



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 291 OF 2014

FLORENCE WAIRIMU MBUGUA

(Suing as Administrator of the Estate of the Late Joseph Kiarie Mbugua).....PLAINTIFF

VERSUS

IBRAHIM BAKARI & 4 OTHERS.....DEFENDANTS

RULING

(Application to set aside interlocutory judgment entered against the 2nd defendant and for leave to file defence out of time; interlocutory judgment entered purportedly because no defence was filed by the 2nd defendant; record demonstrating that 2nd defendant had filed defence shortly after appointing counsel and before interlocutory judgment was entered; interlocutory judgment entered erroneously ; application premised on wrong assumption that there is no defence on record; no need therefore for court to order applicant to file defence out of time)

1. The application before me is that dated 30 April 2021 filed by the 2nd defendant. It seeks orders that the interlocutory judgment entered against the 2nd defendant be set aside and the 2nd defendant be granted leave to file defence out of time. The application is opposed by the plaintiff.
2. To put matters into perspective, this suit was commenced through a plaint which was filed on 21 November 2014. The plaintiff represents the estate of Joseph Kiarie Mbugua (deceased). It is her case that the land parcel Subdivision No. 2464 (Original No. 1113/1)/Section VI/Mainland North (the suit land) was purchased by the deceased on 10 July 1979. It is pleaded that the 4th defendant (Hemedi Hamadi Abdalla) purported to purchase the suit land from the 3rd defendant (M/s Kinyua & Co Auctioneers) through an auction held on 25 August 2014. It is averred that the auction was held at the behest of the 2nd defendant/applicant (the County Government of Mombasa) ostensibly to recover outstanding rates against the 1st defendant (Ibrahim Bakari) who was alleged to be the owner of the suit land. Pursuant to the auction, a vesting order was issued on 22 September 2014 by the Chief Magistrate's Court Mombasa and the 5th defendant (the Registrar of Titles) registered the property in the name of the 4th defendant. The plaintiff contends that the title held by the 1st defendant is not for the same land as that held by the deceased, or in the alternative, that if it is title to the same land, then the title of the 1st defendant was acquired through fraud since the land was already owned by the deceased from 1979. In the suit, the plaintiff seeks a declaration that she is the legitimate owner of the suit land and rectification of the title.
3. On 2 December 2014, a notice of appointment of advocates was filed on behalf of the 2nd defendant through the law firm of M/s O.M Robinson & Company Advocates. A defence was subsequently filed on 2 February 2015. Interestingly, on 1 February 2018 a Memorandum of Appearance was filed on behalf of the 2nd defendant by the law firm of M/s Robson Harris & Company Advocates.

4. The matter came up for hearing on 27 February 2019 before Omollo J. On that day, Mr. Obinju, who appeared for the 2nd defendant, submitted that they have not filed a defence and sought time to do so within 7 days. The court ordered the 2nd defendant to file and serve defence within 7 days. Nothing was filed and on 9 July 2019, the plaintiff filed an application of even date seeking orders that interlocutory judgment be entered against the 2nd defendant. The application was based on the grounds that the 2nd defendant filed a notice of appointment of advocate on 2 December 2014 and a memorandum of appearance on 1 February 2018 but had not filed a defence. That application was not opposed and was allowed by Omollo J on 15 July 2019.

5. Thereafter, this application was filed on 30 April 2021 and I have already mentioned that it is an application seeking orders to set aside the interlocutory judgment entered against the 2nd defendant. The application is based on grounds that no defence has been filed on behalf of the 2nd defendant owing to an inadvertent mistake of counsel. The supporting affidavit is sworn by Kelvin Mbogo, an advocate practising in the law firm of M/s Robson Harris & Company Advocates. He has deposed that the law firm of M/s O.M Robinson & Company was previously on record for the 2nd defendant and that his firm took over instructions on 1 April 2019 but no defence was filed within the prescribed time. It is averred that the advocate who was assigned the file within the law firm left without conducting a proper handover and it is urged that mistakes of counsel should not be visited on the client.

6. To oppose the motion, the plaintiff filed a replying affidavit. It is deposed that the 2nd defendant was served and failed to file defence and now 7 years have lapsed. It is claimed that failure to file defence is because the officers of the 2nd defendant disowned the suit allegedly filed by the 2nd defendant and which led to the auction of the suit property. It is further contended that there is no good defence displayed.

7. I directed that the application be argued through written submissions and I have seen the submissions of counsel for the applicant and counsel for the plaintiff.

8. I have considered the application.

9. I think the parties have been operating on the presumption that no defence was filed yet, as I have pointed out, a defence was filed on 2 February 2015. I don't have proof of service of this defence, and I wonder whether the position is that it was not served, so as to lead the plaintiff to the conclusion that no defence was ever filed by the 2nd defendant. I of course find it curious that counsel for the 2nd defendant, even before the notice of change of advocates was filed, appeared in court in the year 2019 and asked for time to file defence. Maybe he was not familiar with his own file, which, if it is the case, is an unfortunate scenario, that has taken parties quite some way back. Certainly, there ought not to have been any entry of interlocutory judgment against the 2nd defendant for the reason that there was a defence on record. I must set aside the interlocutory judgment, for it must have been entered by mistake and/or error which is apparent on the face of the record, for the reason that there is a defence in the file.

10. What I will order is that the defence on record, filed on behalf of the 2nd defendant, be served, and if the 2nd defendant feels that it is necessary to amend it, proceed to amend it. I am unable to order that a fresh defence be filed for there is already one.

11. The only issue left is costs. I make no orders as all parties seem to have been mistaken in their belief on whether or not a defence had been filed.

12. Orders accordingly.

DATED AND DELIVERED THIS 22ND DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA



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