



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 273 OF 2016

BETWELL KIPLAGAT KOSGEI.....PLAINTIFF

-VERSUS-

JACKSON CHEPKWONY & ANOTHER.....DEFENDANTS

RULING:

1. This is a ruling in respect of a Notice of Motion whose supporting affidavit is sworn on 22nd February 2021. The 1st Defendant/Applicant seeks the setting aside of an ex parte Judgement entered herein against him on 23rd June, 2020 together with any consequential orders.
2. The Applicant who is the registered owner of LR No. Cheptiret/Cheplaskei Block 1 (Kipchamo) 52 (suit property) contends that he was not served with summons to enter appearance in this case or any other Court processes thereafter. The Applicant states that he became aware of this case when he was served with a Court order, decree and bill of costs which he took to his lawyer for advise.
3. The Applicant's lawyer went and perused the Court file that is when the lawyer found out that a case which had been filed against him had proceeded ex-parte and a decree issued against him. He now prays that the ex-parte judgment be set aside so that he can be heard in his defence.
4. The Applicant's application is opposed by the Plaintiff/Respondent through a replying affidavit sworn on 3rd March 2021. The Respondent contends that the Applicant was duly served with summons to enter appearance and subsequently served with all other Court processes but he chose not to participate in the proceedings. The Respondent therefore contends that the Applicant's application is misconceived and is brought in bad faith.
5. In a further affidavit sworn on 10th December, 2021, the Applicant contends that he has a good defence to the Applicant's claim and that the said good defence is a claim for adverse possession over the suit property.
6. The parties were directed to file written submissions in respect of the application. The Applicant filed his submissions dated 10th December, 2021. The Respondent filed his submissions dated 28th April 2021. I have gone through the submissions and the only issue for determination is whether the Applicant has made out a case for setting aside the ex parte judgment and consequential orders.
7. The facts which emerge from this application which are not disputed is that the Applicant was registered as owner of the suit property in trust for the family of the Late Malakwen Arap Rutto who died in 2001. The suit property had been shared out prior to the death of Malakwen Arap Rutto. Geoffrey Kosgei, son to Malakwen Arap Rutto who is also brother to the Applicant was entitled to 9 acres from the suit property. The Applicant admits this fact.
8. Despite this admission, the Applicant has gone ahead to subdivide the suit property into four portions without regard to the agreed sharing which had been agreed upon prior to Malakwen Arap Rutto's demise. The Applicant contends that he was not served with summons to enter appearance. I have looked at the affidavit of service sworn on 10th October, 2016. The process server explains how he went and found the Applicant whom he served with summons to enter appearance. The Applicant declined to sign the summons. The Applicant was thereafter served with all other Court processes subsequent to the service of summons to enter appearance.
9. Though the process server did not strictly comply with the requirements as to the contents of an affidavit of service, I find that the service was proper. The Applicant is an uncle to the Respondent and his home must have been identified to him as well as his identity. The Applicant ignored to attend Court and defend the suit.

10. The ex parte judgment which was entered herein is a regular judgment as the Applicant was served with summons to enter appearance in person but he failed to file a defence. In the circumstances, I am obliged to exercise my discretion and determine whether or not to set aside the ex parte judgment. Firstly, there is no reason given why the Applicant did not file defence. His claim that he was not served with summons to enter appearance is without merit. Secondly, the application for setting aside the ex-parte judgment was made 8 months after the entry of the ex parte judgment. Thirdly, the proposed defence is a sham. The Applicant having admitted that the Respondent's father was entitled to 9 acres cannot again claim to have acquired the whole or portion of that entitlement by way of adverse possession as he claims in his proposed counterclaim.

11. The Applicant has admitted that he is registered as owner of the suit property in trust for the family of Malakwen Arap Rutto. There is no way he can again claim the same land by way of adverse possession. He therefore does not have a defence worth to be given a hearing.

12. The Applicant had already subdivided the land into four portions without regard to the share of the Respondent's father. The Respondent will therefore be greatly prejudiced if he was to be subjected to a fresh hearing all over again when there is no good reason to do so.

13. After entry of judgment, the Applicant through his lawyer belatedly tried to have the issue sorted out but the gesture came too late after judgment. The right to hearing is not an absolute one. It can only be given when there is something to hear. The conduct of the Applicant herein is one of a person who is out to delay the course of justice. This Court declines to exercise its discretion in his favour. It therefore follows that his application must fail and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF FEBRUARY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Ogongo for Ms. Tirop for Plaintiff.

Court Assistant -Albert

E. OBAGA

JUDGE

24th February, 2022