REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 563 OF 2001

KAMAU MWANGI……..PLAINTIFF

VERSUS

WAMBUI KARIUKI……..……
DEFENDANT

RULING

1. The Defendant/Applicant prays that there be stay of execution and the interlocutory judgment and subsequent ex parte judgment be set aside and the Defendant be granted leave to defend. The Applicant raises the grounds that summons to enter appearance and hearing notices were never served on her as she was of unsound mind nor was she served with the notice of entry of ex parte judgment. That the same issues in this case were determined in a different case and further that the defendant has a good defence with merits. That no prejudice would be suffered by the Plaintiff/Respondent if the orders sought were granted.

2. The Affidavit in support of the Application is sworn by one **Samuel Njunge Kariuki** described as the legal manager of the Defendant/Applicant. He was appointed such legal manager on 21/01/2005. He stated further that the Defendant/Applicant has suffered from mental illness since 1986 a fact well known to the Plaintiff and she was not served with any summons as she could not be served in her state of unsound mind. That the parties herein were parties in HCCC NO. 526 of 1993 and even in that case the Applicant appeared through a legal manager due to her state. That the subject matter in both cases is substantially the same and that there is a multiplicity of suits over the same a fact the Plaintiff did not disclose to the court.

3. The Plaintiff/Respondent opposed the application by his Replying Affidavit and further affidavit in which he stated that in deed the Defendant was served with Summons to enter appearance and she was present in court on 18/1/2002 when judgment was entered pursuant to the Notice dated 16/1/2002 and she has since been evicted from the suit land pursuant to the judgment. That it was not shown that the Applicant was of unsound mind between the period of 2002 and 2005 when her legal manager was appointed. That the application has been brought after inordinate delay and it is without merit.

4. The applicant filed a Supplementary Affidavit reasserting that her mental state predates 2001 and that

she has never attended court in this matter at all. That the Defendant has always resided on the suit land whereas the Plaintiff has never occupied the same and as this is a land matter that is sensitive the orders sought ought to be granted.

5. Parties filed written submissions in support of their rival positions. They also highlighted such submissions in court and I have borne all in mind in my determination of this matter. I have also considered the cited authorities.

If service of Summons to enter appearance were not served all subsequent actions would be nullities. The annexture showing the appointment of the Defendant's legal manager and the medical report dated 22/8/2003 clearly state that the Defendant has suffered from mental disorder and been treated at Mathari Mental Hospital since February 1987. The instant case was filed during 2001. Whereas the Defendant was being treated for mental disorder during 1987, the situation does not appear to have changed for in 2005 the court found it necessary, upon documentary evidence being presented on the defendant's mental state, to appoint a legal manager to manage her affairs. Further, the Defendant did challenge that alleged service through Sane & Company Advocates when it became apparent that judgment had been entered. And it is not apparent from the judgment, as alleged by the Plaintiff/Respondent, that the Defendant was present in court when that judgment was read on 18/1/2002. The totality of all the above would go to prove that service was not affected and further the Defendant was in no state of mind to be served in any event, and no wonder the summons were not signed, simply because they were just not served, and that is my finding.

6. There is no mistaking that there was , on behalf of the Plaintiff, a request for judgment dated the 17th May, 2001 and filed in court on 18/5/2001. It read;

"Kindly enter interlocutory judgment against the Defendant (sic) who have failed to file appearance or defence within the prescribed period."

The Deputy Registrar subsequently entered such interlocutory judgment on 8/6/2011. The claim in the plaint is one of, not a liquidated sum or for retention of goods, but for an eviction order and general damages for trespass on land. There could not possibly be any such interlocutory judgment and what the Deputy Registrar did was a nullity without any benefit to the plaintiff. That was an irregular judgment for the dual reasons that no summons to enter appearance were served and the reliefs sought in the plaint were not in the nature of a liquidated demand or pecuniary damages with or without any other claims(s). That judgment must be set aside **ex debito justitiae** which I hereby do. The same fate would befall the ex parte judgment that followed. And I borrow the words of A.G. RINGERA J, as he then was in the case of **ABRAHAM K. KIPTANUI V DELPHIS BANK LTD AND ANOTHER HCC NO. 1864/91** when rejected the ground that the application was brought after a long delay, he said.

"In my view it matters not that the defendant is guilty of inordinate delay in presenting the application for setting aside such a judgment or that he may not have a defence on the merits. Once it is established that a judgment on record is irregular it must be set aside as of right. There are no two ways about it. The same is not susceptible to any variation. Its only fate is vacation from the record. Such a judgment is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself……."

7. Having come to that finding I do not consider it worth the while going into great detail about the other grounds raised in support of the application. However, a casual perusal of the annexed pleadings in other courts shows clearly that these parties have previously litigated in their present capacities and the suit land here was substantially in issue in those other cases, albeit for sometimes different reliefs. That is yet another reason why the application under consideration must succeed, that there was non-disclosure of previous litigation between the parties over the same subject matter.

8. In the result I allow the Defendant's application in terms of prayers 2 and 3. The Defendant is hereby granted leave to file her defence within fourteen (14) days of today. The Defendant has costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30 TH DAY OF MAY 2012.

P.M. MWILU
JUDGE

In the presence of:-

…….Advocate for Defendant/Applicant

……Advocate for Plaintiff/Respondent

……Court Clerk

P.M. MWILU
JUDGE