



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

Civil Case 3981 of 1979

JOHN MUCHERU MURIU PLAINTIFF

VERSUS

KAMAU MAE DEFENDANT

RULING

BACKGROUND OF APPLICATION

1. Kamau Mae, the defendant herein was the registered proprietor of land LR Limuru Bibirioni/744 within the Kiambu area that consisted of

3 ½ acres of land. He took a loan from Kenya Commercial Bank of Ksh.3,000/- in 1974. He was unable to pay back this loan. The security offered for the loan was the said parcel of land. The Bank sold the land by way of public auction on 14 December 1977 for Ksh.16,500 to John Mucheru Muriu the plaintiff herein.

2. The defendant failed to vacate the property land. The plaintiff filed this suit on 10 December 1979 seeking courts orders to have the suit land vacated by the defendant.

3. The defendant failed to attend court after being served. The suit coming before Nyarangi J (as he then was) on 17 December 1980 was heard by way of formal proof. The Hon. Judge gave orders on 17.9.80 and entered judgment as prayed, for the plaintiff.

4. It is unclear whether the plaintiff executed these orders. I see no evidence in the file of this. At the trial, the advocate for the plaintiff stated that they had no objection in having the said land re sold to the defendant.

5. In 1996, the plaintiff passed away. The defendant noticing the caution against the land had been removed, made an application to court to have it reinstated (21 July 97) The said application of 30 September 03 was filed by the defendant to review the judgment of the court entered in 1980; to enjoin the Commercial Bank of Kenya to the suit and to have the decision set aside.

6. The bank filed application of 11 June 2004 seeking to be struck out from the suit. They did not persecute this application and the same was duly dismissed for non-attendance (Ojwang J) 16 September 2009

7. There appears to be a pending appeal not prosecuted.

8. On the 14 June 04 application to set aside the Interlocutory Judgment was made. It was later amended on 20.6.06 to take into consideration the death of the plaintiff.

9. This application came for arguments before the Land and Environmental Law Division on 30 May 07 and 4 June 07, twenty seven years after the judgment ex parte entered by Nyarangi J.

II: Application dated 20 June 2006, amended

10. The application was brought under order IXA r 10 and 11 and sought orders:-

“i) This Hon. Court be pleased to set aside the interlocutory judgment entered against the defendant in the matter hereof in default of entering appearance and filing defence.

ii) the defendant/applicant be allowed to

unconditionally defend this suit and the defence and counter claim filed in the matter hereof be deemed as duly and properly filed within time.

iii) Costs of application be provided for”

11. The main grounds of the application is that the defendant has a good defence. The other is that land is a sensitive matter. That the defendant, a semi-illiterate and feeble minded and that the procedural system of civil litigation is still very charge to his compression. The defendant/applicant had limited knowledge in interpreting the summons.

12. Order IXa r 10,11 Civil Procedure rules is an order where by the defendant having been served with summons to enter appearance and the plaintiff asking for the defendant to enter such appearance and file defence within 15 days of service fails to take any action or make response then, the plaintiff may apply to the court and the Deputy Registrar in the High Court or the executive officer in the subordinate court would enter Interlocutory Judgment. If it is a money claim the plaintiff proceeds to execute. If it is a tort or a claim for eviction as is in this case, the plaintiff sets the suit down for formal proof hearing. The plaintiff would attend court and give evidence formally proving his case. This is what happened in this case. The plaintiff appeared before Nyarangi J (as he then was) and gave evidence. Judgment was accordingly given in favour of the plaintiff in absence of the defendant.

13. If the defendant is able to show good cause why he was not able to attend court, and then he would make application under order IX a r 10 and 11 Civil procedure Rules to seek for the setting aside of the Interlocutory Judgment. Good cause would have been for instance that the defendant had not been actually served with the plaint and summons to enter appearance or that the defendant was prevented for good reasons such as illness not to be is able to file the said defence and summons to enter appearance on time. The court using its discretion may allow the setting aside of the interlocutory judgment and ask the defendant to file defence within a subscribed time after entering appearance in the suit.

14. In this present case the defendant admits that he was duly served with the summons to enter appearance and the plaint. According to the advocate for the applicant defendant, the defendant was an illiterate man; a man of feeble mind. On the day he was to attend court for the hearing of his case he wondered around the court corridors and failed to find the plaintiff. He was ignorant of the law and went home.

15. The advocate for the applicant defendant prayed that for a wider interest of Justice that this court set aside the judgment and subsequently allow the defendant to file defence.

16. Both the advocate for the plaintiff/respondent and for the bank, the 2nd defendant enjoined to this suit as third party opposed their application. To the advocates, they agreed with the principles set about in the

case law of Shah v Mbogo & Another (1967) EA 116 (Harris J). In this case an insurance company on behalf of the defendant applied to set aside an ex-parte judgment entered against them in favour of the plaintiff on a claim for damages for personal injuries. The judgment was enforceable against the insurance company. The applicant seeking to set aside the ex parte judgment did so on ground that they did not have adequate notice of the proceeding. The court in that case inter alia applied the principles that it is the:

“Courts’ discretion to set aside an exapрте judgment is intended to be exercised to avoid injustice or hardship resulting from account, inadvertence or excusable mistake or error, but NOT to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice . . .“

17. The cause of justice in this case was being delayed. The plaintiff/respondent and the 2nd defendant/3rd party stated that the delay in coming to court was inordinate. It had been 27 years since judgment was entered against the defendant. This application ought to have been made soon thereafter instead it is made at this stage.

18. The applicant/defendant claim that the plaintiff/respondent would not be prejudice if the orders are set aside on grounds that he was ignorant of the law which he is aware that ignorance of the law is no defence.

19. Should this court set aside the Interlocutory judgment or judgment of this court entered into 27 years ago?

II: FINDING

20. It is hard to believe that the defendant (applicant was illiterate). He went to the bank and obtained a loan. The security offered by him was his land. Instead, he states that he had a good defence, namely by the time his land was being auctioned he had completed paying his loan. He implied he owes the bank no money.

21. In this High Court case that purpose of it being filed was to evict the defendant from the suit land. The plaintiff had gone to an auction where he bought the said land at the fall of the hammer. He paid Ksh.16,500/- on the 14 December 1977. Once a person buys property by way of an auction, having duly paid the full sum, the original owners is not permitted by law to reclaim the property. The interest of the land such as in this case no longer exists.

22. After waiting for two years the new owner, the plaintiff herein, filed suit this to seek eviction orders and to have possession of the suit premises. He had no objection to reselling the land back to the defendant if he so wishes.

23. The interlocutory order if set aside, the issue would be whether the defendant should be evicted from the land or not? This, as explained earlier, amounts to asking who is the rightful owner of the land. It cannot be the defendant/applicant. He lost his interest in the land on 14 December 1977. He has no right in law to claim back this interest once the auctioneers hammer fell.

24. There is therefore no defence available to him. The plaintiff /respondent wishes to enjoy the fruits of his gain in the land but has not been able to do so. He has since passed away and his estate pursues this issue.

25. I recognize the emotional attachment the defendant and his family have had over this land. The confused state the defendant may have been when he was aware he may lose the land and kept quite. He could have called friends and well wishers to assist in donating money to pay the loan. There should have been a policy that banks should not use ancestral homes as security for bank loans. Nonetheless it is too late at this state. The plaintiff too has a right to the land.

26. I hereby find that the application has been brought after an inordinate delay. The defendant/respondent filed various application before this one, even an appeal. As far as I can see judges who dealt with the applications dismissed them, basically because they were badly framed having been filed by the defendant in person.

27. It is the probability of success of this suit and whether the defendant has a defence that is of importance. The suit basically deals with the enforcement of the plaintiff/respondent right. He bought land at an auction and wants possession of it. The defendant had issues with the bank, the 2nd defendant, not with the plaintiff/respondent.

28. As the rights of the defendant/respondent to the suit land extinguished at the fall of the auctioneers hammer, I find that the application before this court fails and is accordingly dismissed.

Dated this 6th day of June 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

N.M. Oyata for Oyata & Co. Advocates for plaintiff/respondent

E.M. Wachira for Wachira & Co. Advocates for the defendant/applicant

Munyu for Iseme, Kamau & Co. Advocates for the 3rd party