Rotich v Keter & another (Environment & Land Case 71 of 2015) [2023] KEELC 20005 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20005 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 71 OF 2015

JM ONYANGO, J

SEPTEMBER 25, 2023

BETWEEN

ISAAC CHEPKONGA ROTICH ..... PLAINTIFF

AND

JOSIAH KIPROP KETER ..... 1ST DEFENDANT

ROBERT KIPTUM TUWEI ..... 2ND DEFENDANT

RULING

1. The defendants/applicants filed a notice of motion dated March 17, 2023 seeking a stay of execution of this court's orders made on January 28, 2021. They also sought that the court be pleased to set aside the *ex-parte* judgment entered on January 28, 2021 and that the defendants be allowed to defend the suit.

2. The main ground on which the application is based is that the applicants were never served with the originating summons and they only learned of the suit when an auctioneer called the 2nd applicant on February 11, 2023 to inform him that a warrant of arrest had been issued against him. The application is supported by the affidavit of Robert Kiptum Tuwei, the 2nd defendant/applicant sworn on March 17, 2023.

3. In the said affidavit he deposes that he only learnt of the existence of the suit on March 16, 2023 after he visited the offices of an auctioneer after he received a telephone call from him. He then instructed his advocates who perused the court file and discovered that an *ex-parte* judgment had been entered against him. He denies having been served with the originating summons as stated in the affidavit of service sworn by one Eliud Makhakha on March 13, 2015 as he claims that he was away in Narok when the alleged service was effected. He also states that his co-defendant was equally not served and therefore the judgment entered against them was irregular.

4. In opposing the application, the plaintiff filed a replying affidavit sworn on April 13, 2023 in which he deponed that the 2nd defendant was served with the originating summons. The annexed affidavit of

service indicates that he was personally served on March 13, 2015 and he also accepted service on behalf of the 1st defendant who was alleged to be his uncle. He states that even though the 2nd defendant was aware of the suit, he failed to enter appearance or file a defence and therefore the *ex-parte* judgment should not be set aside. He discloses that the process server who effected service upon the 2nd defendant passed away recently and that might be the reason why the 2nd defendant is questioning the integrity of the affidavit of service. He maintains that despite being aware of the suit, the 2nd defendant failed to take any action and only filed this application when he realized that the process of execution had been set in motion. He is of the view that the 2nd defendant is being dishonest and he merely intends to frustrate the plaintiff and deny him from realizing the fruits of his judgment.

5. The application was canvassed by way of written submissions and both parties filed their submissions.

Analysis And Determination

6. I have carefully considered the application, the grounds upon which is based, and the applicant's supporting affidavit. I have also considered the replying affidavit together with the annextures as well as the rival submissions and the main issue for determination is whether the *ex-parte* judgment entered on January 28, 2023 together with all consequential orders thereto ought to be set aside.

7. The application was filed pursuant, *inter alia*, to order 10 rule 11 of the *Civil Procedure Rules*, which provides that:

> "Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

8. It is therefore clear that the court has the discretion to set aside or vary any default judgment so long as this is done upon such terms as are just on the basis of the evidence placed before the court, and always bearing in mind the principle set out in the case of *Mbogo v Shah* [1968] EA 93 that the discretion is intended to be exercised "...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error," but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

9. However, the court must draw a distinction between a regular and irregular judgment. This distinction is significant for the reason that where the court finds that the judgment was irregular, then it ceases to have discretion in the matter and it must proceed to set aside the default judgment ex debito justitiae.

10. In the case of in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & Another* [2016] eKLR, the Court of Appeal restated the distinction aforementioned as hereunder:

> 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, but for one reason or another, he had failed 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 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 other. See *Mbogo & Another v Shah* (supra), *Patel v E.A Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

The court further stated that:

> " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986-1989] EA 456).

11. In the instant case the respondent has annexed an affidavit of service sworn by one Eliud Makhakha in which he depones that he served the 2nd defendant/applicant personally at his home on the March 13, 2015. In the said affidavit, Mr Makhakha explained how he located the 2nd defendant's home upon being instructed by the plaintiff. He said that he found the 2nd defendant's mother one Mary Tuwei who then sent someone to call the 2nd defendant who came, introduced himself to the process server and accepted service on his own behalf and on behalf of the 1st defendnt but declined to sign the summons.

12. The 2nd defendant's averment that he was away in Narok on the March 13, 2015 is not supported by any credible evidence and I am inclined to believe the averment in the affidavit of service. I also note from the record that the same process server subsequently served the 2nd defendant with a hearing notice at his home on August 12, 2020 and a taxation notice on February 27, 2022. The fact that the 2nd respondent has not requested to have the process server summoned for purposes of being cross-examined on his affidavit of service lends credence to the plaintiff's contention that the 2nd respondent is challenging service after he learnt of the process server's demise sometime in 2022. I also note that even though the 2nd defendant has indicated that he has a good defence, he has not bothered to annex a draft defence to this affidavit on the face it therefore, it is my finding that service was properly effected on the 2nd defendant and I decline to set aside the *ex-parte* judgment entered against him.

13. As regards, service on the 1st defendant, order 5 rules 6 of the *Civil Procedure Rules* are explicit that service of summons shall be made by delivering or tendering the duplicate thereof. Rule 7 provides that:

> " Save as otherwise prescribed, where there are more defendants than one, , service of summons shall be made on each defendant".

Rule 8(1) provides that:

> " Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient".

14. Since there is nothing to show that the 2nd defendant is an authorized agent of the 1st defendants, it my finding that the 1st defendant was not properly served. In the circumstances, I have no choice but to set aside the *ex-parte* judgment entered against him.

15. The upshot is that the application succeeds partially and I make the following orders:

    a. The application against the 2nd defendant is dismissed with costs to the plaintiff/respondent and the judgment entered against him is valid and it will remain in place.

    b. The *ex-parte* judgment entered against the 1st defendant together with all consequential orders is hereby set aside with no order as to costs.

    c. The 1st defendant shall file and serve his defence within 15 days from the date of this ruling.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2023.

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Osewe Atieno for the Plaintiff/Respondent

No appearance for the Defendants/Applicants

Court Assistant: A. Oniala