



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 116 OF 2014

DANIEL MUIGAI MWAURA.....PLAINTIFF

VERSUS

JULIUS KARIUKI NDEGWA.....DEFENDANT

JUDGMENT

1. By a plaint dated **30th May, 2014** the plaintiff brought the current suit seeking an eviction order against the defendant from land parcel number Ngobit/Muhonia/Block 2/343 (Lombard).
2. The plaintiff who is the registered proprietor of the parcel of land known as **Ngobit/Muhonia Block 2/343** (hereinafter referred to as the suit property), having been registered as such on 4th June, 2012 claims that he bought the suit property from Rumia Ndoho Housing Company Limited.
3. It is the plaintiff's case, that the defendant without any colour of right trespassed into the suit property by building and cultivating therein hence denying him the right to occupy and utilize it.
4. When the matter came up for hearing, the plaintiff informed the court that despite the defendant having been served with summons to enter appearance, he had failed to do so within the time stipulated in law and at all. As a result of the defendant's failure to enter appearance within the time stipulated in law, he applied for and obtained interlocutory judgment against the defendant. The said judgment was entered on 8th October, 2014. Thereafter the suit was fixed for formal proof.
5. The plaintiff informed the court that he bought the suit property from the company mentioned hereinabove and obtained a title in respect thereof. He produced the title issued to him in respect of the suit property as Pexbt 1. He explained that after he obtained title to the suit property, he discovered that the defendant had constructed a house thereon. He requested the defendant to vacate but the defendant refused to vacate the suit property claiming that he was also a Kenyan hence entitled to use of the suit property.
6. Faced with that problem, he instructed his advocate who by way of a letter (demand letter) demanded that the defendant moves out of the suit property in vain. Pointing out that the defendant is still in possession and occupation of the suit property, the plaintiff urged the court to assist him to evict the defendant therefrom.
7. After close of hearing, counsel for the plaintiff filed submissions. In those submissions, counsel

reiterates the plaintiff's contention that after the defendant was served and failed to enter appearance within the time stipulated in law, the plaintiff requested for and obtained interlocutory judgment against him and thereafter the matter proceeded for formal proof.

8. Reference is made to the evidence produced by the plaintiff showing that he is the registered owner of the suit property and there being no evidence to the contrary, submitted that the defendant is occupying the suit property illegally and in total disregard of the sanctity of the title held by the plaintiff.

Analysis and determination

(a) Entry of interlocutory judgment:

9. As pointed out herein above, after the defendant allegedly failed to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the defendant. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

10. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

“JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “ The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

11. The plaintiff's case being for recovery of land, does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **order 10 Rule 2**.

12. The plaintiff ought to have proceeded under **Order 10 Rule 9** which provides as follows:-

“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.”

13. In my view, it is in the proceedings contemplated under **Order 10 Rule 9** where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law, if the trial court is satisfied that service was effected as by law required, it would proceed and hear the plaintiff's case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.

14. In this case, owing to the existence of the interlocutory judgment herein, the trial court did not get an opportunity to interrogate the service allegedly effected on the defendant.

15. In the affidavit of service sworn to prove service on the defendant, the deponent **Samson Karau Mutiso**, has, *inter lia*, deposed that:-

“2. That on 25th June, 2014, I received Summons to Enter Appearance dated 4th June, 2014 in duplicate plus a copy of plaint, Verifying Affidavit and supporting documents from M/s Wagiita Theuri & Co. Advocates with instructions to effect service upon the defendant;

3. That on 19th July, 2014 at around 3.15 p.m at Julius Kariuki Ndegwa’s place of residence at Karigu-ini sub-location in Kieni West Sub-county within Nyeri County, I met his adult daughter one miss Nyambura and after introducing myself to her and the purpose of my visit, she informed me that her father was away and unlikely to return early. She provided me with her father’s mobile phone number 071651563 and after I called him he instructed me to hand over the said documents to her. I hence personally effected service of the aforementioned documents upon her by tendering duplicate copies thereof to her and requiring her to sign which she accepted but declined to sign on the copy returned herewith duly served.

4. That I was directed to Julius Kariuki Ndegwa’s place of residence by the plaintiff and the said Miss Nyambura became known to me at the time of service.”

Law on Service of summons:

16. Order 5 Rule 7 of the Civil Procedure Rules, Provides as follows about service:-

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

17. On the other hand, cv Rule 13 of the same order provides as follows:-

“Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:

Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.”

18. Upon reading the affidavit of service herein, I entertain doubt whether the defendant was indeed served with the summons to enter appearance as alleged. This is so because the affidavit of service does not meet the requirements of **Order 5, Rule 15(1)** which provides as follows:-

“(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.”

19. In the circumstances of this case, the deponent of the affidavit of service states that he called the defendant and the defendant instructed his daughter to receive the summons on his behalf. Despite the defendant having instructed his daughter to accept summons on his behalf, the process server alleges that the defendant’s daughter refused to sign the summons to acknowledge service.

20. A review of the allegations in the affidavit of service leaves a serious doubt as to whether indeed the defendant instructed the person alleged to be his daughter to receive the summons on his behalf. I say so because, ordinarily where a person is instructed to do something on behalf of another, it would not be

expected that the person would do what he/she is instructed to do with reservation unless instructed to do so. In the affidavit of service, it is not clear whether it is the defendant who instructed the person served on his behalf not to acknowledge service as by law required.

21. The proviso to **Order 5 Rule 13** aforementioned, gives the court discretionary power if satisfied that the defendant or such agent or other person served has refused to acknowledge service to declare the summons to have been duly served.

22. In the circumstances of this case, I entertain serious doubt as to whether proper service was effected on the defendant or his agent as contemplated in law. That notwithstanding, having considered the evidence adduced in this suit and in particular the certificate of title issued to the plaintiff on 4th June 2012; the certificate of official search issued to the plaintiff in respect thereof; and the provisions of **Section 26(1)** of the Land Registration Act, 2012 which provides:-

“ (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Subject to the defendant showing cause why he should not be removed from the suit property, the plaintiff has proved his case against the defendant on a balance of probabilities.

23. Having entertained doubt whether the defendant was served, I direct that the defendant be served with this judgment and a notice to show cause why execution should not issue against him in accordance with the orders sought in this suit within 45 days.

24. Mention on 14th July, 2015.

Dated, Signed and Delivered at Nyeri this 28th day of May, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wahome h/b for Mr. Wageta for the plaintiff

N/A for the Defendant

Court assistance - Lydia