



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 2 OF 2012

KIPTARUS ARAP TUWEI.....PLAINTIFF

VERSUS

FEMINA SONGOK.....1ST DEFENDANT

KIPYEGO KOSGEL.....2ND DEFENDANT

RULING

1. The defendants pray that the *ex parte* judgment and all consequential orders be set aside. By a notice of motion dated 24th September 2015, the defendants allege that they were never served with the summons to enter appearance, pleadings or hearing notice; and, that they were condemned unheard.
2. On 3rd August 2012 the High Court (Mshila J.) entered judgment in favour of the plaintiff against the defendants. The proceedings were by way of formal proof; the defendants having failed to enter an appearance or defence to the action. The court declared that the property known as Nandi/Baraton/118 belongs to the plaintiff; that the defendants were trespassers; that the defendants be evicted from the land; and, that a permanent injunction do issue restraining the defendants from trespassing, sub-dividing or dealing with the land in any manner.
3. The defendants claim that they have had uninterrupted occupation of the suit land for 40 years. It is deposed by the 2nd defendant that there were other proceedings in Eldoret Chief Magistrates Civil Case 17 of 2004 over the same property. That suit was transferred to Kapsabet Law Courts where it was dismissed. The 2nd defendant alleges that his father bought the suit land from the plaintiff in 1975. A sale agreement dated 5th November 1975 is exhibited. He claims he was born there and has lived on the land ever since. He avers that the defendants were not served with the decree. He opines that the defendants have a good defence and should be heard on the merits. No draft defence was annexed.
4. The motion is contested. There is a replying affidavit of the plaintiff sworn on 12th October 2015. He contends that the defendants were served with the summons, plaint and documents in the suit as per the affidavit of service marked KAT2. He avers that the defendants were also served with the hearing notice for 27th June 2012 as per exhibits KAT3 (a) and (b). He also avers that the defendants were served with the decree as per exhibit KAT5. It is the plaintiff's case that there has been undue laches; that the motion lacks merit; and, is a stratagem contrived to obstruct or defeat the course of justice. I was implored to dismiss the action.

5. On 9th March 2016, I heard oral arguments from learned counsels for all the parties. I have considered the notice of motion, the depositions and rival submissions.

6. The claim in this suit relates to possession and ownership of land. It was not a claim for a liquidated sum. Notwithstanding the failure to enter appearance or defence, it was not amenable to entry of an interlocutory judgment. The plaintiff was mandated to set down the suit for hearing by dint of Order 10 Rule 9 of the Civil Procedure Rules 2010. That is precisely why the plaintiff set down the matter for formal proof. The defendants were entitled to be served with a hearing notice.

7. The court has discretion to set aside the *ex parte* judgment. See Order 12 Rule 7. The legal principles in a matter of this nature are well settled. This court has wide and *unfettered* discretion to set aside an *ex parte* judgment. As stated in Shah v Mbogo (No. 1) [1967] E.A 116, the discretion “*is intended so to be exercised to avoid injustice or hardship resulting from accident, 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*”. That decision by Harris J was upheld by the Court of Appeal in Mbogo and another v Shah [1968] E.A 93. See also Kimani v Mc Connell [1966] E.A 547, Patel v East African Cargo Handling Services [1974] E.A. 75, Magunga General Stores v Pepco Distributors Limited [1987] 2 KAR 89.

8. The key question in this case is whether the defendants were served with the summons and pleadings in the suit. The answer is found in the affidavit of service sworn by Vincent Ogutu on 31st January 2012. In paragraphs 3 and 4, he deposes as follows-

“3. That on 28/1/2012 I travelled to Cheptiret Centre and alighted at a bus stop. I took another motorbike to Baraton University and alighted at a bus stop and I met with Mr. Rono at the roadside and he directed me to the homestead of Mr. Kipyego Kosgei about two hundred meters from Baraton University and on arrival I met with him and his family and after my introduction and purpose of my visit he also introduced himself as Mr. Kipyego Kosgei and he also called his mother Mrs. Femina Songok and she came immediately and after explaining to her the nature of my visit they perused the said document and they acknowledged service but declined to sign saying that they will take the same to their advocate.

4. That both defendants were each known to me at the time of service at 12 noon”.

9. A number of matters arise from the deposition. First and foremost, the defendants did *not* acknowledge service by *executing* the summons. Secondly, the process server does *not* state which court document the defendants received, perused or acknowledged. Thirdly, it is obvious that the process server did not know the homestead of the defendants. That is why he was led there by a Mr. Rono. At paragraph 4 of the affidavit, the process server claims that the defendants were *known* to him. It then beats logic for Mr. Kipyego Kosgei to have *introduced himself* to the process server. I have thus entertained some doubts about the efficacy or sufficiency of the service.

10. Having so found, the court is entitled to set aside the *ex parte* judgment *ex debito justitiae*. See Ramco Limited v Mistry Jadva Parbat Company Limited Nairobi, High Court Civil case 171 of 2001 (unreported). The same may be said of the subsequent service with a hearing notice dated 28th February 2012. The same process server went to the same homestead. He avers at paragraph 3 that Femina Songok was hostile and shouted to the process server that he “*can be killed at any time, so I served her with the hearing notice and she acknowledged service but she declined to sign*”. He says he then went to Baraton Centre where he found Kipyego Kosgei, a motor bike operator, who also declined to sign the notice.

11. If the defendants were not properly served with the summons or hearing notice, it would be a misnomer to say they were aware of the proceedings; or, that they chose not to participate in the proceedings. Not that the defendants are virtuous virgins. The defendants claim that they learnt of the matter through a neighbor who heard their names being called out in court. It is then that they visited the court registry and perused the court record. They do not give the exact *dates* of this *discovery*. I have a lingering feeling that they were less than candid and only awoke from their slumber when the process of

their eviction ensued in 2015. So much so that the setting aside of the *ex parte* judgment would have to be conditional.

12. My doubts on the sufficiency of the notice are also fortified by the history of the litigation. During the formal proof, the plaintiff acknowledged there were *two* previous cases over the suit land. He told the court they were never determined on merit because they were filed in courts without jurisdiction. The defendants contend that Eldoret Chief Magistrates Civil Case 17 of 2004 was transferred to Kapsabet Law Courts where it was *dismissed*. I cannot make a conclusive finding on the matter. But it is not contested that the plaintiff was seeking an order to evict the defendants.

13. There is another important matter. This suit relates to the emotive subject of occupation, use and title to land. From the valuation report produced at the hearing, the land was worth Kshs 6,400,000. The plaintiff acknowledged in the proceedings for formal proof that the defendants had been in occupation for *10 years*. The defendants contend they have been in occupation for *40 years*. I am alive that the plaintiff is the *registered* proprietor. He produced a copy of the title. The 2nd defendant claims that his father bought the suit land from the plaintiff in 1975. A sale agreement dated 5th November 1975 is annexed. All those matters cannot be wished away lightly.

14. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. In a synopsis, the present legal regime frowns upon technical justice.

15. I am alive that the plaintiff would be prejudiced by re-opening the litigation. However such prejudice can be fairly compensated in thrown away costs. And I am prepared to grant the plaintiff costs. Like I stated, the defendants did not impress me as completely forthright in the matter. I will only set aside the judgment on terms.

16. I will exercise my discretion in favour of the defendants. The upshot is that the *ex parte* judgment delivered on 3rd August 2012 is hereby set aside *but* upon the defendants meeting the following *conditions*. The defendants shall pay the plaintiff *thrown away* costs of Kshs 20,000 within the next *thirty* days. The defendants are granted leave to defend the suit. They shall file a memorandum of appearance within *fourteen days* of today's date; and, a defence within a *further fourteen days*. The plaintiff shall be at liberty to reply within *fourteen days* of service with the defence. If the defendants fail to meet *any* of the conditions within the set *time*, the *ex parte* judgment shall stand reinstated; and, execution may proceed.

17. Lastly, this matter relates to occupation, use and title to land. If the defendants comply with the above conditions, I further direct, *suo moto*, that the file be transferred to the Environment and Land Court at Eldoret for hearing and determination of the suit.

It is so ordered.

DATED and DELIVERED at ELDORET this 17th day of March 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance for the plaintiff.

Ms. Ruto for Mr. Awi for the defendants.

Mr. J. Kemboi, Court Clerk.