



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 220 OF 2017

JOHN KIMOTHO NDOLO (Suing as the Legal Administrator of the Estate of the late

JOSEPH MUSILU NDOLO alias MUSILU NDOLO(Deceased).....PLAINTIFF

VERSUS

RICHARD ZENGA BONGEI.....1ST DEFENDANT

HENRY MAROVA.....2ND DEFENDANT

LAND REGISTRAR, MACHAKOS.....3RD DEFENDANT

ALI MURSAR alias MOHAMED.....4TH DEFENDANT

RULING

INTRODUCTION

1. Vide a Notice of Motion Application dated 24th February, 2021 and brought under the provisions of Sections 1A and 1B of the Civil Procedures Act, Order 10 Rules 10 and 11, Order 50 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules, the 4th Defendant/Applicant sought the following Orders;

1) **Spent**

2) **Spent**

3) **THAT the Honorable court be pleased to grant leave to the Applicant to cross-examine one ALFRED KIOKO, a process server.**

4) **THAT this Honorable court be pleased to set aside the Judgment and Decree issued on 12th November 2020 as against the 4th Defendant/Applicant herein**

5) **THAT the costs of this Application be provided for.**

2. The Application is based on grounds on its face and supported by the affidavit sworn by MOHAMED ALI MURSAL, the Applicant herein, dated 24th February, 2021. The applicant alleged that the Plaintiff filed suit in May 2017 claiming that the rightful title was No. L.R 337/641 and Athi River Township Block 6/4 was a fraudulent title; that in September 2018, the Plaintiff was amended, whereof the 4th Defendant was added to the suit; that despite being added as a Defendant in the suit, the 4th Defendant was never served with summons or any other court processes in the matter and that he learnt of the case only when the police in Athi River informed him of an eviction order issued against him on 10th February, 2021.

3. It was the Applicant's assertion that he does not understand why he was included in the suit yet the disputed title was Athi River Township Block 6/4 whereas his property was title No. Athi River Township Block 6/2. He further claimed to be wrongly joined in the suit since the parcel he owns is not in contention in this suit and that the eviction orders against him would greatly prejudice him causing irreparable harm.

4. He also filed a further affidavit on 10th November, 2021 to buttress his claims. He averred that he was never served with both the original plaint and the amended plaint; that an interlocutory judgment cannot apply to land matters and cited the case of **Beatrice Wanjiru Kamuri vs John Kibira Muiruri (2016) eKLR**; that issues on locations cannot be dealt with at a preliminary stage; that matters concerning how and when the 4th Defendant purchased the suit property are issues that can only be resolved upon taking evidence; that he is not obstructing or delaying justice but seeking to be heard before he is deprived of his property; that he believes that he is either in occupation of title L.R No. 337/640 or L.R No. 337/642 but not the Plaintiff's title L.R No. 337/641 and that the position of the suit land can only be ascertained by a site visit and not by the survey map.

5. The application is opposed. The Respondent filed his replying affidavit on 16th March 2021 whereof he averred that upon the 4th Defendant being joined to this suit, summons against him were issued on 17th September 2018 and service effected upon him on 5th November, 2018 by the process server one Alfred Kioko who swore an Affidavit to that effect; that having been served and failing to enter appearance, the Respondent by letter sought for interlocutory judgment against the Applicant and during pretrial, the court certified the matter as ready for hearing.

6. The Respondent contended further that the applicant was aware of this suit as he has in the past been served with demand letters before he commenced construction but went ahead to construct on the suit land; that the decree is lawful and there is no impediment to its execution; that on the ground, the Applicant occupies the suit property, that is L.R No.337/641 on the strength of the alleged fraudulent title ATHI RIVER TOWNSHIP BLOCK 6/4; that the issue is the true location of the plaintiff's land hence the reason why the 4th Defendant was joined to the suit; that the Applicant is well connected to the local police since they alerted him of the eviction notice and that he obtained his title by dubious means.

7. The Respondent further argued that the Applicant had not satisfied the conditions for setting aside *exparte* judgment; that there was no draft statement of Defence attached to the application and that the Applicant was merely wasting the court's time; that although the Applicant alleges to own parcel No. Athi River Township Block 6/2 on the ground, he occupies the plaintiff's title number L.R No. 337/641; that Mavoko Municipal Block 6/2 is in the same series as Mavoko Municipal Block 6/4, which is nonexistent according to the Land Registrar Machakos and therefore the difference raised by the Applicant of Block 6/2 and 6/4 is immaterial as the suit land is L.R No. 337/641 which belongs to the plaintiff; that the plaintiff's ownership claim is supported by the deed plan which shows the exact location of the property, unlike the applicant who has not shown where on the ground his property is situated; that the Applicant has not disclosed how he obtained the suit property and therefore that in 2003 when he allegedly acquired the title Block 6/2, the Plaintiff already owned the property since 1st March 1979.

8. He concluded by praying that should the court exercise its discretion in favor of the Applicant, the same be done under such terms and conditions that the court deems fit including costs but without interfering with the judgment against the 1st, 2nd or 3rd Defendants.

SUBMISSIONS

9. Counsel for the Applicant filed submissions dated 8th November, 2021 in support of his application. He cited the cases of **Solomon Mwobobia Nkuraaru vs Jacob Mwiti (2015) eKLR**, and **Peter Karanja Kamani v Isaac Mwangi Kimani (2018)** for the proposition that where a claim is not for a liquidated amount, there cannot be entry of interlocutory judgment. Counsel put forth the argument that the interlocutory judgment entered was irregular and ought to be set aside. Counsel concluded by praying that the Application be allowed since the parcel the Applicant occupies is not the disputed parcel and the interlocutory judgment was irregularly entered.

10. The Respondent filed his submissions on 28th September, 2021. He submitted that judgment had been regularly entered against the Applicant who failed to enter appearance and file defence despite being served with summons to enter appearance. Counsel for the Respondent referred to the case of **SHAH VS MBOGO 1967 EA 116** wherein the court held that the discretion to set aside *Exparte* judgment should be exercised by the court to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the course of justice; and that where judgment is regular, the court can only interfere with it upon being satisfied that there is a defence on the merits. Counsel also argued that the judgment on record was regular and that there was no draft defence attached to the application. Counsel argued that the applicant does not deny that he is in occupation of title L.R 337/641 (IR 34744), which belongs to the Plaintiff. Counsel pointed out that there was no attempt by the Applicant to attach a survey map in respect of the title he claims to be his, to show the position of the applicant's title.

11. Further, it was contended for the Respondent that the process server's affidavit of service sworn on 29th November 2018 is well detailed giving the Applicant's phone number, a matter which has not been disputed. Counsel observed that although the applicant sought to cross examine the process server, he never pursued the issue despite the court attendances of 17th March 2021 and 30th June 2016. Counsel also argued that the Applicant will not suffer prejudice as he has been aware of the suit but went ahead to do the construction on the suit property. Counsel concluded that the Applicant having come to court with unclean hands, by failing to obey court orders, does not deserve the discretion of this court in his favour.

ANALYSIS AND DETERMINATION

12. I have considered the application, the reply and the rival submissions. I have also perused the entire court record. The issue that arise for determination is whether the applicant has met the threshold for setting aside *exparte* judgment.

13. The jurisdiction of this court to set aside *exparte* judgment is discretionary. However, the discretionary of the court ought to be exercised judicially for the sole purpose of ensuring that justice is dispensed to all the parties in the suit.

14. In the case of **Patel vs. E.A Cargo Handling Services Limited (1974) E.A 75**, the court held as follows;

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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.”

15. Similarly, in the case of **Waweru vs. Ndiga (1983) KLR 236**, cited with approval in the case of **Richard Murigi Wamai vs. Attorney General & Another [2018] e KLR**, the Court of Appeal held that a court has wide discretion to do justice between the parties and a court may set aside ex parte judgment to avoid hardship or injustice resulting from inadvertence or mistake, but should not be exercised to assist anyone to delay the course of justice as delay defaults equity.

16. It is clear from the long line of decided cases, that the court’s unfettered discretion to set aside ex parte judgment should be exercised judicially and not be exercised to assist persons whose objective is to delay or obstruct justice. In the instant case, the applicant denies having been served with summons to enter appearance. Although one of the Applicant’s prayers was to cross examine the process server, yet at no point did he ask for a date for cross examination of the process server. The process server swore a detailed affidavit on how he effected service on the applicant vide his affidavit of service sworn on 29th November 2018; where he stated that he carried out investigations about the Applicant and established that he was a business man based in Machakos County and his mobile phone number was 0722511878. He further deponed that having contacted him on phone, they met on 5th November 2018 at 1 pm at Connections Hotel situated at Mlolongo trading centre along Nairobi-Mombasa Road. I note that the description attributed to the Applicant as being a businessman in Machakos County and that his phone number is 0722511878 is not disputed. While the Applicant states that he has never been served with summons to enter appearance, he states that he was contacted by police on 10th February and informed of this suit. In my view, the Applicant is not truthful, as the affidavit of service clearly demonstrate that he was indeed served with summons to enter appearance and failed to enter appearance and file defence, but only came to court when the police were involved for purposes of executing eviction against him. The prayers sought by the applicant are equitable prayers, and he who comes to equity must do so with clean hands. It is my finding therefore that the applicant was indeed served with summons to enter appearance and hence the judgment on record is regular.

17. I am clear in my mind that this court has discretion to set aside regular ex parte judgement, but the threshold for the exercise of such discretion is that the Applicant must satisfy the court that he has a defence on merit. In this matter, no draft defence has been attached to the application and no leave to defend the suit has been sought. That notwithstanding, I have considered the averments of the applicant in the supporting affidavit to establish whether the same raises a defence on merit. The applicant has stated in his supporting affidavit that he is the owner of parcel number Athi River Township 6/2. In his supplementary affidavit, he states that his parcel is land parcel number Mavoko Municipal Block 6/2. He has also averred that he believes that he may be in occupation of parcel number L.R No. 337/640 or L.R No. 337/642 and not the Plaintiff’s property L.R No. 337/641. It is the Applicant’s contention that his property has nothing to do with the plaintiff’s parcel number L.R No. 337/641 and therefore sought to set aside the Ex parte judgment as the judgment has no bearing on the Applicant neither does it relate to the Applicant’s property.

18. On the other hand, the Plaintiff stated in his replying affidavit that although the Applicant alleges to own parcel number Athi River Township Block 6/2, on the ground, he occupies the Plaintiffs title L.R No. 337/641. The Plaintiff argued that Mavoko Municipal Block 6/2 is in the same series as Mavoko Municipal Block 6/4 which are both nonexistent according to the Land Registrar Machakos and therefore the difference raised by the Applicant of Block 6/2 and Block 6/4 is immaterial as the suit land is L.R No. 337/641 which belongs to the plaintiff, and which fact of ownership is not in dispute. The plaintiff further stated that his claim is supported by the survey plan which shows the exact location of the property unlike the applicant who has not shown where on the ground his property is situated. The Plaintiff has also pointed out in his reply that the Applicant has not disclosed how he obtained the suit property and therefore that in 2003 when he allegedly acquired title Athi River Block 6/2, the Plaintiff already owned the property since 1st March 1979.

19. I have considered the plan map presented by the Plaintiff and I note that the same shows the exact location of parcel L.R No. 337/641. The neighbouring parcels are in the same series of L.R NO. 337. The applicant has alleged that he may be occupying either parcel L.R 337/640 or L.R No. 337/642 and not the plaintiff’s parcel L.R 337/641. From the survey plan there is no land by the series of Mavoko Municipal Block 6/2 or 6/4 or Athi River Township Block 6/4 or 6/2 as alleged by the applicant. The applicant on being challenged by the plaintiff to avail the map showing where his land is situated, has stated that the situation of the suit property cannot be proved by maps but by site visit. The fact that the applicant has stated in paragraph 14 of his supplementary affidavit that he believes that he occupies either L.R 337/640 or L.R 337/642, without offering any justification for such belief, coupled with the fact that the Plaintiff’s map does not show the Applicant’s title, and neither has the applicant shown his own map, clearly demonstrate that the Plaintiff’s claim that his land parcel L.R No. 337/641 is where it is shown on the map and the ground and that any other person on that property ought to be evicted has not been rebutted by the Applicant. In addition, the Applicant has not shown the nexus between his parcel Athi River Township Block 6/2 with L.R No. 337/640 or L.R. 337/642 which he claims he believes to be in occupation. I therefore find that the Applicant is dishonest and his application is a waste of precious judicial time, as he has not shown any triable issue or a defence on merit to warrant the court to set aside the Ex parte judgment on record.

20. Consequently, the application dated 24th February 2021 lacks merit and the same is dismissed with costs.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Wambua for the Plaintiff/Respondent

No appearance for the Defendants

Josephine Misigo – Court Assistant