



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 230 OF 2016

EMILY KOECH.....PLAINTIFF

VERSUS

ZIPPORAH NYAMOITA MWANGI.....1ST DEFENDANT

UASIN GISHU COUNTY LAND REGISTRAR...2ND DEFENDANT

RULING

This ruling is in respect of an application dated 6th February 2018 brought by way of notice of motion by the defendant /applicant seeking for orders:

- a) Spent
- b) That leave be granted to the firm of Morgan Omusundi Law Firm Advocates to come on record for the 1st defendant.
- c) That there be stay of execution of the judgment or decree in this matter pending hearing of this application *inter partes*.
- d) The ex-parte judgment entered against the defendant in default of appearance plus all the consequential ex-parte proceedings and orders be set aside and leave be granted to the 1st defendant to enter appearance and file defence out of time.
- e) Costs be borne by the respondents.

This matter came up for hearing of this application under certificate of urgency when the court granted Morgan Omusundi Law firm Advocates leave to come on record for the 1st defendant after Judgment. The court ordered that the applicant serve the application within 7 days for inter partes hearing. The same was served and Counsel agreed to canvass the application vide written submissions.

Defendant/applicant's submissions

It was Counsel's submission that the 1st defendant was not served with summons to enter appearance or any hearing notices or process apart from the ex parte judgment and eviction orders. It was further Counsel's submissions that the replying affidavit vehemently opposed the application but did not state how the process was served on the applicant.

Mr. Omusundi also submitted that the 1st defendant will suffer great prejudice if the ex-parte judgment is not set aside and it would be in the interest of justice for the 1st defendant to be granted leave to defend the suit. He cited the case of Kamau Mwangi versus Wambui Kariuki (2012)eKLR where Mwilu J (as she then was) had quoted from the celebrated case of Abraham Kiptanui versus Delphis Bank Ltd & Anor. HCCC No. 1864 of 1991 (unreported) as follows:

"Once it is established that a judgement on record is irregular it must be set aside as of right. There are no two ways about it. The same is not susceptible to any variation. Its only fate is vacation from the record. Such a judgement is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

He also cited the case of Kimani v McConnell case referred to in the Maina v Mugiria case as follows:

“Some of the matters to be considered when an application is made are the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel [1966] EA 547, 555F)”.

Counsel submitted that the 1st defendant's defence raises triable issues and if the said ex-parte judgment is not set aside, she would be condemned unheard which is contrary to the rules of natural justice. He urged the court to allow the application as prayed.

Respondent's Submissions

The respondent herein opposed the application for setting aside judgment and relied on the replying affidavit as filed in this matter. Counsel stated that the applicant has not opted to cross examine the process server, who swore the affidavit of service and that the contents of the affidavit have not been controverted. It was further Counsel's submission that the draft defence filed by the applicant does not have any plausible points to controvert the plaintiff's claim. He therefore prayed that the application be dismissed with costs, and further proceed to order that, the applicant do vacate the said land within two weeks.

Analysis and determination

The issues for determination in applications for setting aside judgments are as to whether there is a defence on the merits, whether there would be any prejudice to the plaintiff and lastly what is the explanation for the delay.

It should be noted that the court has unfettered discretion to set aside ex parte judgments but this discretion must be exercised judiciously so as not to cause injustice to either party. It was held in the case of *Shah -vs- Mbogo* [1967] EA166 at page 123B as follows:-

‘this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.’

The court must consider each case on its own merits and not a blanket cheque for the applicant who may have deliberately ignored court summons to enter appearance only to realize the seriousness of the default after judgment. The setting aside of ex parte judgments is not to aid a negligent and indolent party. It is meant to do justice for both parties as natural justice applies to both parties.

Before I deliberate on the gist of the application, I wish to point out that there is a tendency of Counsel not being very keen on documents being filed in court especially affidavits which require signatures of the deponents and attestation. Some of the affidavits are neither signed nor attested to. Some do not have dates when they were sworn or attested to. For an affidavit to be treated as such then it must bear the signature of the deponent, date and it must be attested to by a commissioner for oaths or a Magistrate.

The reason I am stating this is because the respondent treated this application casually by not signing the affidavit which she intended to rely on to oppose this application. So when an affidavit is not signed by the deponent, does it pass as an affidavit? This should not be said to be a technicality as it forms the core of an affidavit. The replying affidavit therefore is expunged from the court record. Having expunged the affidavit from the court record, it follows that the application is not opposed.

On the issue whether the applicant has a reasonable defence, the 1st defendant has annexed a draft defence and counterclaim which raises issues which should go on full trial. The defendant has claimed that she has been in occupation for more than 15 years. The application was also brought without delay when the applicant was served with the decree and judgment. The plaintiff has also not stated that she would suffer any prejudice if the judgement is set aside. The defendant is the one in occupation and the plaintiff is seeking for the orders of eviction. Further I also find that the plaintiff did not address the issue of service whether it was effected procedurally or not.

It was held in the case of **Tree Shade Motors Ltd -vs- DT Dobie &Anor [1995-1998] 1EA 324** that:-

‘Even if service of summons is valid, the judgment will be set aside if defence raises triable issue. 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.’

I have considered the pleadings, submissions of counsel and find that this application has merit and therefore exercise my discretion to set aside the judgment entered on 18th October 2017 with all the consequential orders. I order that the 1st defendant pay thrown away costs of Kshs. 15,000/ within the next 21 days, file defence within 15 days failure of which the order lapses.

Dated and delivered at Eldoret this 3rd day of July 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of Miss Kisei holding brief for Andambi for Plaintiff/Respondent and Miss Khadambi holding brief for Omondi for 1st Defendant/Plaintiff.