



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 248 OF 2014

DANIEL NJOGU NYAGA PLAINTIFF

VERSUS

ALICE WANJIKU DEFENDANT

RULING

On 21st August 2014, the plaintiff/respondent filed this suit as the registered owner of the land parcel No. BARAGWI/KARIRU/1462 and sought an order for the eviction of the defendant/applicant from the said land.

The defendant/applicant filed a memorandum of appearance through the firm of Ikahu Ngangah Advocates but no defence was filed and on 7th October 2014, interlocutory judgment was entered against him. On 9th March 2015, the matter came up for formal proof and Mr. Miano advocate for the plaintiff/respondent informed the Court that Mr. Ikahu Ngangah advocate had been served but had not appeared and neither was there any defence on record.

The Court allowed the plaintiff/respondent to prosecute his claim and on 20th March 2015, judgment was entered for the plaintiff/respondent as per his plaint.

On 15th April 2015 the defendant/applicant filed a Notice of Motion citing **Order 10 Rule 11 and Order 50 Rule 5 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act** seeking the following orders:-

1. *Spent*
2. *Spent*
3. *That the Honourable Court be pleased to set aside the interlocutory judgment entered on 7th October 2014 and the judgment entered on 20th March 2015.*
4. *That the defendant be granted leave to file defence and counter claim out of time.*
5. *That costs be provided for.*

The application is supported by the defendant/applicant's affidavit and based on the grounds set out therein.

The application is opposed by a replying affidavit sworn by the plaintiff/respondent and filed herein on 4th May 2015.

Submissions have been filed by counsels as directed.

I have considered the application, the rival affidavits and the submissions by counsels.

The Court has a wide discretion in setting aside an ex-parte judgment. That discretion, unfettered though it is, is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice – see SHAH VS MBOGO 1967 E.A 116. Like all other discretion, it must be exercised judiciously and not upon the whims of the Court nor capriciously. Even where summons were served and therefore the judgment is proper, the Court may, in the exercise of that discretion, and where a draft defence is annexed, consider the said draft defence to see if it raises any triable issues that may require investigation by the Court. The broad principle is that even where the judgment is regular, a Court exercising such discretion may nevertheless set it aside if it is satisfied that the draft defence raises issues that ought to go to trial. The Court of Appeal addressed this issue in the case of TREE SHADE MOTORS LTD VS D.T. DOBIE & CO. (K) LTD & ANOTHER C.A. CIVIL APPEAL NO. 38 of 1998 as follows:-

“The learned Judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff’s claim. When a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defence”

And in PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75, Duffus P said:-

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where there is a regular judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put in, “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”

There is also the decision of Sheridan J. in SEBEI VS DISTRICT ADMINISTRATION CASYALI 1968 E.A 300 in which he adopted the words of Ainley J. in JAMNADAS SUDHA VS GORDANDAS HEMRAJ (1952) 7 ULR 11 as follows:-

“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should be always remembered that to deny the subject a hearing should be the last resort of a Court”

In this matter before me, it is not in doubt that there is a regular judgment entered for the plaintiff/respondent against the defendant/applicant. Summons were duly served and an advocate entered appearance accordingly but filed no defence. And when this suit came up for formal proof on 9th March 2015, the defendant/applicant’s advocate Mr. Ikahu Ngangah was duly served although the hearing notice was received under protest as counsel was said to be attending to another matter in Siakago Court. However, he ought to have instructed another advocate to hold his brief either in this Court or at the Siakago Court and attend to this case. In the end however, neither the defendant/applicant nor his counsel appeared in this Court and the plaintiff/respondent was entitled to prosecute his case and obtained the judgment which cannot be faulted in the circumstances. In the supporting affidavit, the defendant/applicant has deponed, inter alia, that she was still looking for evidence and digging ***“deep into the history of the subject land parcel”***. Nothing could have been easier than filing a defence even as she continued to investigate the matter. After all, there is always room to amend pleadings. That excuse does not help her case.

I have however looked at the draft defence filed herein and again I must express my displeasure at the same. It is headed ***“Defendant’s Defence and Counter claim”*** but there is no counter-claim. It is also

pleaded therein that the plaintiff/respondent obtained the property subject of this suit through fraud but no allegations of fraud are disclosed. What perhaps may be of assistance to the defendant/applicant is that in the draft defence, it is indicated that there is pending at this Court KERUGOYA CHIEF MAGISTRATE'S CIVIL CASE NO. 301 of 2001 between the plaintiff/respondent and one NJERU MWATHUKE whose Estate the defendant/applicant represents. I have seen a copy of a ruling dated 18th June 2002 which seems to refer to the same land subject of this suit i.e. BARAGWI/KARIRU/1462. I must state that the information made available to this Court by the defendant/applicant is rather scanty. However, borrowing from the words of **Sheridan** quoted in the **PATEL** case above, a defence on merit need not be a defence that will succeed. It is also clear from the record herein that the defendant/applicant's advocate contributed towards this by not appearing in Court during the hearing or sending someone to hold his brief. It would therefore be harsh to punish the party due to the omission of her advocate. I also take cognizance of the overriding objectives that guide the Court in the handling of disputes and these are the just determination of proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources and timely disposal of proceedings. The defendant/applicant moved this Court expeditiously once judgment was entered against her. Further, bearing in mind the emotive nature of land disputes, I find this to be a proper case to exercise my discretion and allow the defendant/applicant to prosecute her case for whatever it is worth.

I therefore find merit in the defendant/applicant's Notice of Motion filed herein on 15th April 2015 and accordingly set aside the interlocutory judgment entered on 7th October 2014 and also the judgment delivered on 20th March 2015. The defendant/applicant is granted leave to file her defence and counter-claim within 15 days from to-day and the plaintiff/respondent shall be at liberty to amend his plaint, if need be, within 15 days of service of the defence.

Finally, however, in setting aside the judgment herein, the Court is required to do so in terms that are just. Those terms must be just to both the plaintiff and the defendant as well. The condition that commands itself to me is that the defendant/applicant pays thrown away costs which I assess at Ksh. 10,000/= within 15 days from to-day and in default, the plaintiff/applicant shall be at liberty to execute the judgment.

It is so ordered.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

4/12/2015

Before

B.N. Olao – Judge

Mbogo – CC

Mr. Miano for Plaintiff – present

Mr. Ngangah for Defendant – present

COURT: Ruling delivered, dated and signed this 4th day of December, 2015 in open Court.

Mr. Miano for Plaintiff present

Mr. Ngangah for Defendant present

B.N. OLAO

JUDGE

4TH DECEMBER, 2015