave to file a defence and counterclaim out of time. The application is supported on the grounds set out on the body of the application and the affidavit sworn by the defendant in support thereof dated 5th May 2021 annexed to the affidavit. Principally, the defendant avers that he was never served with summons to enter appearance, any pleadings, mention or hearing notices by the plaintiff and that he only became aware of the existence of the suit on 3rd May, 2021 when he was served with proclamation Notice by the Auctioneers. The defendant/applicant averred that the judgment entered against him ordered that he be restrained from interfering with the plaintiff's possession of land parcel **LR No. Gilgil/Block/1/26307 (Kekopey)** which was in the process of being subdivided by the plaintiff. The defendant denied that he ever had any interest in land parcel **LR No. Gilgil/Block1/26307 (Kekopey)** and/or that he had occupied the same as alleged by the plaintiff.

3. The defendant stated that he was the registered proprietor of land parcel **LR No.29008** located in Gilgil Township which was allocated to him by the government. The defendant averred that it was in regard to the said parcel of land which he lawfully owns, that the plaintiff had sought to lay unfounded claims to, when in 2016 the plaintiff approached him and made a demand that he (the defendant) vacates from the land alleging that it belonged to him. The defendant thus averred that the plaintiff had misled the court to award him judgment on the basis that the defendant was in occupation of land parcel **L.R No. Gilgil/Block1/26307 (Kekopey)**. The defendant averred that his parcel of land **L.R No.29008** is situate within Gilgil Township whereas the parcel of land the plaintiff claims ownership of is in Kekopey. He averred that the plaintiff's intention was to unlawfully utilize the judgment obtained unlawfully to enter onto the defendant's land. The defendant maintained he was not served with summons to enter appearance and/or any other process and that neither was his wife served as alleged in the affidavit of service sworn by the process server.

4. The plaintiff in response to the defendant's application filed an affidavit in response sworn by the plaintiff and one Solomon

Njoroge a process server on 9th June 2021 who allegedly served the summons to enter appearance and other notices. The process server detailed the several instances he had served process but of note is that there was no one occasion he served the defendant personally. The service on all the occasions was effected on Halima Ibrahim, the alleged wife of the defendant who the process server alleges gave him her mobile telephone number 0721544363. On all the occasions the process server stated he only met the defendant's said wife at their residence and even though she would accept service on behalf of her husband she declined to acknowledge.

5. The defendant swore a further affidavit on 17th August 2021 where he deposed that he sought clarification from Land Registrar respecting the plaintiff's claims and that the Land Registrar did request the District Land Surveyor to visit the site and to have a ground report prepared. He stated the surveyor's report affirmed that the plaintiff's property was overlapping the defendant's land **L.R No.29008** as per the report dated 23rd June 2021 annexed to the further affidavit. The defendant further deposed that the Agricultural and Industrial Holdings Limited the organization that allocated the plots at Kekopey have confirmed that the land claimed by the plaintiff did not form part of their land as per their letter dated 5th August 2021 to the Land Registrar, Naivasha.

6. The parties canvassed the application to set aside and stay of execution of the judgment dated 7th March 2019 by way of written submissions. The defendant applicant filed his submissions on 18th August 2021 and the plaintiff respondent filed his on 22nd September 2021. I have considered the application together with the affidavits in support and in opposition and I have equally considered the filed written submissions.

7. This being an application to set aside an *ex parte* judgment the issue for consideration and determination is whether on the facts and circumstances the court ought to exercise its discretion in favor of the defendant/applicant and set aside the judgment. In determining whether or not to exercise its discretion to set aside the court has to take into account the reasons that may have occasioned default in appearance and such reasons and/or explanations as the applicant may adduce. The Court of Appeal in the case of ***Janes Kanyiita Nderitu & Another -vs- Marius Phillotas Chikas & another (2016)*** summarized the criteria upon which the courts exercise discretionary jurisdiction as follows: -

“In regular default judgment, the defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default judgment. Such a defendant is entitled under Order 10 Rules 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 the default judgment and will take into account such factors as the reason for the 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; whether on the whole, it is in the interest of justice to set aside the default judgment, among others.”

8. In the case of ***Shah -vs- Mbogo (1967) EA 166*** the court of appeal established the guiding principles that a court needs to consider in an application to set aside an *ex parte* judgment. The court stated thus:-

“Firstly, there are no limits or restrictions on the judge's discretion to set aside except that if the judge 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 in itself to fetter the wide discretion given to it by the rules. Secondly, the discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

The court of appeal reiterated the principles in the subsequent case of ***Patel -vs- E.A Cargo Handling Services Lt (1974) EA 75*** and the courts have continued to apply the said principles.

9. In the instant matter the defendant/applicant avers that he was not served with summons to enter appearance. However, the record shows that the plaintiff/Respondent on 5th September 2016 made an application to be granted leave to serve the defendant with summons to enter appearance, plaint and Notice of Motion dated 19th July 2016 by way of substituted service as he was unable to establish the defendant's physical address. The court granted the plaintiff leave on 21st September 2016 and the defendant was served vide a Daily Nation Newspaper advertisement inserted in its issue of 10th October 2016. The defendant did not enter appearance. The matter was scheduled for hearing on 19th November 2018 but the same was adjourned as the defendant had not

been served. The court fixed the matter for hearing on 18th December 2018 and directed that the defendant be served either personally or by way of advertisement in a local daily with wide circulation. The advertisement was made in the Daily Nation Newspaper on 26th November 2018 indicating the hearing date was slated for 18th December 2018. On 18th December 2018 the court record does not show that any proceedings occurred on that date. The record indicates that from 19th November 2018 when the hearing was adjourned the next court proceedings were on 14th January 2019 when the hearing proceeded *ex parte* in the presence of the plaintiff who testified was the sole witness in support of the plaintiff's case. It is not clear and/or evident how the matter got to be listed for hearing on 14th January 2019 when it was heard. There is no minute on the file indicating the earlier hearing date of 18th December 2018 was vacated and/or varied and the new hearing date of 14th January 2019 fixed. The record does not also show that any hearing notice for the new date was served on the defendant.

10. Without an explanation as to how the scheduled hearing date on 18th December 2018 was varied to 14th June 2019 and whether any directions were given by the court respecting service on the defendant in regard to the new date, my view is that the proceedings of 14th January 2019 that resulted in the impugned judgment against the defendant were irregularly taken and cannot stand. Process and Procedure is what ensures every party has a chance to have a fair and just trial. Adherence to the process and procedure levels the justice arena and enables litigants to access justice in a predictable and fair manner. It ensures no party steals a match on the other and when that happens there is a procedure that can be applied to even out.

11. In the instant suit it is quite probable that the defendant did not see the advertisement vide which he was deemed to have been served with process. The process server, Solomon W Njoroge swore an affidavit in support of the plaintiff's replying affidavit state that he severally served the defendant's wife on several occasions and annexed various affidavits of service marked as "SWN-2". I have scrutinized the affidavits of service and note that the affidavits of service relate to service allegedly effected during the months of July /August 2016. On 6th September 2016, the plaintiff filed the Notice of Motion dated 5th September 2016 to be allowed to serve the defendant by way of substituted service. The ground was that the plaintiff had been unable to serve the defendant as he could not establish the defendant's whereabouts, residence or business for purposes of service. That contradicts, the process server's assertions that he served the defendant's wife at their residence on 27th July 2016 and again on 16th August 2016. If indeed the process server had served the defendant as alleged there would have been no reason to make the application to be allowed to serve the defendant by way of substituted service. The defendant has denied that his wife was served with any court documents on his behalf at any time. I entertain some doubts that the said process server actually effected the service as alleged.

12. Where a defendant in an application to set aside an *ex parte* judgment demonstrates that he was not served with summons, it follows that any *ex parte* judgment must have been obtained irregularly and the court in such instance will set aside the *ex parte* judgment unconditionally and will grant the defendant leave to defend the suit. Even where a regular judgment was obtained after due service the court may for sufficient cause and upon the applicant demonstrating he has a defence on merits, set aside the *ex parte* judgement on such terms as may be just.

13. In the case of *Patel -vs- East African Cargo Handling Services Ltd (1974) EA75* the court of Appeal per Duffus, V.P stated as follows:-

"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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied there is a defence on merits. In this respect defence on merits, does not mean in my view, a defence that must succeed it means as Sheridan, J put it "a triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication"

14. In the present application the defendant has annexed a draft defence and counter claim where he avers that he has not at any time laid claim to land parcel **LR No.Gilgil /Block 1/26307 (Kekopey)** and denies being in occupation of the same. He contends in the counterclaim that he is the owner of land parcel **LR No.29008** located in Gilgil Township and asserts the plaintiff sometime in 2016 attempted to enter onto his said land and to unlawfully have the defendant vacate from the land. The defendant claims it's the defendant who has trespassed onto his parcel of land and prays that the plaintiff be restrained from trespassing on his land. The defendant has annexed to the supporting affidavit a certificate of title for LR No. 29008 "**A13**" which indicates he is the registered proprietor of the parcel of land. In the supplementary affidavit sworn in support of the application by the defendant, the defendant has annexed copies of letters from the Land surveyor, Naivasha and Agricultural & Industrial Holdings Ltd "**ATP**" and "**AI2**" respectively which points to the possibility of the plaintiff's land parcel **LR Gilgil/Block1/26307** overlapping that of the defendant and further raising issues as to the authenticity of the plaintiff's land title. I am satisfied the defence and counterclaim raises triable issues that would require adjudication by way of trial.

15. Considering that I have found the proceedings of 14th January 2019 pursuant to which the ex parte judgment was entered were irregular for want of service on the defendant of a hearing notice, I am persuaded the ex parte judgment must be set aside. Equally having expressed doubts regarding service of the summons to enter appearance on the defendant, I am left with no option but to set aside the judgment. The Defendant has demonstrated he has a defence on merits and therefore taking into account the totality of the circumstances I exercise my discretion to set aside the ex parte judgment entered against the defendant on 7th March 2019 and all the consequential orders thereon unconditionally. I grant the defendant leave to file his defence and counterclaim within the next 30 days from the date of this ruling.

16. The cost of the application shall be in the cause.

RULING DATES SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF DECEMBER, 2021

J M MUTUNGI

JUDGE



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