



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 177 OF 2017

JOHN MUISYO KYULU.....PLAINTIFF/RESPONDENT

-VERSUS-

STEPHEN MUSEMBI NDONYE.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **14<sup>th</sup> September 2020**, by the Defendant/ Applicant seeking for orders that;

- 1. That the ex parte Judgement entered on 8<sup>th</sup> December 2017, and any further consequential order in execution of the judgement and decree, be set aside and the suit be set down for interparties hearing and determination.**
- 2. That upon granting prayer 3 above, the court do order the cancellation of the subdivision of land parcel KAKUZI/GITUAMBA BLOCK 11/554, into parcels **715** and **716** and further that the said parcels be consolidated again into parcel No. 554 and in the name of the defendant/applicant pending the hearing and determination of this suit.**
- 3. That costs be provided for.**

The Application is premised on the grounds that an affidavit filed by the Process Server is misrepresentative, erroneous and false as it does not reflect a true and accurate account regarding service of the Court process and the Plaintiff/Respondent has committed a fraud against the court by withholding material facts. That the Judgment and Decree are being enforced against a party who did not participate in the said suit and was not given an opportunity to be heard. Further that the Plaintiff/ Respondent has obtained Orders with regards to the disposal and partition of the old title **for L.R Kakuzi/Gituamba Block II /554**. That there is an obligation to serve Summons and all notices upon the Defendant/ Applicant, even after entry of interlocutory Judgment. That the proceedings, Judgment, Decree and resultant orders are irregular and should be set aside.

In his Supporting Affidavit, **Stephen Musembi Ndonge**, averred that he was never served with any pleadings or notices regarding the suit and hence denied a chance to enter appearance and defend the suit. That Interlocutory Judgment was entered against him in Default of Appearance and the matter proceeded **Ex parte** and **Judgement** was delivered on **8<sup>th</sup> July 2017**, and a **Decree** was issued on **19<sup>th</sup> December 2017**, granting the plaintiff the reliefs sought. That the court went ahead to grant orders disposing with the production of the old title of the suit land, copies of his identity card, KRA pin and passport photos. It was his contention that the Plaintiff/ Respondent presented an Application dated **10<sup>th</sup> August 2018**, and the same was heard in his absence and the Court granted orders disposing with the production of the old title deed. That the Plaintiff/ Respondent did not approach him to provide him with the original title deed as alleged in his supporting Affidavit sworn on **10<sup>th</sup> August 2018**. That he has approached the Court with stay orders after the Plaintiff/ Respondent went with Police Officers to take possession of the land and he learnt of the existence of the instant suit and that the suit proceeded irregularly. Further that pursuant to the Orders of the Court, the Plaintiff/Respondent has proceeded to subdivide parcel no. **KAKUZI/GITUAMBA BLOCK 11/554** into parcels **715** and **716** irregularly. He stated that he has a credible Defence that raises triable issues and he should be granted unconditional leave to raise the same and be heard on merit.

The Application is opposed and **John Muisyo Kyulu**, the Plaintiff/ Respondent filed a Replying Affidavit sworn on **2<sup>nd</sup> October 2020**. He averred that the Application is an abuse of the court process and brought in bad faith and only meant to delay the fruits of his judgement. That the Court pronounced itself and ordered the Defendant/ Applicant to transfer **one acre** out of his **Kakuzi/Gituamba Block II/554**, and he filed an application dated **10<sup>th</sup> August 2018**, seeking that the Land Registrar Thika to dispense with the production of title deed for **KAKUZI/ GITUAMBA BLOCK 11/554**, as well as the Defendant's/Applicant's copies of his Identity Card, KRA Pin and photos and the said application was allowed. That the land was subdivided in his name as per the judgement dated **8<sup>th</sup> December 2017**, and was registered as **KAKUZI/GITUAMBA BLOCK 11/715**, while the Defendant's/ Applicants land was registered as **KAKUZI/GITUAMBA BLOCK 11/716**. That the Defendant/ Applicant was duly served but chose not to attend Court or respond to the suit. He urged the Court to dismiss

the Application.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered together with the affidavits and the annexures thereto. The Court finds that the issues for determination are;

**1. Whether there was valid service of summons to enter appearance**

**2. Whether the Defence raises triable issues to warrant setting aside of Ex parte Judgment.**

**1. Whether there was valid service of summons to enter appearance**

The instant Application which seeks to set aside the Ex parte Judgment delivered on **8<sup>th</sup> December 2017**, is premised on the contention by the Defendant/ Applicant that he was never served with the **Summons to Enter Appearance**. While the Defendant/ Applicant alleges that he was never served with the suit papers, it is the Plaintiff's/ Respondent's contention that the Defendant/ Applicant was duly served as the process server served the suit papers on him personally and further served him with subsequent Notices for hearings.

In his various Affidavit of Services, the Process Server, **Amos Chege Kanoga**, detailed the steps he undertook to serve the Defendant/ Applicant with the suit papers. In his Affidavit of service sworn on **18<sup>th</sup> April 2017**, he averred that he served the Defendant/ Applicant with the Summons to Enter Appearance and a **Plaint** and further detailed how he was able to identify the Defendant and the place and time. This has been replicated in his various Affidavits, one sworn on **25<sup>th</sup> July 2017**, **6<sup>th</sup> February 2018** and **15<sup>th</sup> August 2018**. He further averred that the Defendant/ Applicant accepted service but refused to sign on his copies.

While the Defendant/ Applicant has denied that there was ever, service upon him, apart from denying service, the Defendant/ Applicant being the one who alleged did not prove his allegations. He did not make any attempts to cross examine the process server in order to prove his claim apart from claiming that the Affidavits are not true. There is no basis laid in which the Court can reject the Affidavit of Services that had been filed by the Plaintiff/ Respondent to support the allegations that the Defendant/ Applicant was served with the suit papers in the absence of any proof to support his claim.

Having failed to prove there was no service, it is the Court's considered view that the Affidavit of Services sworn by **Amos Chege Kanoga**, have satisfactorily detailed the process of service of the Defendant/ Applicant and the same having been served on Defendant/ Respondent personally then service was validly effected.

Consequently, the Court finds and holds that the service of **Summons** to the Enter Appearance upon Defendant/ Applicant was valid.

**2. Whether the defence raises triable issues to warrant setting aside of Ex parte Judgment**

The Defendant/ Applicant has sought to have the **Ex parte Judgment** entered on **8<sup>th</sup> December 2017**, set aside. Having held that Summons to Enter Appearance were properly served upon the Defendant/ Applicant, it is the Court considered view that it ought to then determine if it should set aside the Ex parte Judgment as that is one factor that it ought to consider. See the case of **Sebei District Administration ... Vs... Gasyali (1968) EA 300**: where the Court held that;

**"The nature of the action should be considered, the defence that has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."**

Further in the case of **Tree Shade Motors Ltd ...Vs... DT Dobie & Anor [1995-1998] 1EA 324** the Court held that:-

**"Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."**

**Order 12 Rule 7 of the Civil Procedure Rules** provides:-

**"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

**"The court may set aside an order made ex parte"**

**From the above provisions of law, it is very clear that the court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. In deciding the same, the Court is guided by the decision of the Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, where the Court of Appeal stated thus:**

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I 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.”

The Court having already found and held that Service of Summons were properly served on the Defendant/Applicant and that the Judgment was regular, then Court must determine whether or not the draft Defence raises any triable issue.

In the case of **Toshike Construction Company Limited...Vs... Harambee Co-operative Savings & another [2019] eKLR** the Court stated:-

“the defence need only raise a *bona fide triable issue*, which is 'any matter that would require further interrogation by the court during a full trial'. The *Black's Law Dictionary* defines the term 'triable' as, 'subject or liable to judicial examination and trial'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. See the *Patel case (supra)* and *Olympic Escort International Co. Ltd. & 2 Others vs Parminder Singh Sandhu & Another [2009] eKLR*.

Guided by the above case and definition of a triable issue, the Court will then determine whether the draft Defence has raised issues that warrants further intervention of the Court. In his statement of Defence, the Defendant/ Applicant has averred that;

“...the contents of paragraph 3 and 4 of the **Plaint** is denied and without prejudice to the foregoing, the Defendant avers that the **Plaintiff** did not at any material time purchase the suit property parcel of land known and described as **Kakuzi/Gituamba Block II/193** and if he did a copy of the sale agreement should be produced in Court together with the mode of payment as evidence of the transaction.”

The Plaintiff's/ Respondent's suit is anchored on the sale agreement that has been impugned by the Defendant/ Applicant. Having looked at the Defence, the Defendant/ Applicant asks the Plaintiff/ Respondent to produce a copy of the Sale agreement together with the mode of payment. It is clear from the Court's Judgment that indeed the Plaintiff/ Respondent produced in evidence the sale agreement which indicates that he paid the Defendant/Applicant for the transaction. What the Defendant/ Applicant is asking the Court to interrogate in the Court's considered view is already there. The Sale agreement has not been impugned and therefore in the Court's considered view, the statement of Defence does not raise any triable issues. There is nothing that warrants further intervention by the Court as the Defence raises no further issue that goes to the root of the matter that would require the Court to interrogate.

The Court is also called upon to consider the length of time within which the Application was filed. Though the Defendant/ Applicant avers that he only learnt of the suit when the Plaintiff/ Respondent went with Police Officers to take possession of the land, he does not disclose when he learnt of the existence of this suit. The Judgment having been entered on **8<sup>th</sup> December 2017**, and the instant Application having been filed in **December 2020**, the Court finds and holds that there was inordinate delay in bringing the Application and having been duly served with **Summons to Enter Appearance** and subsequent Decree in **2018**, the Defendant/ Applicant has not given sufficient reasons for the delay.

The Upshot of the foregoing is that the Defendant/ Applicant has not met the threshold to warrant the Court to exercise its discretion in his favour and consequently the applicant is not entitled to the setting aside of the Ex parte Judgment.

Having now carefully read and considered the instant Application, the affidavits and annexures thereto together with the written submissions, the Court finds and holds that the Notice of Motion Application dated **14<sup>th</sup> September 2020**, is **not** merited and the same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered

**DATED, SIGNED AND DELIVERED AT THIKA THIS 15<sup>TH</sup> DAY OF APRIL 2021**

**L. GACHERU**

**JUDGE**

**15/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Njoroge for the Plaintiff/Respondent**

**Mr. Jesse Kariuki for the Defendant/Applicant**

**L. GACHERU**

**JUDGE**

**15/4/2021**