REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1413 of 2005

JOHN ALLAN OKEMWA……PLAINTIFF

VERSUS

HOSEA KIPLAGAT……...DEFENDANT

R U L I N G

1. What is before me is a chamber summons filed on 4th May, 2010 in which Hosea Kiplagat who is the defendant in this suit, seeks to have the proceedings and judgment entered against him on 6th April, 2010 set aside. The defendant prays that he be allowed to file his defence. The application is supported by grounds which have been stated on the application. It is also supported by an affidavit sworn by the defendant. In short, the defendant contends that his failure to file a defence to the plaintiff's suit was not of his own making. The defendant blames his former advocates who failed to file a defence in time or inform the defendant of that failure. The defendant prays that he should not be condemned for the mistakes of his counsel.

2. The defendant further maintains that he has a good defence to the plaintiff's suit, as he has been in possession and occupation of the suit property since 1990. The defendant claims that he has enjoyed quiet, peaceful and uninterrupted enjoyment of the suit property. He also claims that he has invested heavily in the suit land, and has several infrastructural developments. The defendant pleads that it would be against the rules of natural justice for him to be condemned unheard due to the mistake of his former advocate. He therefore prays that the court grants his application.

3. The application is opposed through grounds of opposition filed on 21st April, 2010 as follows:

(i) That the application is incurably defective.

(ii) That the application is an abuse of the process of the court.

(iii) That the application is incompetent and does not lie in law.

(iv) That the application is either *res judicata* or *subjudice*.

(v) That the application is without merit, is not made timeously, and the orders therein cannot obtain at law or equity.

Both parties' counsel have filed written submissions.

4. In support of the application, the case of ***Waweru vs Ndiga [1983] KLR 236*** was cited, for the proposition that there are no limits to the Judge's exercise of discretion in setting aside a judgment under Order IXA. It was contended that it was just for a judge to set aside a judgment to avoid injustice or hardship resulting from accident inadvertence or excusable mistake, without assisting a person who deliberately seeks to obstruct or delay justice. It was submitted that in the instant case the failure by the defendant to file a defence was not of his making but arose from the neglect of is advocates. It was argued that it was in the interest of justice for the court to look at the draft defence to see whether there are any triable issues raised. The court's attention was drawn to the fact that the gist of the draft defence was a claim in adverse possession of the suit land and that such a claim could only be ventilated and fairly determined at a full trial.

5. The case of ***Gachagu vs AG Civil Appeal No.24 of 1980*** was relied upon for the proposition that a defendant who has entered appearance should not be debarred from defending a suit. As regards the judgment, it was submitted that provisions of Order IXA only provides for a judgment in default where there is a claim for a liquidated amount. It was submitted that in this case, judgment was entered for general damages in contravention of Order IXA. Further it was submitted that assessment of the general damages lacked basis.

The court was therefore urged to grant the application.

6. For the plaintiff/respondent, it was pointed out that there was no judgment entered on 6th April, 2010 but that judgment was entered on 7th April, 2010, and 6th April, 2006. It was therefore submitted that the application before the court was defective as the court was being asked to set aside a judgment that does not exist. The case of ***Kipkembe Ltd vs Omote [2000] eKLR*** was cited. It was pointed out that the judgment entered on 7th April, 2010 was one for assessment of damages following formal proof. The applicant had erroneously sought to set aside the judgment of 6th April, 2010 and not the exparte judgment of 6th February, 2006 that gave rise to the formal proof. It was contended that the only recourse available to the applicant against the judgment of 12th April, 2010 was to file an application for review having not appealed against the assessment of damages. Further, it was contended that the application before court was incompetent for the reason that the applicant has not challenged the judgment of 6th February, 2006 which is the root of the assessment of damages made on 7th April, 2010.

7. Referring to Section 68 of the Civil Procedure Act, it was submitted that there was a legal estoppel by operation of the law precluding a party aggrieved by a preliminary decree from challenging the resultant subsequent decree or orders, if he fails or does not challenge the preliminary decree. It was argued that the judgment of 6th February, 2006 resulted in a preliminary decree while the judgment of 7th April, 2010 resulted in a final decree. It was maintained that the final decree could not be challenged except by an appeal or review. The case of ***G.M. Mandalia vs Lakha Singh [1965] EA 118*** was cited.

8. Regarding the assessment of damages it was submitted that the assessment having been done by a court of concurrent jurisdiction this court cannot sit on an appeal with regard to the merits of that assessment. It was further submitted that the judgment of 7th April, 2010 having been entered under Order IXA Rule 5, there was no requirement for the claim to be a liquidated claim. It was further submitted that the plaintiff's claim as set out in the plaint was a monetary and specific sum quantified in paragraph 5 of the plaint. Therefore the claim was a liquidated claim. It was pointed out that since the claim also contained prayers for injunctive relief, the preliminary decree was not conclusive hence the need for assessment of damages.

9. It was further claimed that the application before the court was *res judicata* as there was an application filed earlier which had not been prosecuted. It was pointed out that the applicant had failed to disclose that the firm of Odhiambo & Odhiambo advocate had attempted to come on record and had even filed a suit for adverse possession on behalf of the applicant in the High Court at Nakuru. At attempt to obtain orders of interlocutory injunction was dismissed as the applicant was found to be a trespasser. It was submitted that the applicant was not coming to this court with clean hands and did not therefore deserve the exercise of the court's discretion.

10. I have carefully considered the application, the affidavit in support and in reply as well as the submissions filed by parties. The application dated 4th May, 2010, sought to have all the proceedings and the judgment dated 6th April 2010 set aside and the defendant allowed to file a defence. From the court record, it is evident that no judgment was entered on 6th April, 2010. A final judgment was in fact delivered on 7th April, 2010 following the interlocutory judgment entered on 6th February, 2006. Therefore, the application before court is defective in so far as it refers to a judgment which does not exist on record.

11. Assuming that the date of 6th April, 2010, was a mere clerical error, and was in fact intended to be 7th April, 2010, would the application be saved under the slip rule Section 99 of the Civil Procedure Act? In answering this question I have taken note of the fact that the application dated 4th May, 2010 was brought under Order IXA Rule 10 and 11. This means that in actual fact, what was targeted by the application was the initial interlocutory judgment entered under Order IXA Rule 5 of the Civil Procedure Rules. That judgment was the one dated 6th February 2006.

12. Therefore, the application before court is defective to the extent that it has not touched on the interlocutory judgment giving rise to the assessment of damages. As was submitted by the respondent's counsel, Section 68 of the Civil Procedure Act, precludes the applicant from disputing the final judgment without seeking to set aside the interlocutory judgment. The applicant may have had a good reason for failing to file a defence, however, he has not properly invoked the jurisdiction of this court. Nor has he challenged the interlocutory judgment entered against him in default of the defence. The applicant has therefore not given the court the appropriate mandate to go into the plausibility of his intended defence. For this reason, I find that this application must fail and it is accordingly dismissed with costs.

Dated and delivered this 29th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mutibwa for the plaintiff/respondent

Ms Macheru H/B for Ojienda for the defendant/applicant

Kosgey - Court clerk