



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 37 OF 2015

JOYCE BOCHERE NYAMWEYA

Suing as legal representative of

TABITHA MOIGE NYAMWEYA (DECEASED).....PLAINTIFF

VERSUS

CHARLES RATEMO NYAMWEYA (Sued as the legal

Representative of honourable JAMES NYAMWEYA (DECEASED)

and also in his personal capacity.....1ST DEFENDANT

JEMIMAH NYABOKE NYAMWEYA (sued as the

legal representative of honourable

JAMES NYAMWEYA (DECEASED)

and also in her personal capacity).....2ND DEFENDANT

PAUL NYAMWEYA.....3RD DEFENDANT

JAMESPARK HOLDING LTD.....4TH DEFENDANT

GEORGE OMARI NYAMWEYA.....5TH DEFENDANT

JAMES OGENDI NYAMWEYA.....6TH DEFENDANT

CHRISTOPHER NYAMBANE NYAMWEYA.....7TH DEFENDANT

MOIGE GARDENS LTD.....8TH DEFENDANT

TANYA HOLDINGS LTD.....9TH DEFENDANT

HOTEL PHOENIX LTD.....10TH DEFENDANT

RULING

1. The parties in the present suit are all related. The properties the subject of the suit equally relate to the estates of the Hon. James Nyamweya (deceased) and the late Tabitha Moige Nyamweya (deceased) and more specifically the distribution of the estate's properties to the parties in the suit who are beneficiaries and/or companies associated with beneficiaries. Central in the suit is the administration of the deceased estate. The plaintiff filed the plaint dated 6th February 2015 on 9th February 2015 and simultaneously with the plaint also filed a Notice of Motion dated 9th February 2015 under a certificate of urgency seeking diverse conservatory and injunctive orders against the 1st, 2nd, 3rd and 4th defendants in respect of various assets of the deceased estate.

2. On 20th March 2015 the 2nd defendant filed a Notice of Motion application dated 19th March 2015 seeking an order staying further proceedings of this suit pending the hearing and determination of Kisii HC Succession Cause No. 451 of 1996. The plaintiff on 10th April 2015 filed an application dated 9th April 2015 seeking an order that the 2nd defendant do furnish security for costs of the plaintiff in the sum of kshs. 5 Million respecting the 2nd defendant's application dated 19th March 2015.

3. The 1st defendant in the meantime filed a memorandum of appearance on 9th March 2015 and filed his defence dated 1st April 2015 on 10th April 2015. The record of the court does not show that the other defendants appeared or filed any defences. On 15th May 2015 the firm of Kamau Kuria & Company Advocates for the plaintiff filed a request for judgment dated 14th May 2015 against all the defendants who had not filed defences. The entry of interlocutory judgment against the 2nd to 10th defendant was minuted on 15th May 2015 and endorsed by the Deputy Registrar on 7th August 2015.

4. On 19th November 2015 the 3rd and 4th defendants filed the application dated 18th November 2015 which is the subject of this ruling. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 11 and Order 51 Rules 1 and 15 of the Civil Procedure Rules and seeks the following orders:-

1. THAT this court be pleased to set aside and/or vacate the interlocutory judgment entered by this court in favour of the plaintiff against the defendants in this suit.

2. That this honourable court be pleased to grant the application leave to file and serve their respective statements of defence, out of time.

5. The applicant's application is supported on the grounds that are set out on the body of the application and on the sworn affidavit of Paul Nyamweya the 3rd defendant herein dated 18th November 2015. The applicants state that following the filing of the instant suit there were efforts made at the instance of the court aimed at promoting a reconciliation and an out of court resolution of the matter. The applicants have drawn attention of the court to orders made by Hon. Justice Wakiaga on 20th March 2015 in Kisii HC Succession Cause No. 451 of 1996 which were to apply equally to this matter. In deed the court record indicates that to have been the case. The orders were as follows:-

a. That the court calls for an informal meeting of the parties in view of trying to settle the matter.

b. That each party shall give a proposal on its preferred mode of settling this dispute.

c. That the proposals be exchanged between the parties by 7th April, 2015;

d. That the matter be mentioned on 10th April for an informal meeting to receive the said proposals and if possible reach a formal settlement on the dispute;

e. That in the meantime, the status quo as at 20th March, 2015 in respect to the estates of James Nyamweya and Tabitha Moige Nyamweya shall be maintained pending further orders.

f. That in the event that no formal settlement is reached now that the court has put itself on the matter as a mediator, the two applications dated 28th January 2015 and 9th February, 2015 respectively shall be heard by Hon. Justice C. B Nagilla.

6. The court record does not show or reveal whether the directions given by Hon. Justice Wakiaga on 20th March 2015 were followed through unless the record was maintained in the Succession Case file which is not before this court. On the basis of the directions given by the judge on 20th March 2015, it is evident that the parties more or less agreed to suspend further action and/or further proceedings in the matter to give the mediation process initiated by the court a chance. Realistically for as long as the mediation process was ongoing the parties would not have been expected to be bound by the time lines and limitations for filing of pleadings. The applicants have averred the intervention by the court operated as a bar to filing of further pleadings pending the outcome of the informal consultations between the parties.

7. The plaintiff opposes the application by the 3rd and 4th defendants on the grounds set out in the replying affidavit sworn on 26th January 2016. The 5th defendant/respondent, George Omari Nyamweya and the 6th defendant/respondent, James Ogendi Nyamweya have separately sworn and filed replying affidavits both dated 4th February 2016 in opposition to the applicants' application and basically support the position taken by the plaintiff that the applicants' application should be dismissed.

8. The applicants filed written submissions to canvass the application. The plaintiff filed submissions in response and in opposition to the applicants' application. The 1st defendant filed submissions in support of the applicants' application. The other defendants against whom the interlocutory judgment was entered did not file any documents in support or in opposition of the applicants' application.

9. I have considered the material placed before the court in support of the application by the 3rd and 4th defendant including the affidavits sworn in support and in opposition thereof together with the annexures thereof and the submissions filed on behalf of the parties and the issues for the court to determine is firstly, whether there was a valid and regular interlocutory judgment entered, and if so, whether the court ought to exercise its discretion to set the same aside and grant leave to the applicants to defend.

10. Interlocutory Judgment

Order 10 of the Civil Procedure Rules makes provision for entry of judgment and/or interlocutory judgment against a defendant who fails to appear and/or file a defence after being served with summons in a certain category of suits. Under Rule 4 (1) where the claim is only for a liquidated amount, judgment may be entered for the liquidated sum where a defendant who is served fails to appear or having appeared fails to file a defence. Under Rule 4 (2) where the claim is for a liquidated sum together with another claim, judgment may be entered against a defendant who fails to appear or file a defence for the liquidated demand but any award of costs would have to await judgment on such other claim.

11. Rule 5 also allows for entry of judgment where the plaintiff makes a liquidated demand with or without some other claim where the defendant does not appear or file a defence. Order 10 Rules 6 and 7 provide for entry of interlocutory judgments and as they are the ones which concern us in this matter I will set them out for ease of reference.

10(6) Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

(7) Where the plaint is drawn as mentioned in Rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in form No. 13 of Appendix, A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

Order 10 Rule 9 provides the general Rule where no appearance is entered and 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 down the suit for hearing.

Under Order 10 Rule 6 and 7 interlocutory judgment may only be entered where the claim is for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages and in all other cases not provided for under Order 10 the plaintiff's obligation as provided under Rule 9 is to fix the suit for hearing.

12. In the instant matter the plaintiff applied for judgment against all the defendants who had not filed defences following service on them of the summons. I have perused the plaint filed herein and quite clearly the plaint is not one that would fall in the category of plaints envisaged under Order 10 Rules 4, 5, 6 and 7 of the Civil Procedure Rules. The plaint inter alia seeks a nullification of various transfers of properties effected to the 2nd, 3rd and 4th defendants as per prayer (i) in the plaint. The plaint also seeks declarations of trust in regard to various properties held by the 1st and 2nd defendants as itemized under prayer (iii) of the plaint in addition to other prayers where a declaration of trust is sought. The interlocutory judgment entered by the Deputy Registrar was in my view irregular and I would ipso facto set it aside. The same ought not to have been entered at all as the plaint was not such as would have permitted for entry of interlocutory judgment under Order 10 of the Civil Procedure Rules.

13. Discretion of the Court

Following the enactment of Order 11 Civil Procedure Rules 2010 courts have been liberal in allowing all parties to file all their pleadings and documents during the case conferences and hearing of pre trial directions. In the present case where the 1st defendant had filed his defence, the plaintiff in line with Order 10 Rule 9 should have applied for a case conference and/or pretrial direction so that the court could issue directions. Order 11 Rule 3 (1) (a) requires the court to inquire as regards compliance with Order 3 Rule 2 and Order 7 Rule 5 which relate to documents accompanying the plaint and defence respectively. During the case conference any party who has been served and has not filed a defence would normally be allowed to file his/her defence to allow the pre trial directions to be taken. My view is that at the case conference stage any party who may not have filed a defence in a case such as the present one where no judgment or interlocutory judgment could have been properly entered for failure to appear or file a defence ought to be freely allowed to file their defence. I have digressed abit but I wished to put the point across that in my view a party is at liberty to file a defence at any time before pre-trial direction are given by the court in a case where judgment or interlocutory judgment could not be given for default of appearance or defence.

14. Although what I have stated should be sufficient to dispose of the instant application, just in case I may be wrong in my appreciation of the law, I wish to confirm that I would in the circumstances of this case considering the material placed before me have been inclined to exercise my discretion in favour of the applicants to allow them to defend the suit.

In the case of **Shah –vs- Mbogo & Another [1967] E.A 116** Harris, J held as follows:

“Applying the principle that the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be

refused.”

15. I see no deliberate attempt by the applicants to obstruct or delay the cause of justice. I rather see inadvertence owing to the other happenings in the file. The record shows there were attempts at mediation and/or settlement out of court which was initiated by the court. The parties were also kept busy by the filing of various applications in this case and in the succession file. In the case of **Patel –vs- East African Cargo Handling Services Ltd [1974] E.A 75 Duffus, P.** while considering the principles upon which the court ought to consider in an application to set aside interlocutory judgment stated thus:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions itself to fetter the wide discretion given to it by the rules...”.

16. I do not consider that the plaintiff will be prejudiced and/or occasioned any injustice if the applicants are allowed to defend the suit. The essence of meting out justice is that every party to the suit should be given a fair chance to ventilate their case. Denying the applicants the chance to defend the suit by filing their defence is to shut them away from the seat of justice and they will feel they have been denied access to justice. I agree the plaintiff will be occasioned some delay in the prosecution of the case owing to the failure by the applicants to file their defence at the time they should have but then to do substantial justice to all the parties it is essential that the applicants be afforded an opportunity to file their defence and participate in the proceedings.

17. The overriding objective of the court is to do justice to all parties that come before it in an expeditious manner and without undue regard to procedural technicalities. Indeed that is what Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act No. 19 of 2011 enjoin this court to do. The courts ought not to sacrifice doing substantial justice at the altar of procedural technicalities.

18. In the result I hold and find that the application by the 3rd and 4th defendants dated 18th November 2015 has merit and grant the same on the following terms:

- 1. That the interlocutory judgment entered herein be and is hereby set aside and vacated.**
- 2. The applicants have leave to file their defence within 15 days from the date of this ruling.**
- 3. That the costs of the application are awarded to the plaintiff.**

Judgment dated, signed and delivered at Kisii this 13th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....	for the plaintiff
.....	for the 1 st defendant
.....	for the 2 nd defendant
.....	for the 3 rd and 4 th defendants
.....	for the 5 th defendant
.....	for the 6 th defendant

J. M. MUTUNGI

JUDGE