



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII

ELC CASE NO 1021 OF 2016

(FORMERLY CIVIL SUIT NO. 371 OF 2012)

FRANCIS MOSE KEBASO.....PLAINTIFF /RESPONDENT

VERSUS

HARRISON MOKAYA KEBASO.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Defendant/Applicant filed a Notice of Motion dated 29th January 2021 seeking an order of stay of execution of the decree and all consequential orders made on the 23rd October, 2019. He also seeks an order that the Defendant/Applicant be granted leave to file his Defence out of time.
2. The application is based on the grounds contained in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 29th January, 2021 in which he averred that he was not served with the Summons to enter Appearance, Complaint, Witness Statements and other documents. He further averred that he has been in open, peaceful and uninterrupted occupation and utilization of the suit land for over 12 years and that he has extensively developed the same.
3. It was his contention that if the decree herein is executed, him and his family members would be rendered landless despite having paid loan arrears in respect of the suit property amounting to Kshs. 7,558.
4. He averred that he had filed the application timeously and in good faith and he thus deserves the orders sought.
5. In response to the application the Plaintiff/Respondent filed a Replying Affidavit sworn on the 3rd March, 2021. He deponed that he filed this suit in 2012 and that he had served Summons to enter appearance upon the Defendant/Applicant. He averred that after being served with Summons to enter appearance, the Defendant appointed the firm of M/S Sonye Ondari & Co. Advocates who entered appearance on 25th October, 2012 and later filed a statement of Defence on his behalf on 13th November, 2012.
6. He further deponed that the said firm thereafter filed an application to cease acting for him which application was granted. He averred that after allowing the application for the said Advocate to cease acting, the court gave a hearing date and the Applicant was served personally through a private Process Server.
7. He contended that the case was thereafter heard on merit after which judgment was delivered. He averred that the notice of entry of judgment and decree were served upon the Defendant. It was his averment that the Plaintiff had been given 60 days to vacate the suit property but he failed to do so, forcing the Defendant to file an application seeking an eviction order. It was his contention that the Applicant only filed this application after he was served with the application for eviction.
8. The Plaintiff strongly believes that the Defendant has all along been aware of the existence of this case and its progress as he has always been served with the necessary court documents. It is his further contention that the issue of ownership of the suit property had already been determined in the Succession Cause whereby the Defendant's mother one Sabiri Nyaboni Omoso filed an objection but the same was dismissed and a Certificate of Confirmation of Grant issued to the Plaintiff. He is therefore of the view that the issue of ownership of the suit property should not be the subject of this application.

BACKGROUND OF THE CASE

9. Before delving into the merits of this application, it is necessary to give a background of this matter. The Plaintiff, who had previously

been acting on behalf of his late mother commenced this suit vide a Complaint filed on 10th October, 2012 which was later amended on 22nd June 2018 seeking the following reliefs:

- a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession, occupation and user of all that land known as LR NO. MATUTU SETTLEMENT SCHEME/620;
- b) A declaration that the Defendant whether by himself, servants, agents, assigns or otherwise howsoever is unlawfully in occupation, possession and use of the suit property and is equally a trespasser;
- c) A permanent injunction restraining the Defendant whether by himself or his agents, servants, assignees or otherwise howsoever from remaining or continuing in possession, occupation and user of the suit property
- d) Eviction from the suit property and/or surrender vacant possession of the suit property
- e) Costs of the suit and interest; court rate; and
- f) Any other or better relief the Honourable Court may deem fit to grant.

10. The Defendant through the firm of M/S Sonye Ondari & Co. Advocates filed a Memorandum of Appearance on 25th October 2012, together with a Statement of Defence denying the Plaintiff's claim.

11. The matter was mentioned on 19th May, 2014 to confirm whether the parties had complied with pre-trial directions given on 23rd July, 2013 when the matter came before this court for the first time. On this date both advocates for parties were present and counsel for the Defendant sought more time to comply with the Pre-trial directions.

12. On 15th December, 2014 the matter came up for hearing and counsel for the Plaintiff indicated that he was ready to proceed with two witnesses who were present in court. However, the counsel for the Defendant was not ready to proceed on the grounds that he had not managed to trace his client, (the Applicant) because the mobile number that he had given him was not going through. The court allowed the application for adjournment and the Defendant was ordered to pay adjournment fees before the next hearing date.

13. On 10th December, 2016 the representative of the firms representing the parties and parties themselves appeared before the Registry to fix the matter for hearing and the matter was fixed for hearing on 23rd May, 2016 by consent.

14. On 23rd May, 2016, when the matter came up for hearing, both the Defendant and his Advocate failed to attend court despite having been present when the hearing date was taken. The court then allowed the Plaintiff to proceed with the hearing.

15. However, in the course of the Plaintiff's testimony the court discovered that his mother, Prisca Moraa who had donated a power of Attorney to the Plaintiff to act on her behalf had died and he was therefore stood down to allow for the appropriate substitution of the Plaintiff.

16. In the meantime, on 26th April, 2018, the firm of M/S Sonye Ondari & Co. Advocates filed an application to cease acting for the Defendant and the same was allowed. The application to substitute the original Plaintiff was also granted. The court further granted the Plaintiff leave to file an Amended Complaint within 21 days and serve the same upon the Defendant in person.

17. After confirming that the Defendant had been served with the Amended Complaint, the court fixed the case for hearing on 26th February, 2019. On the hearing date, the Court upon being satisfied that the Defendant had been served, allowed the matter to proceed ex-parte. On 23rd October 2019 the court delivered its judgment in favor of the Plaintiff.

18. On 3rd August, 2020, the Plaintiff/Respondent filed a Notice Motion seeking an order of eviction against the Defendant after the expiry of the 6-month period given to the Defendant to vacate the suit property. However, the Plaintiff's application was placed in abeyance awaiting the hearing and determination of this application.

ISSUES FOR DETERMINATION

19. Having considered the application, the response by the Respondent and the rival submissions filed by the parties, the main issue for determination is whether the Applicant is entitled to a stay of execution and whether the ex parte judgment of this court delivered on 23rd October, 2018 should be set aside.

ANALYSIS AND DETERMINATION

20. The principles for the setting aside of ex parte judgments were considered by the predecessor Court of Appeal for East Africa in **Mbogo v. Shah** (1968) EA 93, 95 referred to in **Pithon Waweru, Maina v Thuka Mugiria (1983) eKLR** as follows:

“Two questions arise on this appeal. The first is the circumstances which would justify a judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.”

21. In **Mbogo vs Shah** (supra), it was held that:

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

22. In the case of **Ongom -v- Owota**, it was held that:

*“the court must be satisfied that either the Defendant was not properly served or failed to appear in court at the hearing due to sufficient cause. The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court(see **Sebei District Administration -v- Gasyali**)”.*

23. In this instant suit the Applicant alleges that the reason he wants the *ex-parte* judgment set aside is that he was not served with Summons to enter appearance. Having perused the record, I note that the Defendant is being dishonest when he avers in paragraph 4 of his Supporting Affidavit that he was not served with Summons to enter appearance, witness statements verifying affidavit and any other documents related to this case. This is because the Defendant entered appearance and filed a Defence through the firm of Sonye Ondari & Co Advocates. The said firm of advocates later formally withdrew from the matter and the firm of Anyona & Co. Advocates filed a Notice of Change of Advocates. I also note from the record of the court that the Applicant was present in court on 23rd May, 2016 when the matter was first listed for hearing. How did he know about the hearing date if he had not been served?

24. The Applicant also alleges that he was not served with the Amended Plaint as ordered by the court. Counsel for the Plaintiff/Respondent had indicated that he was ready to cross examine him and had averred so in his affidavit. I have perused the Court record and it is clear that the Applicant was served with several documents including the Amended Plaint, Notice of Entry of judgment *inter alia*. Apart from the learned counsel’s argument in the written submissions that the Plaintiff was ready to cross examine the Defendant, there is nowhere in the supporting and further affidavit where the Applicant averred that he was ready to cross examine the Process Server. I also note that the Applicant did not make any request to this Court for the Process Server to be summoned for purposes of being cross examined regarding service. That being the case, I find that there is no sufficient evidence to controvert the evidence tendered in the Affidavits of service on record that the Applicant was served with the Amended Plaint and Hearing notice.

25. All in all, I am not persuaded that the Applicant has a satisfactory explanation as to why he failed to attend court. The Applicant was all along aware of the suit. Since 2014 he never made any effort to follow up on his case until 2020 when he was served with an application seeking his eviction from the suit property. He could not have left the suit against him in the hands of his advocates only to show up in court 6 years later claiming that he was not aware of what had transpired.

26. In the light of the foregoing, I find no merit in the application and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF SEPTEMBER, 2021.

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J.M ONYANGO

JUDGE