REPUBLIC OF KENYA

High Court at Machakos

Civil Case 54 of 2001

FLORENCE MUTONO MUINDI……...……PLAINTIFF

VERSUS

MBEVI WAMBUA……..DEFENDANT

RULING

Before me are 2 applications; one dated 25th January, 2012 by the defendant seeking that;

- The judgment and decree issued against the defendant on 27th May, 2004 by **Wendoh, J** be set aside.
- The defendant be allowed to enter appearance and file a defence to the suit, and
- Costs be in the cause

The other application is dated 25th October, 2011 by the plaintiff seeking that:-

- The OCS, Machakos Police Station, do enforce the decree issued herein by putting the plaintiff into effective possession of land parcel Machakos Town Block 2/1077 by removing the defendant from the same land if necessary to employ reasonable force and demolish the defendant's structures erected thereon and,
- Costs of and incidental to the application be met by the plaintiff.

What is the genesis of the dispute between the parties? From the rival pleadings and affidavits filed, the following scenario emerge;

The plaintiff is the registered proprietor of all that piece or parcel of land known as Machakos Town Block 3/1077, hereinafter "*the suit premises*". On or about 2nd February, 2001 the defendant without the plaintiffs consent or knowledge, wrongfully and unlawfully entered the suit premises and erected thereon illegal structure, namely, a semi permanent mud walled house and proceeded to occupy the same. He also went ahead to clear the bush and vegetation, damaged the fencing poles, wire fence and cultivated 50% of the suit premises, oblivious of the plaintiffs protestation.

On 4th April, 2001, the plaintiff brought this claim against the defendant seeking an order of injunction, eviction and demolition of any illegal structures put up by the defendant on the suit premises and lastly, costs of the suit. The suit was filed along with an application for a temporary injunction which was issued *ex parte* against the defendant restraining him from interfering with the suit premises. The same was subsequently confirmed on 8th May, 2001.

When served with the suit papers, the defendant failed to enter appearance nor filed a defence to the plaintiff's claim in time or at all. Interlocutory judgment was accordingly entered against him and later the case proceeded by way of formal proof before **Wendoh, J**. In a reserved judgment delivered on 27th May, 2004, **Wendoh, J** allowed the plaintiff's claim and gave the defendant 60 days within which to vacate the suit premises voluntarily and demolish any structures she had erected therein failing which the plaintiff was at liberty to do so. It is this decree that the plaintiff is seeking to execute by the application dated 25th October, 2011.

The defendant is resisting such move on the grounds that he was not aware of the suit as he was never served with the suit papers, nor was he informed of the suit by any other channel. Had he been served with the suit papers he would have defended himself as he had perfectly legal claim to the suit premises which merits judicial consideration on merit. This then is the basis of the application dated 25th January, 2012 by the defendant.

When the 2 applications came before me on 13th March, 2012, **Mr. Mbithi** and **Mr. Mbaya,** learned counsel for the plaintiff and defendant respectively agreed and it was ordered that the 2 applications be consolidated and be heard together by way of written submissions. Subsequently, the parties filed and exchanged written submissions which I have carefully read and considered.

In my view it is convenient to deal with the defendant's application first since its outcome will have a direct bearing or impact on the plaintiff's application either way.

The defendant is seeking to set aside the judgment and decree dated 27th May, 2004 on the singular ground that he was not served with summons requiring him to enter appearance as well as the plaint. He only became aware of this suit during the 2nd week of December, 2012(*not yet reached though*) when he returned home from work one evening and found a bundle of documents slipped under his door, which documents consisted of a judgment, court decree and a hearing notice all relating to this case. These assertions must of necessity compel me to look at the affidavit of service filed that convinced this court to enter the interlocutory judgment against the defendant subject to formal proof. The affidavit of service by the process server dated 26th April, 2001, details the circumstances under which the defendant was served. It was on 18th April, 2001, at around 12.30pm when he served the defendant with the suit papers. He was in the company of the plaintiff's son, **Sylvester Muema Muindi,** 3 police officers from Machakos Police Station; **PC Mbinda, P.C Omwono** and **P.C Ngere.** When the defendant was served with the suit papers, he was reluctant to sign an acknowledgement. As he was being persuaded by the process server to sign and upon realizing that the other persons with the process server were police officers, he instantly fled with the court papers and the process server was therefore unable to secure his signature. The defendant has not at all rebutted these depositions by the process server. I do not think that the affidavit of service is false. There is no way the process server would have made up the story about service upon the defendant even to the extent of involving the names of serving police officers. The process server must have known the consequences of swearing a false affidavit and throwing in there the names of police officers. The defendant has not demonstrated that such police officers did not exist at the time. Nor has he denied that at the time he was staying at Katelembo village where service was effected upon him on the material day. The defendant's affidavit in support of the application is completely silent on these aspects of the matter.

In my view, the defendant, as demonstrated in the plaintiff's replying affidavit and the annextures thereto, was at all material times served with summons, plaint and other court processes including the application for interlocutory injunction. The court was satisfied of such service before granting the injunction, entering the interlocutory judgment and proceeding to formal proof. The judgment and ensuing decree were therefore valid and regular and cannot be set aside unless the defendant demonstrates sufficient grounds other then lack of service.

There are ample authorities to the effect that notwithstanding regularity of it, a court may still set aside an *ex-parte* judgment if it is satisfied that the defendant has a reasonable defence to the plaintiff's claim on merit. *See* for instance *Tree shade Motors Ltd vs D.T. Dobie and Company(K) Ltd & Another, C.A. No.*

38 of 1998[UR]. It follows therefore that an application to set aside a regular judgment must of necessity be accompanied by a draft defence to enable the court to revert to it in determining whether the *ex parte* interlocutory judgment though regular should be set aside on account of the defendant having a reasonable defence on the merits. In the circumstances of this case, the defendant has not annexed a draft defence to the application. This court thus has no way of assessing the viability of the defendant's defence if at all, in the event that the court was inclined to set aside the *ex-parte* judgment.

Of course I am not oblivious to the fact that the defendant mistakenly and irregularly annexed such draft defence in his written submissions. This is tantamount to adducing evidence from the bar. Written submissions are not evidence. It is not permissible in law. As correctly submitted by counsel for the plaintiff, I should ignore the purported draft defence attached to the written submissions as of no consequence as the purposes of written submissions is not to adduce evidence through the backdoor but to canvass issues of law.

In view of the foregoing, I am satisfied that the defendant has not demonstrated any basis upon which the court can exercise its judicial discretion in his favour and no useful purpose will be served at all by disturbing a valid and regular judgment entered upon due to satisfactory service.

In any event there is already *prima facie* evidence of proof of legal ownership of the suit premises by the plaintiff. The defendant's application fails and is accordingly dismissed with costs. It then automatically follows that the plaintiff's application is allowed as prayed.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **14TH** day of **DECEMBER, 2012.**

GEORGE DULU
JUDGE