



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 36 OF 2010

DAVID S. WANYONYI.....PLAINTIFF

VERSUS

JOHN SILAKWA

SAMWEL C. L. AKIFUMA.....DEFENDANT

R U L I N G

1. The second defendant/applicant filed a notice of motion dated 9/7/2014 in which he seeks to set aside the interlocutory judgement entered herein and that he be granted leave to defend the suit herein. The plaintiff contends that he was never served with summons to enter appearance and that he has a good defence which raises triable issues.
2. The application is opposed by the plaintiff/respondent through replying affidavit sworn on 28/10/2014. The respondent contends that the applicant was duly served with summons to enter appearance which he received and signed. The respondent further contends that the applicant has always been aware about the case against him and that he and his son have been attending court to monitor proceedings between him and the first defendant. That the applicant is a liar and that he had actually entered appearance belatedly through his advocate on 24/4/2012. He therefore argues that the applicant is not being honest when he claims that he was not aware of this case and that in any case, his proposed defence is a sham and does not raise any triable issues as the same consists mere denials.
3. I have gone through the applicant's application together with the supporting affidavit and his further affidavit sworn on 16/1/2015. I have also gone through the respondent's affidavit and the pleadings herein. The issue which emerges for determination is whether or not the applicant herein was served with summons to enter appearance.
4. When it comes to setting aside an interlocutory judgement, the court has wide discretion. The discretion must however be exercised in such away as to only assist a litigant who has an excusable mistake. It cannot be exercised in favour of a party who has deliberately evaded the court process or is out to delay the case in issue. If no summons were served, the court can even set aside the judgement on its own motion. In the present case, the applicant is contending that he was never served with summons to enter appearance. He contends that when the summons to enter appearance were allegedly served, he was not around as he is a person who is in and out of the country.
5. I have gone through the affidavit of service which was filed by a process server upon the respondent's advocate requesting for judgement against the applicant for failure to enter appearance and file defence. The process server has deponed that he served the applicant at his home on 7/5/2010 after being pointed out by the plaintiff/respondent. The applicant duly signed the summons to enter appearance. The

applicant contends that when he is alleged to have been served he was away. He has annexed copies of his passport and correspondence in support of his claim. A look at the copies of his passport show that he has annexed copies of stamped passport relating to the year 2013 and 2014. This is not the time he was served. He has also annexed a copy of his stamped passport showing that he left Kenya on 18/12/2010 for Uganda. This is not the time he was served. He was served on 7/5/2010. It is therefore clear that he has no evidence to show that he was out of the country on 7/5/2010 when he was served.

6. The applicant was aware about this case. On 24/4/2012 he entered appearance through his current advocates. He did not however file any defence. This was well before the case started being heard on 4/12/2012. The plaintiff completed his evidence and that of his witness on 11/6/2013. The first defendant started his defence on 10/3/2014 and closed his defence on 14/10/2014. The respondent contends that the applicant has been to court over this period monitoring how the case has been going on either through his son or himself. During the hearing, the counsel for the applicant conceded that the son of the applicant is the one who became aware of this case which resulted in a memorandum of appearance being filed.

7. The applicant was not keen on defending this case. He is only out to delay this case. The plaintiff and the first defendant have closed their cases. He (applicant) entered appearance on 24/4/2012. He is coming to court two years later seeking to set aside a judgement entered against him over three years ago. I find that the applicant was properly served and was aware of the case but chose to ignore. He is coming too late in the day seeking to set aside the ex-parte judgement entered against him.

8. Even if applicant was duly served, I am obliged to consider whether he has a defence on merits. The claim by the plaintiff relates to a boundary dispute. The plaintiff contends that his two neighbours who are the defendants have encroached on to his land. A surveyor has already gone to the ground and made his findings which have been filed in court. Which defence is the applicant going to file which will contradict the findings of a surveyor who is a professional in that field? The determination of the boundary was made after all the concerned parties were given notice. Those who were notified attended. I have looked at the applicant's proposed defence. The same does not fault the findings of the surveyor. It is a just a mere denial. I therefore find that the applicant's application lacks merit. It is merely intended to delay this case. The court cannot exercise its discretion in favour of such a person. The applicant's application is hereby dismissed with costs to the plaintiff/Respondent.

9. It is so ordered.

Dated, signed and delivered at Kitale on this 17th day of February, 2015.

E. OBAGA

JUDGE

In the presence of M/S Arunga for Mr Millimo for Plaintiff, Mr Kaosa for Mr Ambutsi for 2nd defendant and M/S Nasike for 1st defendant. Court Clerk- Kassachoon.

E. OBAGA

JUDGE

17/2/2015