



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT
ELC CASE NO. 32 OF 2012

KELLEN KARIMI NDUMA NDAMBIRI 1ST PLAINTIFF

NICHOLUS NJINE 2ND PLAINTIFF

(Suing as personal legal representatives of the Estate of JAMES NDAMBIRI (deceased))

VERSUS

THE HON. ATTORNEY GENERAL1ST DEFENDANT

PERMANENT SECRETARY

MINISTRY OF WATER & IRRIGATION2ND DEFENDANT

GENERAL MANAGER

NATIONAL IRRIGATION BOARD3RD DEFENDANT

RULING

This is in respect to the two applications one dated 8th March 2012 and the other dated 10th April 2012.

The application dated 8th March 2012 was filed by the plaintiffs herein and seeks orders that leave be granted to enter judgment in default of defence against the 1st and 2nd defendants while the application dated 10th April 2012 was filed by the 3rd defendant and seeks orders that the interlocutory judgment entered against the 3rd defendant on 2nd April 2012 be set aside. When the parties appeared before me on 19th December 2012, it was agreed that the two applications be heard together by way of submissions which have now been filed except those of the Attorney General appearing for the 1st and 2nd defendants.

I have considered the two applications and the submissions by counsels for the plaintiffs and the 3rd defendant. The Attorney General did not file any submissions on behalf of the 1st and 2nd defendants.

I will begin with the 3rd defendant's application which seeks the setting aside of the interlocutory judgment entered against it on 2nd April 2012. I have looked at the supporting affidavit of Dorothy Kawira who works for the 3rd defendant as an Irrigation officer and in which she says she was never served with summons to enter appearance in this matter. She adds further that she is not authorized to

accept service of documents on behalf of the 3rd defendant. I am however satisfied that she was served. The process server even gives the number of her office as 213. Nowhere in her affidavit does she deny that that is not her office. Indeed she makes no mention of that office which is the same office mentioned by David Gachoko who accompanied the process server Mark Nyaga on the date of the service on 22nd February 2012. I am satisfied that service upon the 3rd defendant was proper and they cannot escape on that ground.

That notwithstanding, the Court has unfettered discretion to do justice to the parties and although a regularly obtained judgment should not lightly be interfered with, the Court will consider all the circumstances in each case including whether there is a defence on the record and also whether a party is being evasive or otherwise is attempting to obstruct or delay the course of justice. In this case, the interlocutory judgment was entered against the 3rd defendant on 2nd April 2012. This application was filed on 10th April 2012 and not only seeks the setting aside of that judgment but also the filing of a memorandum of appearance and draft statement out of time. The application was therefore filed without delay and there is no evidence that it is meant to delay or obstruct justice. I have looked at the defence. It raises serious issues and it should be the last resort of a Court to drive a party from judgment without a hearing. The plaintiffs can be compensated with an order for costs. I would therefore allow the 3rd defendant's application dated 10th April 2012. The 3rd defendant will however meet the plaintiff's cost of this application.

With regard to the plaintiff's application dated 8th March 2012 seeking leave to file judgment in default of appearance against the 1st and 2nd defendants, the record shows that the 1st and 2nd defendants did file a defence on 3rd March 2012 while this matter was still in High Court Embu. This is even conceded by the 3rd defendant's advocate in his submissions. Case law abound to the effect that the main concern of the Court is to do justice to the parties and that to deny a party a hearing should be the last resort of the Court. See for example the following:-

1. ***PATEL VS E.A CARGO HANDLING SERVICES LTD 1975 E.A 75***
2. ***SEBEI DISTRICT ADMINISTRATION VS GASYALI 1968 E.A 300***

The defence may have been filed out of time but the record also shows that the plaintiff's application was served upon the 1st and 2nd defendants on 10th July 2012 which was some two months after the 1st and 2nd defendants had filed their defence. Indeed the plaintiff's application is not hinged on the fact that there is no defence filed by the 1st and 2nd defendants but that there is no appearance. The defence itself cannot be regarded as frivolous.

Ultimately therefore, having considered the two application dated 8th March 2012 by the plaintiffs and 10th April 2012 by the 3rd defendant, I make the following orders:-

1. ***The plaintiff's application dated 8th March 2012 is dismissed with no order as to costs***
2. ***The 3rd defendant's application dated 10th April 2012 is allowed in the following terms:-***
 - a. ***The interlocutory judgment entered against the 3rd defendant on 2nd April 2012 is set aside***
 - b. ***The 3rd defendant's memorandum of appearance and draft statement of defence be deemed as duly filed and served***
 - c. ***The 3rd defendant shall pay the plaintiff all the thrown away costs and the costs of this application forthwith.***

Orders accordingly.

B.N. OLAO

JUDGE

29TH AUGUST 2013

29/8/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Ngangah for Plaintiff - absent

Attorney General for 1st and 2nd Defendants- absent

Mr. Ombachi for 3rd Defendant present

COURT: Ruling delivered this 29th day of August 2013 in open Court.

B.N. OLAO

JUDGE

29TH AUGUST, 2013