



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 840 OF 2012

JAMES NGARA MUKIRI& ANOTHER.....PLAINTIFF

VERSUS

JOSEPHINE WANGARI MUKIRI.....DEFENDANT

RULING

The plaintiff filed the instant suit on 14th November 2012 vide a plaint dated 9th November 2012 seeking the following orders:

- a. The parcel of land namely **Ruiru East block1(Githunguri/1422)** be divided into 3 equal portions and the same be registered into the names of:
 - i. **James Ngaara Mushiri**
 - ii. **Rebecca Wambui Mushiri**
 - iii. **Josephine Wangari Mushiri as a trustee and for the benefit of her children**
- b. Any other relief that this honorable court may deem fit to grant
- c. Cost of this suit

The plaintiff has filed an affidavit of service sworn on 8th March 2013 by one **Samuel Nderitu Kariuki** where he depones that he on 3rd December 2012 travelled in the company of the first plaintiff to the Defendants residence at **Donholm Estate** where he served the first Defendant with the summons to enter appearance together with the plaint although the first defendant instructed him to effect service upon her lawyers **Sijerry &Company Advocates**. The record shows the firm **Sijeny &Company advocates** on 14th January filed a memorandum of appearance for the defendant and yet again the firm of **Kamunye Gichugi & Company Advocates** filed a memorandum of appearance for the defendant on 31st January 2013. The defendant did not file defence and the plaintiffs vide a letter dated 28th February

2013 made a request to court thus:-

“Kindly enter judgment against the Defendant who has entered an appearance but has failed to file a defense within the stipulated time”

Upon receipt of this request by the court the **Deputy Registrar** on 12th March 2013 made and signed the following endorsement:-

“The defendant James Mushiri, having been served with summons to enter appearance and having entered appearance but failed to file a defense within the stipulated period upon request dated 28th February 2013 for interlocutory judgment you are now directed to proceed to set the suit down for hearing as provided under the order 10 rule 9 of civil procedure rules”

Is this endorsement an entry of interlocutory judgment in favour of the plaintiff" And could the deputy registrar enter interlocutory judgment in the circumstances of this suit" Answers these queries are necessary since the defendant initially by notice of motion filed 7th June 2013 applied to the set aside what is stated to be default judgment entered against the defendant on the 12th March 2013. This notice of motion however appears to have been abandoned as the firm of **Kamwenye G.Gichigi & Company Advocates** who filed the same appears to have been ignorant of the fact that the firm of **Sijeny & Company Advocates** had on 14th January 2013 filed a memorandum of appearance for the defendant. Upon realization of the double representation of the defendant by the said two firms, the firm of **Kamwenye Gichigi & Co. Advocates** on the 10th June 2013 filed a notice of change of advocates for the defendant to cure the defect and re- filed the notice of motion to set aside the default judgment allegedly entered against the defendant on 12th March 2013.

The defendants Notice of motion is expressed to be brought under **Order 36 Rule 1 (3) and 10, Order 22 Rule 51 and 52** of the civil Procedure Rules and sections **1 A & 3A** of the Civil Procedure Act Cap 21 and seeks the following orders:-

- I. That the default judgment entered against the defendant herein on 12th March 2013 be set aside
- II. That the defendant be granted leave to serve her defence and counterclaim out of time and the same be adjusted as part of this courts record.
- III. That the costs of this application be in the cause:

The application is premised on the following grounds appearing on the face of the application as follows:-

- a. ***The judgment had been entered against the defendant due to the mistake or negligence on the part of the defendant***
- b. ***The defendant has already filed her defence and counterclaim***
- c. ***That the defendant's defense and counterclaim raises triable issues.***
- d. ***That it's in the interest of justice that the orders prayed for be granted.***

The application is further supported on the grounds contained in the supporting affidavit by **Esther W. Gitau Advocate** on 7th August 2013. At the outset the court observes that the provision pursuant to which the application is expressed to be made has no application as **Order 36** applies to summary judgment applications while **Order 22** deals with execution of orders and decrees. The court nonetheless will entertain the application pursuant to the provisions of **Order 51 Rule 10** which provides:-

10. (1) Every order, Rule or other statutory provision under or by virtue of which an application is made must ordinarily be staged but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

Thus even though the inappropriate provisions of the law have been cited by the applicant the court is at liberty to determine the application on its substantive merits and in this regard the provisions of the sections 1A and 1B of the Civil Procedure Act come in handy as they enjoin the court to foster the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil Disputes governed by the Act.

The plaintiffs oppose the Defendants' application and the 1st Plaintiff has sworn a replying affidavit dated 16th August 2013. The first Plaintiff impugns the conduct of the defendant who he claims instructed the firm **Sijeny & Co. Advocates** but chose to disown them when they failed to file a defense for whatever reasons. The Plaintiff states that the Defendant is not being honest and that the instant application is blatant abuse of the court and an afterthought should be dismissed.

The respective counsel filed written submission asserting their positions and the court in the premises is invited to determine whether the defendant ought to be granted leave to defend the suit: The suit by the Plaintiffs herein did not make a claim for a liquidated amount against the Defendant and did not have a claim for pecuniary damages and neither was it a claim for detention of goods. **Order 10 of the Civil Procedure Rules** deals with consequence of non-appearance, default of defense and failure to serve and specifically Rules 4 to 7 of the same Order deal with instances where interlocutory judgment may be entered.

These instances include where the plaintiff makes a liquidated claim or a liquidated claim with some other claim as under rule 4; or as under rule 5 where the plaintiff makes a liquidated claim with or without some other claim and there are several defendants of whom one or more appear and some others fail to appear. The court on application will enter interlocutory judgment for the liquidated sum against the Defendant(s) who have not appeared and the other claim will await hearing.

Order 10 Rules 6 and 7 provide for entry of judgment where the claim is for pecuniary damages and interlocutory judgment will be entered against a defendant who fails to appear, or to file a defense and subsequently the suit is set down for assessment of damages.

In a situation as in the instant suit there is no provision for entry of interlocutory judgment as the plaintiffs claim does not fall under any of the provisions under **Order 10 Rules 4,5,6 and 7** where interlocutory judgment may be entered. The plaintiff makes a claim for land and there is no claim for pecuniary damages to have entitled the court to enter the interlocutory judgment.

It does appear in instant matter **Rules 9 and 10** would come into play.

Rule 9 provides thus:-

9. Subject to Rule 4 in all suits not otherwise specifically provided for by this order, where any party served does not appear the Plaintiff may set the suit down for hearing.

Rule 10 provides;-

10. The provisions for Rules 4 and 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defense

In the circumstances of this case therefore no interlocutory judgment could be entered and indeed the deputy registrar did not enter any as he merely directed the plaintiff to fix the case for formal proof hearing and hence there was no interlocutory judgment available for setting aside.

On the substance of the Defendants' application I will therefore not dwell on whether or not to set aside any interlocutory judgment as there is none and there could not have been any. The question for determination is whether I should extend time for the Defendant to file and serve their defense and counterclaim. I have in that regard reviewed the file record and I am satisfied the defendant may not have expressly instructed the firms of **Sijeny and Co. Advocates** to act for her in this matter. I say so because it does not make any sense that the same defendant would at the same time have instructed the firm of **Kamunye Gichigi & Co. Advocates** to act for her. As the same time **Kamunye Gichigi & Co. Advocates** filed their memo of appearance on 31st January 2013 the plaintiff had not applied to the court for the entry of interlocutory judgment. The firm of **Kamunye Gichigi & Co. Advocates** state they made several attempts to locate the court file to enable them to file the Defendants' defense and counter claim. Even though the veracity of these averments is in issue there is documentary evidence that they wrote to the court on the matter.

The overriding interest of the court as captured under section 1A and 1B of the Civil Procedure Act Cap 21 laws of Kenya and as enshrined in article 159 of the Constitution of Kenya is to do substantial Justice to the parties without undue regard to the technicalities of procedure. I do not consider that any injustice will be occasioned to the Plaintiffs if the defendant is allowed to defend this action. The cardinal rule of natural justice is that every party ought to be given a fair hearing and it is my view that if the Defendant is denied the chance and opportunity to present her case she may rightly claim to have been denied access to justice.

The Plaintiff will have an opportunity to respond to the case by the defendant and at the end of the day the court will render a verdict after hearing all the parties in the dispute.

I will in the premises exercise my discretion and allow the defendant to file her defense and counterclaim within the next fourteen (14) days from the date of this ruling and I allow the Plaintiffs corresponding leave of fourteen (14) from the date of service of the defense and counterclaim upon them to file a reply to defense and defense to counterclaim.

As it is the Defendants' actions that have made the making of this application necessary I award the costs of instant application to the Plaintiffs in any event.

Orders accordingly.

Ruling Delivered at Nairobi this 15th day of November 2013

JM MUTUNGI

JUDGE

In the presence of

----- Plaintiffs

----- Defendants



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