



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 560 OF 2011

KOMBO HASSAN KOMBO (suing as the administrator of the

Estate of MWISHAHALI KOMBO MWINYIHAJI PLAINTIFF

- V E R S U S -

OMAR SAID ABDALLA DEFENDANTS

RULING

1. By a motion dated 19th November, 2014 brought under certificate of urgency. The applicant has sought the following orders:

1. ...

2. ...

3. *That there be a stay of execution of the judgment and decree issued herein on 18th October 2014 and all orders and/or process consequential thereto, pending the hearing and determination of this application.*

4. *That the ex parte judgment herein and all orders/process consequential thereto be set aside and the defendant be granted unconditional leave to defend the suit leave to defend the suit per the annexed draft statement of defence.*

5. *The Costs of application be provided for.*

2. The application is supported by 13 grounds listed on the face of it and his affidavit sworn on 19th November 2014. The defendant/applicant's main contention is that he was never served with summons to enter appearance, plaint and verifying affidavit and/or any relevant process. The applicant stated in ground (i) that he has a credible meritorious defence which raised a myriad of triable issues and which ought to be ventilated in a fair hearing. In the affidavit in support of the application he has annexed a draft statement of defence.

3. The application is opposed by the plaintiff/respondent who has filed a replying affidavit. In the affidavit, the respondent deposes that the application was served as he pointed out the defendant to the process server who effected service. The defendant ignored to enter appearance and he proceeded to

prove his case and thereafter obtained a decree. He also deposed the defendant has no sound defence as the draft defence annexed amount to mere denials. Further that the defendant did survey and he found he had encroached on the plaintiffs property. He deposed that the application be dismissed.

4. The counsels for the parties then made oral submissions. Mr. Mutiso submitted that the applicant was never served and he only learnt of this case when he was served with the notice to show cause. He submits that the affidavit of service does not indicate the specific area where the defendant was served as Jomvu is a big area with seven (7) locations. Further that the server did not indicate which day of the week service was effected and on 21.10.2011 the defendant was at work in Mombasa. In the letter serving the notice of entry of judgment, it is addressed to c/o Chief Mombasa yet it is not clear if there is a Chief for Mombasa. Mutiso submits that the Notice of show cause is improperly worded. The defendant denied being in occupation of the suit premises as pleaded in para 4B of the draft defense. He cited the case of *Shah vs Mbogo & another (1967) EA. 116* and *Gandhi Brothers vs H.K. Njage Milimani HCCC 1330 of 2001* and the doctrines of equity. He urged the court to allow the application.

5. Mr. Mohamed in opposing the motion, submitted that summons were duly served upon the defendant irrespective of the fact that Jomvu area is big. Secondly that interlocutory judgment could not have been entered if service was not found to be proper. It is the defendant's case that the draft defence is a mere denial and raised no triable issues. Further that there is no reason to stay the execution process as the defendant chose not to appear. He admits a mistake on the address in the letter sent to the Chief Mombasa as it ought to have been served on the Chief Jomvu area. He urged the court to dismiss the motion.

6. In the celebrated case of *Shah vs Mbogo Supra*, it was held that setting aside is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error or mistake but not to assist a person who has deliberately sought to obstruct or delay the cause of justice. In the case of *Shanzu Investments Ltd vs The Commissioner of Lands Civil Appeal No. 100 of 1993 [1993]*, the Court of Appeal set down the principles for setting aside ex parte judgment to constitute the following; defence on merits, prejudice and explanation for the delay. In the *Gandhi case supra*, Ringera J said ex parte judgment will be set aside where there is no proper service and if default judgment is regular, the court has unfettered discretion to set aside such judgment and any consequential decree.

7. In this instance, the applicant disputes that he was ever served with summons to enter appearance and the notice of entry of judgment. The plaintiff/respondent in relying on his replying affidavit annexed the process server's affidavit of service used to obtain interlocutory judgement. In paragraph 3 of the affidavit of Michael Otieno he deposed; **"That on the same day (21.10.2011) I was accompanied by the plaintiff to the defendant's residence at Jomvu area and upon reaching the defendant's residence, the plaintiff pointed out to me the defendant to whom I introduced myself and the purpose of my visit."** It means the process server was taken to the defendant's premises by the plaintiff. Although the defendant submitted that Jomvu area is big, the fact that the process server was accompanied by the plaintiff he cannot be faulted for failing to specify which area in Jomvu the defendant lives in.

8. The defendant/applicant has not denied the fact of the plaintiff knowing him or where he lives. It is my opinion that service of summons to enter appearance was proper in the circumstances. The law does not require the process server to specify day of the week but just to indicate a date and place of service. In any event it is common sense to establish which day of the week once you know the date. The defendant/applicant has not put in anything to corroborate that on the 21st October, 2011 at 10.30 a.m. he was not at home. However the service of notice of entry of judgment was not proper as service upon Chief Mombasa is too general. But I hold that it cannot be a reason to set aside ex parte judgment where service of summons to enter appearance is found to be proper.

9. The second principle guiding setting aside ex parte judgment is whether there is a defence on merit. The defendant submits that paragraph 4B of his draft defence raised triable issues. Paragraph 4B states;

"In reply to paragraph 4 of the plaint, the defendant avers that he has never encroached on any parcel of land belonging to the plaintiff and he is not in occupation/possession of the suit property."

I have considered this paragraph and form the view that it is no different as it is mere denial as the rest of the paragraphs of the defence. Under paragraph 4B, the defendant has not even demanded strict proof. General denial cannot constitute defence on merits for this court to exercise her discretion in favour of the defendant.

10. Lastly on the principle of prejudice, the applicant in paragraph (j) of the grounds on face of the motion said if these orders are not granted, he will suffer substantial loss and damage. The nature and extent of this substantial loss and damage is not explained both in the supporting affidavit and oral submissions presented to this court. Mr. Mutiso quoted equity doctrine that equity shall suffer no wrong without a remedy. The wrong has not been disclosed. The applicant has failed to justify that he has suffered any prejudice. In light of the foregoing paragraphs, I find this application fails to satisfy any of the guiding principles for setting aside ex parte orders. I do not find any reason to exercise the discretion on his favour. Consequently I dismiss his motion with costs to the plaintiff/respondent.

Dated and delivered in open court at Mombasa this 20th day of February, 2015.

A. OMOLLO

JUDGE

20.2.2015