



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 10 OF 2009

CHOME MWAJOTO.....PLAINTIFF/RESPONDENT

-VERSUS-

CHIDZAO MWAMBIRE (BOJO).....DEFENDANT/APPLICANT

RULING

Coming up before the Court is the defendant's application by Chamber Summons dated 27th August, 2009, which is brought under Orders IXA rule 10 & 11 and V rule 16 of the Civil Procedure Rules, and ss.34(1) and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The applicant's substantive application is thus expressed:

“THAT this Honourable Court be pleased to set aside the proceedings, interlocutory judgment and the decree issued on 8th April, 2009 and all other consequential orders made herein and the defendant be allowed to defend this suit.”

The application is based on several general grounds, as follows:

- i. that the defendant had not been personally served with summons to enter appearance, and only learned of the existence of the suit when the plaintiff attempted to evict him from the subject property;
- ii. that pursuant to the execution proceedings instituted by the plaintiff, some of the defendant's houses have been demolished, and the plaintiff threatens to continue with demolition;
- iii. that the defendant has been in actual occupation of the suit property for over 20 years uninterrupted;
- iv. that the defendant has a good defence with high chances of success, and should be allowed to file a statement of defence, so that both parties are given a fair opportunity to state their case;
- v. that it is in the interest of justice that the orders sought herein be granted.

The applicant has sworn a supporting affidavit accompanying the application. The applicant deposes that he was not directly or indirectly served with summons to enter appearance, and only came to learn of the existence of the suit when the plaintiff was attempting to evict him from the suit premises.

The applicant deponed that a process server by the name **Michael Thoya M'Bwana**, though he claims to have effected personal service, had in fact, not effected service upon the deponent. The applicant deponed that the Court had proceeded on the basis of a false return of service, to hear an interlocutory matter and to give judgement, from which a decree was later issued.

The deponent deponed that on the basis of an interlocutory judgment, the plaintiff had proceeded to demolish the defendant's houses, leaving some members of the defendant's family out in the cold; and it became necessary to construct impermanent dwelling, for the affected members of the family.

The defendant averred that the suit property had been sold to his late father on 4th July, 1982 by the plaintiff's brother, **Chimako Mwajoto**, and all due payments had been settled.

The defendant deposed that since the said sale of the suit property, he and other members of his family had been in peaceful, uninterrupted occupation of the property, and this has been for a period of 20 years – “and the plaintiff had never made any effective entry upon the suit land.”

The applicant stated his belief in the truthfulness of his counsel's advice: that since he had been in continuous, open and uninterrupted possession of the suit property for more than 12 years, he, the defendant, was entitled to file a suit for adverse possession against the plaintiff.

The respondent, in his replying affidavit, deponed that the defendant/applicant had been well aware of the existence of the suit, but took no action to enter appearance and file a defence. The respondent denied the claim that the defendant had been in occupation of the suit property for 20 years, and that the defendant entered the said property only in 2002.

Contrary to the statement in the supporting affidavit, the deponent deposed that the defendant had not purchased the suit parcel of land, namely L.R. No. Kwale/Mnanasini/234, from the plaintiff's brother. The deponent deponed that the applicant had entered the suit land in 2002 and has not been in continuous, open and uninterrupted possession.

Counsel for the applicant queried the affidavit of service – by which he was said to have been served with the suit papers: on the ground that the affidavit did not identify the exact place where service had been effected; and on the ground that the process server had not stated the name of the person who introduced him to the defendant so he may serve summons upon the defendant. Counsel urged that no proper service of the suit papers had been effected upon the defendant.

Learned counsel urged that the defendant had a case based on adverse possession. There was evidence, counsel urged, of houses put up by the defendant on the suit land, and some of these had been demolished by the respondent. Counsel noted the evidentiary matter from the applicant, that the applicant, in 2002, registered a caution against the subject property “when the plaintiff [began] claiming ownership of the subject property in..... 2002”.

Counsel urged that the applicant's draft defence did raise triable issues which can only be resolved on the merits, at a hearing.

In support of the defendant's position, learned counsel cited the Court of Appeal decision in **Geeta Bharat Shah & 4 Others v. Omar Said Mwatayari & Another**, Civil Appeal No. 46 of 2008, in which the following relevant passages appear:-

(a) “Where it is established that there was no service, the Court has no option but to set aside such judgment *ex debito justitiae*... In such a case the Court has no jurisdiction other than to set aside the *ex parte* judgment. Where it is established that the defendant was served, the Court has [an] unfettered discretion to set aside the default judgment, provided that in so doing, no injustice is occasioned to the opposing party”.

(b) “... in a case where the summons was properly served and therefore the *ex parte* judgment

is regular, the Court, in the exercise of its discretion, does not end there. It is enjoined, in a case where [a], draft defence is annexed in the application, to consider that draft defence and if having considered it, it comes to [the] conclusion that the draft defence raises matters that require the Court's investigation, or.....if the draft defence.....raises arguable issues or triable issues, then the Court is required to exercise its discretion in favour of setting aside the *ex parte* judgment even though it is regular."

Counsel urged that the defendant had established good grounds to warrant the setting aside of the proceedings, the interlocutory judgment entered on 28th March, 2009 and the decree issued on 8th April, 2009 and all the consequential orders made therein.

Learned counsel for the plaintiff/respondent proceeded on the basis that the applicant's case rested on two contentions: non-service of summons-to-enter-appearance, upon the applicant; and the existence of triable issues that should be heard in Court.

Counsel submitted that "the entire Court process was proper and regular, from service of summons up to notification of entry of an *ex parte* judgment". Counsel referred to annexure CM1 to the replying affidavit – an affidavit of service sworn on 24th July, 2007. The deponent deposes in the affidavit of service that the plaintiff had indicated to him the place where the defendant resided; and the deponent went there, and one *Kassim* then took him to the defendant's village; *Kassim* introduced the deponent to the defendant; the defendant accepted service, and the deponent tendered to the defendant in duplicate the summons to enter appearance; the defendant however, declined to sign on the reverse side of the original summons.

Counsel also made reference to annexures to the replying affidavit showing that the applicant had been kept informed of the *ex parte* judgment delivered by the Court.

Counsel for the respondent submitted too that there was no basis to the claim that the applicant's defence raised any triable issues. In this regard, counsel for the respondent states:

"As in his [applicant's] defence he states that he has acquired title of the suit parcel of land by way of adverse possession. [But].... paragraphs 4,5 and 6 of the draft statement of defence states that the defendant bought the suit parcel of land from the plaintiff's brother, one Chimako Mwajoto, while paragraph 12 of the defendant's supporting affidavit clearly states that the defendant bought the parcel of land known as Kwale/Mnanasini/235 and not the suit parcel of land."

As the validity of each side's case must be reflected in the conviction carried by the submissions of counsel, I have subjected the foregoing statement of counsel to scrutiny: it refers to paragraphs 4, 5 and 6 of the draft statement of defence, and to paragraph 12 of the defendant's supporting affidavit. Paragraph 4 of the said draft statement of defence refers only to the suit land, L.R. No. Kwale/Mnanasini/234.

It is evident to me that there are conflicting claims in the case which should be resolved by orderly hearing, as a basis for determining the rights of the parties. Where such unresolved questions remain, the goal of justice requires that, as far as possible, the matter be not disposed of on a technicality. Besides, the various contentions made by the parties touch on issues complex enough to call for a full hearing, before the matter is disposed of.

It is clear that the mode of disposal of a question such as that now coming before the Court is not predetermined: the law as stated in *Geeta Bharat Shah v. 4 Others v. Omar Said Mwatayari & Another*, Civil Appeal No. 46 of 2008, is that the Court's discretion in such a matter is paramount.

I hereby set aside the proceedings and interlocutory judgment and decree issued on 8th April, 2009, and allow the defendant to properly lodge his defence, so that the matter is determined on the merits. For this purpose, the draft statement of defence shall, subject to payment of the requisite Registry fees, be deemed duly filed.

Costs shall be in the cause.

DATED and **DELIVERED** at Mombasa this 12th day of March, 2010.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ibrahim

For the Plaintiff/Respondent:

For the Defendant/Applicant: