



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 50 OF 2021

STEPEHEN MBAKI WAITA.....PLAINTIFF/APPLICANT

- VERSUS -

NATIONAL LAND COMMISSION.....1ST DEFENDANT/RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND DEFENDANT/RESPONDENT

RULING

I. PRELIMINARIES.

1. Before this Honorable Court for determination is the Notice of Motion dated 8th September 2021 filed by the Plaintiff/Applicant. It is brought under the provisions of Articles 40 and 50 of the Constitution of Kenya, Section 123 of the Land Act, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap. 21, Order 2 Rule 15 (1)(b), Order 10 Rule 5, Order 13 Rule 2 of the Civil Procedure Rules, 2010.

II. THE PLAINTIFF/APPLICANT'S CASE.

2. The Plaintiff/Applicant sought for the following orders: -

a) Spent.

b) THAT Judgement in the sum of Kshs. 33, 450,450/= as prayed in the Plaint be entered against the 1st Defendant/Respondent who has failed to enter appearance and file defence within the prescribed period.

c) THAT Judgement in the sum of Kshs. 33, 450,450/= as prayed in the Plaint be entered against the 2nd Defendant/Respondent on 2nd defendant/respondent admission of Plaintiff/Applicant's claim in paragraphs 12,19,21,23,24, and 33 of the Defence dated 23rd April 2021 and Paragraphs 12, 13, 17, 19, 20, 21, 22, 23, 27, and 31 of the 2nd Defendant/Respondent Replying Affidavit sworn on 23rd April 2021 by senior surveyor Daniel K. Mbuteti.

d) THAT the total sum of Kshs 33,450,450 transferred to 1st Defendant/Respondent by the 2nd Defendant/Respondent's accounts vide letter Ref. KeNHA/F/NLC/6/Vol3/3306 dated 15th October 2020 as compensation to the Plaintiff/Applicant for land development and loss of business be paid to the Plaintiff/Applicant by the 1st Defendant/Respondent.

e) THAT further orders be given as the Honourable Court deems fit and just.

f) THAT the costs of this application be provided for.

3. The Plaintiff/Applicant's application is based on the testimony, grounds and averments of the 38 Paragraphed Supporting Affidavit of STEPHEN MBAKI WAITA dated and sworn on 8TH September, 2021 and 14 annexures marked as "SMW – 1 to 4" annexed hereto. The Applicant stated that the 1st Respondent has failed to enter appearance and file a defence within the prescribed time despite being served with a Plaint, Certificate of Urgency and Notice of Motion Application and Supporting Affidavit. An affidavit of service dated 16.4.2021 to that effect was attached and summons to enter appearance dated 23rd March 2021. The 2nd Respondent is said to have admitted to the Applicant's claim in its statement of Defence dated 23rd April 2021 and its Replying Affidavit sworn on the same day.

4. He held that the 1st Defendant/Respondent acknowledged receipt of the said documents by affixing their official stamp of the – by the NLC's Secretary. The Deponent held that by a letter dated 23rd March, 2021 addressed to the 1st Defendant/Respondent's Chief Executive Officer and copied to the Chairman, commissioner Alister Muriimi, the Director of valuation and Taxation, the Finance Director and the Legal Department, he was informed by his Advocates that the 1st Defendant/Respondent that since he had filed a suit and strongly cautioned the 1st Respondent from paying his compensation or to persons purporting to be acting on his behalf.

5. He held that this was a fit case to enter judgment against the 1st Defendant/Respondent for failure to enter appearance and file Defence within the prescribed period. He stated that the 2nd Defendant/Respondent filed a statement of Defence dated 23rd April 2021 and a Replying affidavit sworn on 23rd April 2021 by Senior Surveyor Daniel K. Mbutati and a witness statement of the said surveyor.

6. The Plaintiff/Applicant held they failed to file Defence and within the prescribed time has described the statement of defence as frivolous and vexatious for admitting to his claim. The Defendants/Respondents are said to have paid all those affected by the compulsory acquisition including the Plaintiff/Applicant's tenants but has since demolished and began road construction, without fully compensating the Plaintiff/Applicant.

7. He held that the 1st Defendant/Respondent never filed a Replying Affidavit to the Notice of Motion application dated 22nd March, 2021. He filed request for judgment dated 3rd May, 2021 Under Order 10 Rule 6 whereby Honorable Deputy Registrar gave directions that the matter be placed before the Honorable Judge for directions on pre-trial and formal proof hearing.

8. The Plaintiff/Applicant claimed that the admissions made by the 2nd Defendant/Respondent in its defence under Paragraphs 12, 19, 21, 23, 24 and 33 of the said Defence amounts to an admission of his claim under Order 13 Rule 2 of the Civil Procedure Rules, 2010. Consequently, the Plaintiff/Applicant is entitled to judgement on the sum of Kenya Shillings Thirty Three Million Four Fifty Thousand Four Hundred & Fifty (Kshs 33,450,450/-) admitted without waiting for hearing and determination of any other question between the parties. That both the 1st and 2nd Defendants/ Respondents ought to bear equal responsibility in ensuring that the Plaintiff/Applicant is fully compensated.

9. Neither of the Defendants/Respondents complied with the directions of court to file any responses to the application herein. In other words, the application was unopposed.

III. ANALYSIS AND DETERMINATION

10. I have keenly considered the issues raised in the Notice of Motion application by the Plaintiff/Applicant, the supporting documents and the written submissions made by the Plaintiff/Applicant herein.

11. In order to arrive at an informed, fair and just decision, this Court has framed the following issues for determination. These are:-

a) Whether in land matter default judgement ought to be entered against the 1st Defendant/Respondent for failure to enter appearance and file defence.

b) Whether the 2nd Defendant/Respondent's statement of defence ought to be struck out and judgement entered against the 2nd Defendant/Respondent, on the account of being an admission to the Plaintiff/Applicant's claim.

ISSUE No. a). Whether in land matter default judgement ought to be entered against the 1st Defendant/Respondent for failure to enter appearance and file defence.

Brief Facts.

Before embarking on the indepth analysis of the framed issues hereof, it is imperative that the court provide brief facts of the case first and foremost. From the filed pleadings the Plaintiff/Applicant filed a suit vide a Plaint dated 22nd March, 2021 to enforce payment of two awards of Kenya Shillings Twenty Seven Million Eight Seventy Thousand Four Fifty Thousand (Kshs. 27,870,450/=) and Kenya Shillings Five Million, Five Eighty Thousand (Kshs. 5,580,000) issued to him as more particularly set out in Paragraphs 6, 7, 8, and 9 of the filed Plaint.

It is the contention by the Plaintiff/Applicant the 1st Defendants/Respondents has willfully and blatantly failed, neglected and/or refused to enter appearance and Defence nor any replies to the Notice of Motion applications while the 2nd Defendant/Respondent though has filed a Defence but not within the prescribed time its replies are full of admission particularly under Paragraphs 12, 19, 21, 23, 24 and 33 of the statement of Defence and hence there is need to enter judgment in default and admission.

12. Now back to the issues under this sub heading. It will be noted that the summons to enter appearance to the Defendants/Respondents were issued by court on 23rd March 2021. The Plaintiff/Applicant's process server filed a return of service on 26th April 2021, where she affirmed to have effected service on the 1st Defendant/Respondent on 23rd March 2021. The Plaintiff/Applicant then proceeded to request for interlocutory judgement under the provisions of Order 10 Rule 6 of the Civil Procedure Rules, 2010 on 4th May 2021. The prayer was however declined by the Deputy Registrar who directed the Plaintiff/Applicant to appear before this Honourable Court and seek the same orders. The 2nd

Plaintiff/Respondent entered appearance on 13th May 2021 by filing a Memorandum of Appearance dated 6th April 2021 and statement of Defence dated 23rd April, 2021. The Plaintiff/Applicant now seeks judgement against the 1st Defendant/Respondent as provided for by Order 10 Rule 5 of the Civil Procedure Rules, 2010.

13. Under Order 7 Rule 1 of the Civil Procedure Rules, 2010, it provides that where a Defendant has been served with Summons to appear he shall, unless ordered by court file his defence within 14 days after he has entered appearance in the suit. The rule does not state what would happen if the same does not happen. However, the provision of Order 10 of the Civil Procedure Rule, 2010, provides for consequences of non attendance and default of defence. For a liquidated demand, which is an ascertainable debt, Order 10 Rule 4 applies where court shall on request enter judgement against the Defendant for the sum claimed. All these are prevalent and applicable in the ordinary Civil proceedings or matter under the Common law.

14. Nonetheless, when it comes to land matters, due to their sensitivities and emotiveness, from mere practice, where claims are for unliquidated claims things ought to be slightly different. Clearly, it will be noted that there is no provision for the same under the rules. This was first observed by **Angote J** in the matter of: **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & another – Verus - Francis Bahati Diwani & 2 others [2014] eKLR**, where he stated, ***“There is no corresponding Rule to deal with unliquidated claims, especially in matters for recovery of land, which provides for entry of judgement in default of a defence, thus giving a defendant room to file his defence before the matter proceeds for hearing.”*** It was his view, which I gladly associate with, that no judgement can be entered in land matters until the suit is heard on merit.

15. But be that as it may, what happens to a Defendant, who does not file his defence within the stipulated time? In my view the 1st Defendant ought to comply with the provisions of Order 7 Rule 1 to file a defence within the stipulated time. However, the court is empowered to, in the interest of justice enlarge time within which a limited time is fixed to do any act under the rules. The Plaintiff/Applicant has not shown the injustice or prejudice that he stands to suffer because the 1st Defendant has not filed its defence within the prescribed period. I therefore decline to enter an interlocutory and/or default judgement against the 1st Defendant as prayed.

16. The Plaintiff/Applicant has urged court to strike out the 2nd Respondent’s defence for admitting to the Plaintiff/Applicant’s claim. Here court is called to examine the striking out of pleadings and entering judgement on admission. The relevant rules are Order 13 Rule 2 and Order 2 Rule 15 of the Civil Procedure Rules. Order 13 Rule 2 provides for Judgement on admissions. It states that:-

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

The legal ingredients for Judgement on admission are set out so clearly in the cases of “HCCC (Mombasa) No. 11 of 2017 – “Endebess Development Company Limited – Versus – Coast Development Authority (2018) eKLR, Njoki J and in Civil Appeal Nbi Choitrum – Versus – Nazari, (1984) eKLR 327, where Madan JA held:-

“For the purposes of Order XII Rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g in correspondence. Admissions have to be plain and obvious, as the a pikestaff and clearly readable because they may result in Judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgement as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties in considering the matter, the Judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by Judges which has become established routine in the courts.....the only question then would be whether the Judge exercised his discretion properly. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of facts the case is plain and obvious, there is no room for discretion to let the matter go to trial for then nothing is gained by having a trial.....”

This court strongly holds from this long passage, the ingredients of admission have been graphically stated out and need no more

interpretation.

17. The 2nd Defendant/Respondent filed its statement of defence on 13th May 2021. I have perused the defence and I do note that the 2nd Defendant/Respondents under Paragraphs 12, 19, 21, 23, 24 and 33 of the said Defence admits to a compulsory acquisition process that has been ongoing for the expansion of Port Reitz, Moi International Airport Access road. The suit property that was acquired was MN/VI/2519 owned by one Hashim Shamasu Naaman & Naaman Mohamed Naaman (as trustees). The Plaintiff/Applicant has not opposed their ownership of the suit property, actually I have come across a tenancy agreement between the Plaintiff and Shamasu Naaman Mohamed dated 18th December 2002 that reveals that Shamasu is the owner of Plot No. 2519/VI/MN, while the Plaintiff/Applicant is the tenant running a business premises by the name Magongo Bar and Magongo Guest House.

18. A further perusal of the 2nd Defendant/Respondent's statement of defence, there evidence to indicated that the 2nd Defendant/Respondent under Paragraphs 12, 19, 21, 23, 24 and 33 of the said Defence had admitted that the Plaintiff/Applicant was identified as a project affected person and was set to benefit, subject to inquiry, inspection and determination of the compensation payable. The 2nd Defendant/Respondent further avers that the Plaintiff/Applicant was to be compensated for the affected land developments and loss of business since he was a tenant and not the owner of the subject matter. The 2nd Defendant/Respondent, however defended its decision not to compensate the Plaintiff/Applicant in Paragraph 24 of the defence, where its stated, ***“Indeed the 2nd Defendant fulfilled its obligation as per Section 111 (1) of the Land Act and the Plaintiff was to be compensated for developments thereon arising from the need to relocate her premises to facilitate road construction save that there was an ownership dispute/encumbrance on the subject property which needed to be sorted out before compensation was effected.”*** The same is emphasized on Paragraphs 25, 26, 28 and 29 of the statement of defence, where the 2nd Defendant/Respondent has defended its position for not compensating the Plaintiff/Applicant dispute being identified as a project affected person eligible for compensation.

19. The Defendant/Applicant's argument that the 2nd Defendant/Respondent has admitted to its claim in its statement of defence is not entirely correct. The 2nd Defendant/Respondent has admitted to the existence of the compulsory acquisition process where the Plaintiff/Applicant was identified as a project affected person and eligible for compensation, however this compensation was halted until the dispute over ownership of the suit land was resolved. In my view, the set of facts as elaborated by the 2nd Defendant/Respondent do amount to a defence that raises triable issues before court for determination.

20. On the other hand, striking out of pleadings under the provisions of Order 2, rule 15 provides for striking out pleadings, it states that:-

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

21. It is trite law that where a defence raises even one bonafide triable issue, then the Defendant must be given the chance to defend its case. The issues raised as defence by the Defendant need not be those that can succeed but rather those that are bonafide and warrant to be heard and determined by court. **“Simon Kirima Muraguri & another – Versus - Equity Bank (Kenya) Limited & another [2021] eKLR**, the court held that unless the Plaintiff/Applicant can demonstrate shortly and conclusively that the Plaintiff/Applicant's claim is bound to fail or is an abuse of the court process, the Defendant claim must be allowed to trial. The court's inherent jurisdiction to strike out a defence must be sparingly exercised in only exception cases.

22. The 2nd Defendant/Respondent's defence is not frivolous or vexatious, it's neither an admission of the Plaintiff/Applicant's claim. It raises triable issues, whether the 2nd Defendant/Respondent was right in withholding compensation from the plaintiff or not, is an issue that will be determined after the court hears all parties concern. I associate myself with the findings of **Madan JA, in D.T. Dobie & Company Kenya Limited – Versus - Joseph Mbaria Muchina & Another [1980] eKLR**, where he stated:- *“The no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

IV. DETERMINATION

23. In the ultimate analysis, and based on the principles in the decision

cited above to the present circumstances and the Notice of Motion application before court partially succeeds, in as far as it is not opposed and Judgement in default of defence is entered with some slight and necessary modification being a land matter under Order 10 Rules 4, 9 and 10 of the Civil Procedure, 2010 but fails for lack of merit in seeking orders to strikeout and entering Judgement on admission against the 2nd Defendant under the provisions of Order 2 Rules 15 and 13 of the Civil Procedure Rules, 2010. For avoidance of doubt the following orders are made:-

a) **THAT** the Notice of Motion application before court is **allowed but only to the extent as:-**

i) It is not opposed by neither the 1st nor the 2nd Defendants; and

ii) Judgement in default of defence be and is hereby entered against the 1st Defendant but with some slight and necessary modification being a land matter under Order 10 Rules 4, 9 and 10 of the Civil Procedure, 2010.

b) **THAT** there shall be formal proof on the matter on 5th April, 2022 to allow the said final Judgement be entered against the 1st and 2nd Defendants by this Court.

c) **THAT** Notice of Motion Application by the Plaintiff/Applicant dated 8th September, 2021 lacks of merit in as far as the orders sought to strike out and entering Judgement on admission against the 2nd Defendant under the provisions of Order 2 Rules 15 and 13 of the Civil Procedure Rules, 2010 is concerned.

d) **THAT** Costs of the application shall be in the cause.

IT IS SO ORDERED ACCORDINGLY.

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

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna, the Court Assistant.

Mr. D.G Wachira Advocate for the Plaintiff/Applicant.

No appearance for the 1st Defendant/Respondent.

M/s. Alago Advocate for the 2nd Defendant/Respondent.