



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 5 OF 2005

ZEPHANIA KHISA SAUL.....PLAINTIFF

VERSUS

MOSES WAFULA SAHANI..... DEFENDANT

R U L I N G

The Applicant Moses Wafula Sahani brought a Notice of Motion dated 22/11/2011 seeking among other orders that the ex-parte judgment entered herein and all consequential orders be set aside and he be allowed to file his defence. The application is supported by his own Affidavit sworn on 22/11/2011. The Applicant contends that he was not served with summons to enter appearance and file defence and that the Affidavit of service sworn by a process server called John Wafula Simatwa is full of falsehoods. He contends that he has a good defence to the Plaintiff's claim and therefore he ought to be afforded opportunity to be heard.

The Applicant's application is opposed by the Respondent through a Replying Affidavit sworn and filed in Court on 06/12/2011. The Respondent contends that the Applicant's application has no merits and is only meant to deny him from enjoying the fruits of his judgment. The Respondent further contends that the Applicant solely brought this application for purposes of avoiding paying him costs which were awarded to him. The Respondent contends that the Applicant is economical with the truth and that he has no defence to the Respondent's claim. The Respondent contends that since the Applicant was evicted from his parcels of land, he has not gone back there and that this application is only meant to cushion him from paying him costs which are due to him.

I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. The genesis of this application can be traced from a suit which the Respondent herein filed on 11/01/2005 against the Applicant. The Respondent was seeking eviction orders and injunction orders against the present Applicant in respect of two properties namely:- Kimilili/Sikhendu/1303 and 1304. The Applicant herein failed to enter appearance or file a defence. The Respondent applied for interlocutory judgment and the suit was thereafter fixed down for formal proof. Judgment was given in favour of the Respondent on 05/05/2010. The Respondent proceeded to apply for eviction which was given 14/11/2011. The Respondents bill of costs was taxed and after he failed to pay the costs, the Respondent moved the Court for notice to show cause. The Applicant was arrested and brought to Court to show cause why he should not be committed to civil jail. This was on 25/08/2011. The Applicant was committed to civil jail for 30 days. It would appear that the Applicant was never committed to civil jail as per the Deputy Registrar's order as there is no committal warrant. This explains why the Applicant has

claimed in his Affidavits that he was let off by the Court and even given transport back home by the Respondent. The reason for his release was because the Respondent did not pay his subsistence charges to Court. This is confirmed by the Respondent in his Replying Affidavit.

The Respondent proclaimed the Applicant's movable properties on 16/11/2011 prompting the Applicant to move to Court where he obtained stay of seizure of his properties and sale of the same. It is in this application that the Applicant also sought setting aside of the ex-parte judgment. Having set out the history of this case, I now have to determine whether the application herein ought to be allowed.

In an application seeking to set aside an ex-parte judgment, the Court has to consider the reasons why the Applicant did not enter appearance and file defence. The Court has also to consider if the Defendant has any defence on merits. In the present case, the Applicant contends that he was not served with summons to enter appearance and file defence. Contrary to the Applicant's contention, there is an Affidavit of service by a process server called John Wafula Simatwa filed in Court on 30/03/2005 together with the request for interlocutory judgment. The process server states that he served the Defendant with summons to enter appearance but he refused to sign on the process server's copy. Though the Affidavit of service does not contain all the details required by Order 5 of the Civil Procedure Rules, I find that the same was proper and that the Defendant/Applicant was duly served with summons to enter appearance but he failed to do so.

Even though I have found that there was proper service of summons to enter appearance, I am still obliged to consider if the Applicant has a defence on merits to warrant the Court to give him an opportunity to defend the suit. The Applicant has annexed a draft defence to his application. In the draft defence, he contends that Plot Nos. Kimilili/Sikhendu/1303 and 1304 do not belong to the Respondent and that they belong to Richard Sahani and Kamusinde Secondary School respectively. He further contends that he does not live on any of the two plots the subject of this suit. He contends that he stays on Plot No. Kimilili/Sikhendu/446 which belongs to Richard Sakani Mero.

I have considered the Applicant's draft defence and find that there are no triable issues in the same. The defence has no merits at all. The Plaintiff/Respondent produced two title deeds during formal proof hearing. The two titles are in the names of the Plaintiff/Respondent. The two titles are as a result of subdivision of Plot No. 447. The Applicant's contention that the titles held by the Plaintiff/Respondent were fraudulently obtained has no basis. The Applicant's claim that Plot No. Kimilili/Sikhendu/446 has not been subdivided has no bearing with the Respondents plots which were as a result of subdivision of Plot No. Kimilili/Sikhendu/447.

The Applicant had no right to remain on any of the Respondents plots and in any case, the Respondent has averred in his Replying Affidavit that the Applicant was evicted from his two parcels of land and has never since interfered with the same. This averment has not been rebutted by the Applicant. There will therefore be no need of setting aside the judgment. The Applicant has no defence to the Respondent's claim. The Applicant's only reason why he is seeking to set aside the judgment is to avoid paying costs. This is clear from the proceedings during his committal for civil jail when he said that he was residing on his brother's land and that it is his brother who ought to meet costs. I find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 14th day of August, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Chebii for Applicant and the Respondent appearing in person. Court Clerk:

Lobolia.

E. OBAGA

JUDGE

14/08/2013