Kimathi v M'Itiabi (Environment & Land Case 4 of 2021) [2022] KEELC 13298 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13298 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 4 OF 2021

CK YANO, J

OCTOBER 5, 2022

FORMERLY NKUBU PM ELC NO. 78 OF 2019

BETWEEN

LUCAS KIMATHI .... PLAINTIFF

AND

ALEXANDER MBIJIWE M'ITIABI .... DEFENDANT

RULING

1. This ruling is in respect to the notice of motion dated November 21, 2018by Jackim Muriuki Mbijiwe, the applicant seeking for orders that the court do set aside/vacate the judgment dated April 2, 2009, order the respondents to serve the suit papers and the defendant be granted leave to enter appearance and file defence out of time. The application is brought under Order 10 Rule 11 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*, and is based on the grounds that the case was heard *ex-parte*, the applicant's deceased father was not served with summons and plaint and that it is imperative that the judgment be set aside for all parties to be heard.

2. The application is further supported by the affidavit of Jackim Muriuki Mbijiwe sworn on 21st November, 2018. The applicant states that he is the legal representative of the defendant herein having been appointed by the court on January 16, 2008. A copy of Limited Grant of letters of Administration Ad Litem is annexed and marked "JMMI". The applicant further states he had sought to be joined in this case on January 20, 2009, but the court declined and he appealed against the decision and this court vide a judgment delivered on October 31, 2018 allowed the applicant to be joined in the case. A copy of the judgment is also annexed and marked "JMM 2"

3. The applicant avers that at the time the respondent states that he served the applicant's father (now deceased) the deceased was seriously sick and was being taken care of by the applicant. The applicant avers that he would have known if his deceased father had been served. The applicant states that the respondent is not a brother to his father, but is a step brother. The applicant further states that

immediately after judgment, the respondent promptly sold the land to a third party and disappeared. The applicant states that his deceased father had in 2005 sub divided the suit land, but died before he could transfer the same to them individually. Copies of an application for consent of Land Control Board and Letter of Consent have been annexed and are marked "JMM 3". The applicant therefore seeks to tender evidence for the court to decide the suit on merit.

4. The respondent opposed the application through a replying affidavit sworn on January 31, 2019and a further affidavit dated July 22, 2022. The respondent avers that the deceased defendant is his step brother and that he had sued him seeking half of land parcel No. Abogeta/u-kiungone/1231. He states that the deceased was duly served with the summons on February 14, 2008as shown by the affidavit of service ("LK1") but failed to enter appearance or file defence, and interlocutory judgment was rightly entered. The respondent further states that there is no evidence to show that the deceased was ill at the time of service and referred to the certificate of death annexed and marked "LK 2". The respondent further states that the judgment has already been executed and the suit land sold to a third party as admitted by the applicant. It is also contended that the application has been made after a period of over nine (9) years, adding that one of the witnesses (P.W 2) who is the respondent's mother died in the year 2011. The respondent therefore argues that he will stand to suffer prejudice should the application be allowed.

5. By way of a rejoinder, the applicant filed a supplementary affidavit onJuly 25, 2022in which he states inter alia, that the application was filed on December 17, 2018upon receipt of the judgment as such no inordinate delay as suggested by the respondent. It is the applicant's contention that no harm or prejudice will be occasioned to either party if the application is allowed since it will be an opportunity for the court to determine the issue on merit after hearing both parties.

6. The application was canvassed by way of written submissions. In his submissions dated and filed on February 25, 2019and others dated July 25, 2022, the applicant, through the firm of Mwangi & Co. Advocates submitted that the applicant sought to be enjoined (sic) in this suit on January 20, 2009, but the court declined to do so and an interlocutory judgment was entered against the defendant who was the applicant's father. That the applicant moved to the High Court on Appeal and his appeal was granted and the High Court set aside the orders that declined to enjoin (sic) him in the suit. It is submitted that the orders being sought are to effect the orders of the High Court enjoining (sic) the applicant to the suit. It is further submitted that if the orders sought are not issued, the applicant will suffer irreparable loss and damages (sic) because the subject matter of the suit is land. That unless the interlocutory orders are set aside the applicant will not be able to defend the suit and the orders of the High Court sitting in appeal will be in vain.

7. The applicant's counsel submitted that it is well established that the fundamental duty of the court is to do justice between the parties and that duty is inherent that both parties to a dispute should have an opportunity to put their case to be heard on merit. The applicant's counsel relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. It was the applicant's submission that the inherent powers vested to this court by section 3A of the *Civil Procedure Act* provides that the inherent powers are intended inter alia to advance the ends of justice and not to strangle it.

8. In further buttressing the discretionary powers of the court in setting aside *ex parte* judgment, the applicant's counsel relied on the case of *Esther Wamaitha Njihia & 2 others v Safaricom Limited* [2014] eKLR in which it was held *inter alia* that the discretion is free and the main concern of courts is to do justice to the parties before it. They also relied on *Patel v EA Cargo Handling Services Limited*, *Shah v Mbogo*, *Sebei District Administration vs Gasyali and Richard Nchapai* *Leiyangu v IEBC & 2 others* [2013] eKLR and submitted that they have demonstrated that sufficient cause exists that entitles

the court to exercise discretion to set aside the *ex parte* judgments and grant the applicant his day in court as envisioned under *the Constitution* of Kenya 2010.

9. The respondent through the firm of Kiautha Arithi & Co. advocates filed his submissions dated July 22, 2022and filed on the even date. It is the respondent's submission that the applicant's deceased father was personally served on February 14, 2008and that the applicant cannot depone over matters that were personal to the deceased and is therefore merely speculating. It is further submitted that the applicant is guilty of inordinate delay as the application was made over nine (9) years after the interlocutory judgment was entered on March 14, 2008and final judgment on July 7, 2008. It was also pointed out that the applicant seeks to set aside a non-existent judgment. That in any event, the respondent will be gravely prejudiced because his mother who was his key witness died in the year 2011.

10. The respondent's counsel also relied on the case of *Mbogo & another v Shah* (1968) EA 93. It is stated that the applicant seeks to put roadblocks to stymie the wheels of justice and that he should be stopped on his tracks because he is wasting this court's precious judicial time. That besides, the High Court in Meru HCC 73 of 2010 (Francis Mbae Nderebea v Stephen Murithi Mbijiwe, Julius Kiambi Mbijiwe, Kimathi Mbijiwe & Kinya Mbijiwe) has ordered vacant possession be given to the purchaser of land parcel No. Abogeta/u-kithangari/1231and issuance of the orders sought herein will amount to circumlocuting the orders issued in Meru HCC ELC 73/2010. The respondent prayed for the application to be dismissed with costs.

11. I have considered the application. The issue to determine is whether I should set aside the *ex-parte* judgment herein. I have perused the court record. Whereas the application herein seeks to set aside a judgment dated April 2, 2009, from the record, there is no such judgment dated April 2, 2009 in this matter, and as correctly pointed out by the respondent, interlocutory judgment was entered in the case on March 14, 2008 and after formal proof hearing, a final judgment was delivered on July 7, 2008. From the outset, it is clear that the applicant is seeking to set aside a non -existent judgment. Nonetheless, and being guided by article 159 (2) (d) of *the Constitution*, I will treat the mix up of the dates as an excusable mistake and proceed to determine the application on merit as if it relates to the actual ex-parte judgment herein.

12. The record indicates that pursuant to request for judgment filed on March 11, 2008interlocutory judgment was entered against the defendant on March 14, 2008. In entering the interlocutory judgment, the court relied on the affidavit of service filed on March 11, 2008which indicated that the defendant Alexander Mbijiwe M'Itiabi was duly served, personally with the summons to enter appearance, plaint and verifying affidavit on February 14, 2008at 8.30 a.m. at his home in Kionyo Imenti South district, and he accepted service by signing a copy in acknowledgment of service. In the affidavit of service the process server, David Mwenda Kanyamu has deponed that the defendant was pointed out to him by the plaintiff. Whereas the applicant has argued that his deceased father was never served, there was no application made to have the process server appear in court for cross examination on the affidavit of service filed.

13. The principles guiding the court in exercising its discretion in applications such as this have been settled. It is trite that the court has wide powers to grant such orders save that where the discretion is exercised, the court will do so on terms that are just.

14. In *Shah v Mbogo* (1967) EA 116 at page 123, it was stated

> " This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person

who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"

15. In the case of *Patel v Cargo handling services* Ltd (1974) 1EA 75 at page 76, sir Ruffus P stated thus;

> " There is no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just .... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view a defence that must succeed, it means as Sheridan J put it " a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".

16. In the case of *James Kanyiita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR, the Court of Appeal stated thus-:

> " 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 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 judgement was entered, whether the intended defence raises triable issue, 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 EA 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 justiae, 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 consideration 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"

17. In the instant case, it is quite clear that the defendant was served and was always aware of the case before his demise. The judgment that was entered against the defendant was therefore regular. In my considered view, the applicant has not presented before court any good ground to warrant the grant of the orders sought. Although the applicant stated that the defendant was unwell at the time of service, there was no evidence presented to support the alleged sickness. Even the certificate of death on record

indicates that the deceased died of old age. Further, no draft defence has been exhibited to enable the court decide whether there is any triable issues. The court has also noted that the application was brought after an inordinate delay of over nine (9) years. Further in the affidavit in support of the application, the applicant admits after judgment, the suit land has already been sold to a third party.

18. By reason of the foregoing, I find that the notice of motion datedNovember 21, 2018lacks merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF OCTOBER, 2022.

In presence of

C.A Mwenda

Karanja for defendant

No appearance for plaintiff

C.K YANO

ELC JUDGE