



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 92 OF 2017

WILLIAM ANYUMBA NDARA.....PLAINTIFF

VERSUS

1. DANCAN MWAKIDEU

2. LYDIA CHOLA.....DEFENDANTS

AND

MOMBASA COUNTY GOVERNMENT.....INTERESTED PARTY

RULING

1. The defendants/applicants in the notice of motion dated 8th September 2020 seek for the following orders:

1. Spent

2. That the interlocutory judgment entered herein for the plaintiff against the defendants and all consequential orders thereto be set aside.

3. That the defendants be granted leave to enter appearance and file their statement of defence out of time.

4. That this honourable court be pleased to make any other or such further orders as it may deem fit and just to grant.

5. That costs of this application be provided for.

2. The application is based on the grounds set out in the body of the motion and supported by the affidavit of Duncan Mwakideu Chola and Lydia Shiabanga Isenye sworn on 8th September, 2020. The defendants aver that they have never been served with summons to enter appearance nor any pleadings at all in this case. That they have a good defence on merits as against the plaintiff's case and therefore they should be granted and accorded an opportunity to ventilate the same. A draft statement of defence has been annexed. It is the defendants' contention that the judgment obtained by the plaintiff against them is irregular since there was no service of summons and that in the interests of justice and fair play, the same should be set aside. The defendants aver that their attention of the existence of the suit herein was drawn by a family friend lawyer who saw their names in a cause list of this Honourable Court sometime in mid-2020. The defendants aver that the affidavit of service sworn by one Nickson Nyange Rodgers Mabishi is full of falsehoods, adding that they reside at Vescon Estate in Bamburi and not at Magongo, Changamwe as stated by the said process server in his affidavit of service. The defendants further aver that the property in question belongs to one Christine Mesi who is now deceased and who was mother to the 2nd defendant whom the plaintiff harassed over time over the same property, including instigation and institution of a criminal case against her at the Municipal Court for flouting the Municipal By-Laws and for which she was acquitted. Copies of proceedings and judgment in Mombasa RMC Criminal case No. 1279 of 2014 have been annexed. It is stated that over the years, the plaintiff has hatched several schemes to take up the said property including filing the present suit. The defendants urged the court to allow the application to enable them participate in the case.

3. In opposing the application, the plaintiff filed a replying affidavit sworn by himself on 24th February 2017. The plaintiff avers that the defendants were duly served but chose not to participate in these proceedings and that the application has been brought in bad faith. It is the plaintiff's contention that the defendants have no defence and that what they seek to use as defence is a mere denial of facts which does not address the issues raised. The plaintiff avers that the application is vexatious and an abuse of the court process and urged the court to dismiss the same.

4. Both parties filed written submissions in support of their rival positions and relied on decided cases.

5. I have considered the application together with the affidavit in support and against. I have also considered the submissions made and the authorities cited. The principles guiding the court in exercising its discretion in applications such as this are well 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.

6. In the case of **Shah-v- Mbogoh (1967)EA 116**, 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.”

7. In the case of **Patel –v- E. A Cargo Handling Services Ltd (1974), EA 75** it was stated:

“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. ”

8. In this case, the defendants have stated that they were never served with the summons to enter appearance and the pleadings. I have perused the court record. In the affidavit of service signed by Nickson Nyange Rodgers Mabishi on 31st October, 2017 and filed in court on 14th February, 2018, the process server has deponed that on 4th May, 2017, he was accompanied by the plaintiff to a certain residential house situate within Magongo area, near medical clinic, along Mkomani Road, Mombasa where he was informed by the plaintiff that it was where the defendants herein reside, and that upon arrival, he found a lady and a gentleman who were identified by the plaintiff as the defendants. That he approached them and introduced himself and the purpose of his visit and that the two said persons confirmed that they were the defendants. It is stated that the defendants accepted service by retaining copies but declined to sign on the returned copies. As already stated, the defendants have averred that they were never served with the summons nor any pleadings. From the material before me, it is clear that this is a case of the process server’s word against that of the defendants. I have also perused other affidavits of service filed. In all of them, the defendants are said to have accepted service but declined to sign. The defendants have also stated that they reside at Vescon Estate in Bamburi and not at Magongo in Changamwe. This allegation was not challenged by the plaintiff. It is therefore doubtful whether the defendants were served as alleged by the plaintiff.

9. I have also looked at the draft defence filed. The plaintiff’s case is that the defendants have encroached onto his land. In the proposed defence, the defendants have denied the plaintiff’s claim in total, and have put the plaintiff to strict proof thereof. The defendants have also stated that the property in question belongs to one Christine Mesi (deceased) who was mother to the 2nd defendants. One of the annexures in the affidavit in support of the application herein are copies of criminal proceedings and judgment in Criminal Case No.1279 of 2014 at the Resident Magistrates’ Court at Mombasa in which the said Christine Mesi was the accused, and was acquitted of charges of erecting a structure without first obtaining approval plan and consent of the landlord, failing to identify plot boundaries, encroaching on a neighbouring plot and public road. In my view, the defence raises triable issues which call for trial. The plaintiff has not demonstrated how he will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit. The overriding objective of the court would no doubt come to the aid of the defendants/applicants.

10. In the result, I find merit in the notice of motion dated 8th September, 2020 and the same is hereby allowed. The defendants are directed to file and serve their defence within 14 days from the date of this ruling. Considering the circumstances of this case, I order that costs shall be in the cause.

11. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF JULY 2021.

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C.K. YANO

JUDGE

In the presence of:

Mokaya for defendants

Magolo for plaintiffs

Court Assistant – Yumna

C. K. YANO

JUDGE