



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 527 OF 2007

ALEX NJOGU.....PLAINTIFF

- VERSUS -

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

FRANKLIN MUTHOML..... 2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. This suit came up for hearing before Lady Justice Jane Onyango during the Milimani ELC Service Week Backlog Programme on 28/11/2018. At the commencement of the court session, Ms Kwanga, counsel for the plaintiff informed the court thus:

“We served the defendants with a hearing notice and we have filed the affidavit of service. The 2nd defendant has never entered appearance. I will be ready to proceed”

2. Based on the above presentation by counsel for the plaintiff, the court made the following order:

“Case to proceed at 10.30 am”

3. Consequently, hearing of the case proceeded from 10.30 a.m in the absence of the 2nd defendant. Jedida Ngina Kibuna who described herself as the plaintiff’s attorney testified as PW1. Magdaline Wambui Mutua testified as PW2. The plaintiff thereafter closed his case. Mr Odhiambo who appeared for the 1st defendant closed the 1st defendant’s case without leading any evidence.

4. Subsequently, Onyango J rendered an *ex-parte* judgment in relation to the 2nd and 3rd defendants on 7/5/2019 in which she made the following orders:

a. A declaration is hereby issued that the 1st defendant having allotted the suit property, that is to say Plot No 346 in Jamhuri 11 (now known as NAIROBI/BLOCK 63/465) and the plaintiff having accepted the allotment and an agreement for lease executed, the said plot was not available for re-allotment to the 2nd defendant and the re-allotment of the suit property to the 2nd defendant was void ab initio

b. A declaration is hereby issued that the registration of the 2nd defendant as the lessor of that property known as NAIROBI/BLOCK 63/465 was fraudulent, unlawful, null and void.

c. The Chief Land Registrar is hereby ordered to cancel all entries relating to ownership and the title issued to the 2nd defendant

d. The plaintiff is at liberty to bring proceedings for cancellation of the title against the current registered owner in order to facilitate the registration of the suit property in favour of the plaintiff.

e. AS AN ALTERNATIVE TO PRAYER (d)

The defendants shall compensate the plaintiff in the sum of Kshs 8,500,000 being the value of the suit property minus any

improvements thereon

f. The costs of this suit shall be borne by the defendants jointly and severally

g. Parties are at liberty to apply generally

5. The above judgment and the consequential decree are what triggered the 2nd defendant's notice of motion dated 9/9/2019 through which he seeks an order setting aside the said judgment and decree. The said application is the subject of this ruling.

6. I have considered the application together with the supporting affidavits; the response thereto; and the parties' respective submissions. The single question falling for determination is whether the applicant has satisfied the criteria upon which our courts exercise the discretionary jurisdiction to set aside an *ex-parte* judgement in the context of the circumstances of the present application.

7. The said criteria was summed up by the Court of Appeal in the case of **James Kanyita Nderitu & Another v Marios Philotas Lihikas & Another [2016] eKLR as follows:**

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

8. The court proceeded to conduct a hearing in the absence of the 2nd defendant because counsel for the plaintiff assured the court that the 2nd defendant had never entered appearance in the suit. I have looked at the court record. Contrary to what counsel for the plaintiff told Lady Justice Onyango, the plaintiff duly appointed the Firm of Njeru Nyaga & Company Advocates who filed a notice of appointment on 18/1/2006. There is no evidence to suggest that the 2nd defendant's advocates were served with a hearing notice relating to the hearing of 28/11/2018. I have carefully looked at the plaintiff's replying affidavit sworn on 22/11/2019. He did not address the issue of service of hearing notice relating to the hearing of 28/11/2018 yet this is the key issue in the application under consideration.

9. What therefore emerges from the evidence before court is that the 2nd defendant's advocates who were on record at the time of the *ex-parte* hearing were not served with a hearing notice relating to the hearing of 28/11/2018. Secondly, on that day, counsel for the plaintiff misled the court that the 2nd defendant had never entered appearance in the suit, thereby procuring the court to conduct an *ex-parte* hearing. In the circumstances, I will allow the notice of motion dated 9/9/2019 in terms of prayer 3. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF MARCH 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Desmond Maina for the Plaintiff

Mr Nyaga for the 2nd Defendant

