REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT 99 OF 2004

HELLEN OBURA OLANG ……..…… PLAINTIFF

-VERSUS-

GRACE OKEYO OKEYO &

JOSEPH OTIENO ACHIENG … ..…..…… DEFENDANTS

Coram:

J. W. Mwera J.

Oluoch for Mwamu for the Plaintiff

Odeny for the 2nd defendant

Raymond CC.

R U L I N G

The main prayers placed before this court by the 2nd defendant/applicant under O.9A r. 10 CPR and SS. 3A, 63 (c) (e) CPA are that:

i) pending the determination of this application there be a stay of eviction, decree or any orders against the applicant.

ii) the interlocutory judgment or the ex-parte judgment entered herein against the applicant in default of filling a defence and all consequential proceedings and orders be set aside unconditionally and consequently.

iii) the applicant's defence be deemed duly filed upon payment of fees.

The grounds upon which these prayers are premised are that the applicant was never served with the summons to enter appearance plus a copy of the plaint. Further, the interlocutory judgment be set aside because it was not in respect of a liquidated claim. And that the applicant has a reasonable defence to the plaintiff's claim. He should not be evicted from the suit land which he has a home – a property which he

validly bought from the previous owner thus if evicted, the applicant stands to suffer irreparably. He then swore an affidavit in support of this application. Mr. Odeny argued it as set out above and on points of law.

Mr. Mwamu strenuously opposed the application as per the plaintiff's replying affidavit on the lines outlined below. Each side relied on annextures to the affidavit.

Hearing Mr. Odeny and perusing the record shows that there are two default judgments entered against the defendants: the part bearing dates on the file cover are torn/worn out. The request to enter judgment against both defendants jointly and severally for having failed to enter appearance, bearing the date of 9.9.2004, was the result of the judgment entered on 12th or 22nd September 2004. Probably that was not good enough because on 9.10.2004 Mr. Mwamu requested the deputy registrar to renew the summons directed to the two defendants to enter appearance. That happened on 6.12.2004 when a licensed process server, one Nadebu Philbert Caleb, filed an affidavit of service to the effect that he served the defendants with summons to enter appearance together with a copy of the plaint which he had received on 22.10.2004. And particularly about the service on the 2nd defendant/applicant Nadebu deponed.

"**3. That I made several efforts to trace the defendants at their homes near Daraja ya Ouko near Kibos, without success. I was informed by the 2nd defendant's wife that he was only available at home during the day on Sundays. She also disclosed to me that the 1st defendant could also be found only on Sundays as she spent most of the time during week days and Saturdays in markets where she trades.**

4. That on 7th November 2004 at 3 pm I proceed (sic) to the 2nd defendant's said home when I met a tall and drunken man hosting a group of people who were taking a local brew outside his house. He was introduced to me by his pregnant wife to be the 2nd defendant. At that point, I introduced the purpose of my visit thereby (sic) tendered a copy of each of the above said documents requiring his signature at (sic) the reverse of the original copy of the summons in acknowledgement. Mr. Otieno accepted service but declined to endorse any remarks nor sign the original copy of the summons herewith returned to court duly served."

On the same day Nadebu served similar documents on the 1st defendant and she acknowledged service. But it is the 2nd defendant about whom this application is about. Following the service of the summons to enter appearance plus a copy of the plaint on 7.11.2004 on the applicant, who then failed to enter appearance, there is nothing on record that Mr. Mwamu for the plaintiff filed a fresh request for judgment in default. There is however a note from officer in-charge, civil registry dated 6.12.2004 for the attention of the deputy registrar:

"**Request for judgment was filed on 22/9/2004. Affidavit of service filed today by M/s. Mwamu, Nyanga & Co. Advocates."**

The contested judgment was entered on 22.12.2004.

The plaintiffs' lawyer asked to fix the case for formal proof. That proceeding was fixed on 14.2.2005. It did not go on but it was so done on 4.5.2005. When that date was taken the deputy registrar directed that notices issue to the defendants. There is no evidence that such notices went out. However Tanui J, as he was then, heard the plaintiff and stated that he would deliver judgment on 6.5.2005. It was delivered on 25.5.2005 in favour of the plaintiff. The subject matter in the suit was land parcel no. KISUMU/NYALUNYA/783 over which the plaintiff was declared sole proprietor. The defendants were to be evicted from it after one month's notice. Apparently the plaintiff issued notices to show cause for the 2nd defendant to vacate the land and that is, as Mr. Odeny put it, when he came to know of the suit in question.

Mr. Odeny's stand was that the affidavit of service sworn on 13.11.2004 and filed in court on 6.12.2004 did not disclose the name of the 2nd defendant's wife who pointed out the applicant. Then that

because the plaint sought a declaration as to who was the proprietor of the suit land and not a liquidated sum, the judgment in question ought not have been entered until and unless a hearing was conducted. And that the 2nd defendant was not notified of such hearing and indeed none was served for formal proof. Citing the ruling in *JOSEPH LIKOMO –VS- K. A. R. I. NRI HCC 2766/92,* this court was told that the orders to set aside ought to be granted without conditions. And that land was involved – usually a sensitive thing in Kenya. And further that the defence strongly showed that the 2nd defendant bought this land from a 3rd party.

Mr. Mwamu maintained that the applicant was served with due documents but failed to enter appearance or file a defence. The court was invited to consider the detailed description the process server went into – about the applicant's "pregnant" wife, pointing out the "tall drunken" man as the 2nd defendant and then having him served.

The court heard that the applicant was seeking to set aside the interlocutory judgment only and not the final judgment plus the decree thereof. However, a closer appreciation of the three main prayers reproduced above, the applicant desires that everything from the interlocutory judgment, formal proof decree and eviction orders e.t.c. be set aside.

Turning to the defence intended to be relied on in case this application is allowed, Mr. Mwamu told the court that that pleading stood on no basis at all. The reason for that argument was that the plaintiff succeeded the subject land following the death of her husband and she had a title to it with effect from 6.8.2001. The claim that the applicant bought the land from one Selina Gwendo in 2000 could not amount to much because Selina never had a proprietary interest in land no. 783 which she could dispose of by way of sale. The court's decision is as follows:

Mr. Odeny went straight to O9A r. 10 CPR to seek the setting aside of the interlocutory judgment in default of entering of appearance or filing a defence and asked this court to exercise its discretion in that regard. But he alluded to the claim which is not liquidated and that falls under O9A r. 3 (2) CPR.

" **(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants, fail to appear as aforesaid, the court shall, on request in Form No. 26 of Appendix C, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon the claim."**

It can be seen that while O9 r. 3 (1) deals with claims of liquidated claims where a defendant fails to appear, while sub – rule 2 covers plaints with a liquidated demand with or without some other claim and defendant or defendants fail to appear. Any other suits not provided for and a defendant fails to appear, the plaintiff sets down the suit for hearing (See O. 9A r. 8, 9B r. 1).

In the present suit the plaintiff, in the main, sought a declaration that she was the absolute proprietor of land no. 783. It was not a claim for a specific sum, called a liquidated claim. And so in this court's mind on obtaining an interlocutory judgment because the 2nd defendant failed to enter appearance (**here the applicant apparently in error alluded to "in default of the defence")** the plaintiff was bound to set down the cause for formal proof so that costs would feature in the final judgment. According to O.9B r. CPR such hearing would follow with due notice only to the defendant who entered appearance.

In our present case the 2nd defendant did not enter appearance. The plaintiff set down the cause for formal proof. She did not have to serve a hearing notice on the 2nd defendant. After formal proof final judgment followed and a decree was extracted. It was not for determination here but the court was notified that a notice to show cause why the applicant should not be evicted from the subject land was served on him but he ignored it. That, again, it was the same Nadebu who served this process.

From the material placed before this court, it was satisfied that the 2nd defendant was served with the summons to enter appearance but he did not do so. Mr. Odeny chose not to examine the process server, Nadebu, on oath but his detailed affidavit of service goes way beyond one who made up a story of serving

the 2nd defendant. Nadebu had on 10/8/2004 served summonses on both the defendants who are neighbours. In the home of the 1st defendant, thought it was not stated how he knew it, he met on Isaiah Onyango, a son of that defendant. He accepted service on behalf of his mother. In the nearly house of the 2nd defendant, both defendants are said to have encroached on the plaintiff's land no. 783, Nadebu found Mrs Phoebe Atieno, daughter in-law of the 2nd defendant. She told him that she was the 2nd defendant's son's wife - John Onyango. Nadebu served Phoebe. It is quite probable that the service on both Isaiah and Phoebe appeared not so satisfactory to the court (see affidavit of service sworn on 10.8.2004) – hence the second service as per the affidavit of 13.11.2004. By the going back and fourth by the process server, the court was satisfied that he properly and validly served the 2nd defendant. Because his knowledge of the area and the people he met, ending with service on the 2nd defendant sounds quite credible. He even served the notice to show cause on the 2nd defendant.

The court having found that there was valid service of the questioned documents, now asks itself if failure on the plaintiff's part to file a fresh request for a default judgment has an impact. The contested service was effected on 7.11.2004. There was no appearance entered by the time judgment was entered on 17.12.2004. The deputy registrar relied on the request for judgment dated 22.9.2004 to do that. Although probably the plaintiff would have done better by filing a fresh request following the service on 7.11.2004, it does not appear to this court that prejudice was caused when judgment of 17.12.2004 was entered. There had been no appearance following the earlier service and some forty one (41) days elapsed between 7.11.2004 and 17.12.2004 with the 2nd defendant entering no appearance. In the circumstances of this case this court is disinclined to set aside the contested judgment and all consequential orders.

The court was invited to look at the draft defence and to consider it as reasonable and substantial in the light of the prayer to allow the prayers. A defence will be considered substantial or otherwise against a plaint. That should normally come at the trial or when dealing with summary judgment, striking out a defence e.t.c. This is not such a stage and probably it would be in error to consider the substance of the defence if all this court is being asked to consider is whether the summons to enter appearance plus a copy of the plaint, was validly served. However it is for Mr. Odeny to look at the draft of his defence vis a vis the point put forth by Mr. Mwamu that the plaintiff got land no. 783 by succession following the death of her husband and at no time did one Selina Gwendo have right and interest in that land which she could sell to the defendants as the 2nd defendant pleads in the draft defence. And that Selina was only a sister-in-law to the plaintiff's late husband. Anyway all this is by the way.

In sum, this application is dismissed with costs.

Orders accordingly. Delivered on 20/3/2008.

J. W. MWERA

JUDGE.

JWM/hao