



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 275 OF 2018

DANIEL GATUMA MUTUA & 10 OTHERSPLAINTIFF /RESPONDENTS

VERSUS

HON ATTORNEY GENERAL..... 1ST DEFENDANT /REPODENT

LAND REGISTRAR, THIKA2ND DEFENDANT/RESPONDENT

T. MASHAERI MAKORI 3RD DEFENDANT /APPLICANT

JACKSON WACHITA WANGONDU T/A MWAMUKI
B.....4TH

INVESTMENT
DEFENDANT/RESPONDENT

JOSEPH WANJOHI MBURU T/AMBURU MWENDIA INVESTMENT....5TH DEFENDANT/RESPONDENT

WILLIAM NJURUMBA MUHIA T/A MBURU MWENDIA INVESTMENT.....6TH DEFENDANT /RESPONDENT

RULING

1. The 3rd Defendant/Applicant filed the instant Notice of Motion dated 24/8/2021 for Orders THAT;

a. Spent.

b. Spent.

c.This honorable Court be pleased to set aside its Judgement and Decree given on 15th July 2021 together with all consequential orders thereto and subject this suit to full hearing and determination on merit.

d. This honorable Court do issue summons to DUNCAN KIMANI MUGO for examination on the contents of the affidavit of service sworn on the 21st December 2018.

e. This Honorable Court do issue a temporary order against the Respondents their agents, representatives, assigns, and anybody acting for them restraining them from alienating, attending, interfering with the Applicants peaceful occupation and enjoyment of the parcel of land known as LR THIKA MUNICIPALITY BLOCK 6/1108 pending the hearing and determination of this suit.

f. Costs of this application be provided for.

2. The application is based on the grounds on the face of it and Supporting Affidavit of the Applicant, **T. Mishael Makori** sworn on even date. It is his case that he is the registered owner of land parcel **LR THIKA MUNICIPALITY BLOCK 6/1108** hereinafter referred to as the suit land. That he has been in occupation and possession of the suit land to the exclusion of any other person.

3. That sometime in November 2018, he received copies of plaint and summons to enter appearance and instructed his current firm of Advocates to enter appearance and file a defence. This was done on 26/11/2018 but they were never served with any ensuing document or date least of all pre-trial or hearing date. That it was not until 19/8/2021 when police from Makongeni Police Station entered the suit property and arrested the Applicant's staff on site with trespass allegations. He then became aware that the Plaintiff had according to him, fraudulently

and maliciously obtained a judgement and decree by lying to this Court. The deponent stated that he was never served with summons to enter appearance on the 19/11/18 nor met Duncan Kimani Mugo at the alleged car wash business at Kiganjo Shopping centre.

4. The Applicant maintained that his pleadings are properly in the Court file and never been struck out. That the request for interlocutory judgment was made on 10/6/2019, six months after he had filed his defence and accompanying documents. However, he denied ever being served with Notice of entry of such judgement against him. He denied selling the suitor any part of the suit land thereof and indicated the Plaintiffs' respective parcels of land are distinct from the suit land. He implored the Court to allow his application.

5. Objecting to the Application, the Plaintiffs/Respondents filed detailed grounds of opposition dated 9/9/2021. They termed the application incompetent, an abuse of the Court of process and full of contradictions. That instead the Applicant has repeatedly and throughout the pendency of the suit tried to dispossess them of the suit land using a fraudulent title. That in the absence of evidence of service of the filed memorandum of appearance and defence as averred by the Applicant, the prayer to set aside the judgment of 15/7/2021 is incurably defective. That the Court perused the record before commencing the hearing and satisfied itself that there was no valid service of the said pleadings upon the respondents.

6. Further that the 1st and 2nd Defendants did not adduce any evidence to prove the validity of the Applicant's title. That they did not appeal against the Court's judgment as provided for in law and the judgement being 'jointly and severally' against the 1st, 2nd and 3rd Defendants, the Applicant's attempt to set it aside is unmerited and bad in law. They also faulted the Applicant for failing to demonstrate the process leading to acquisition of the suit land. The respondents reiterated the Court's judgment that the Applicant acquired the certificate of lease while they were in occupation. They defended the said Judgment as procedurally proper, lawful and legal and urged the Court to dismiss the application with costs.

Analysis and Determination

7. On 26/11/2021, directions were taken to canvass the application through written submissions. None of the parties complied as at 22/11/2021. Additionally, the Applicant's counsel informed the Court that he would wish to file a further affidavit but failed to do so. The Court was therefore denied the benefit of the submissions of the parties.

8. The Plaintiffs filed suit on the 12/10/2018 against the Defendants. On the 13/11/2018 summons to enter appearance were issued by the Court. Pursuant to the affidavit of Duncan Kimani Mugo, the process server, sworn on the 21/12/2018, the 3rd Defendant was served on the 19/11/2018 at his car wash near Kiganjo Trading center, Thika. The averments of the Applicant at para 4 of the application are that he was never served with the summons to enter appearance on the 19/11/2018. The same averments are repeated at para 9 of the application and further that he has never met Duncan Kimani Mugo, the process server. He disputed ever owning a car wash business at Kiganjo. For the Court to discount the affidavit of the said process server, it was for the Applicant to table evidence to the contrary. It is trite that where a party is disputing service, the onus rests on him to prove that he was not served. The Applicant undertook to do that in his pleadings but to the extent that he has elected not to, the Court is right to make the presumption that based on the documents on record, the Applicant was duly served. The Court may not know the exact details of the service suffice to say that there is evidence that the Applicant filed his elaborate pleadings which can only have been prompted by the notification of a suit in Court.

9. The respondents have argued that the Applicant failed to serve the memorandum and defence within the prescribed time. **Order 7 rule 1 of the Civil Procedure Rules** provides as follows;

“Where a Defendant has been served with a summons to appear he shall, unless some other or further order be made by the Court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.

10. The prescribed time within our procedural laws is 14 days upon service which means the Applicant ought to have served the Respondents by 11/12/2018 or thereabouts. There is no evidence that this was complied with.

11. What are consequences of non-service of the memorandum of appearance and defence? **Order 10 Rule 3 Civil Procedure Rules** provides that where a Defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the Court may on its own motion or on application by the Plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances. (emphasis is mine).

12. I have perused the record and I think the respondents/Plaintiffs are being truthful when they state that they were not served. I say so because of the absence of reply to defence of the 3rd Defendant and the submissions made in the opening statements on the date of the hearing when Mr Gitau informed the Court as follows;

“Mr Gitau; the 3rd Defendant did not file any appearance. We have filed a request for interlocutory judgement.”

13. Indeed, the Court record attests to the fact that the respondents filed a request for judgement on the 3/6/2019 in the following terms;

“Kindly enter interlocutory judgement against the 3rd Defendant herein. The 3rd Defendant was served with the plaint on the 12/11/2018 herein and the summons to enter appearance dated the 13/11/2018 thereof on the 19/11/2018 but he has defaulted and or refused to enter appearance and or file his defence.”

14. Under Order 10 rule 6 of the Civil Procedure Rules, where the claim is for unliquidated sum or which requires evidence to establish and prove and the Defendant fails to enter appearance the Plaintiff may make a request for judgement in default and the Court shall enter

interlocutory judgement after which it shall be incumbent upon the Plaintiff to set down the matter for formal proof.

15. In this case upon receipt of the request for judgment, the Court directed that the parties comply with Order 11 of the Civil Procedure Rules and prepare the case for hearing. One may say that clearly a step was missed when the Registry failed to enter judgement against the 3rd Defendant. Being unliquidated claim the route the Registry took is in my considered view the correct one.

16. Back to the failure of the Applicant to serve the defence upon the Plaintiffs. Now that none of the two actions were taken to strike out the Applicant's pleadings, the same remained alive on record. It is my finding that the request for judgement should not have been entered or directions should not have been given for the formal proof hearing because the pleadings of the Applicant were all along on record. That said it is my finding that the Applicant contributed to the state of these affairs by failing to serve the memorandum of appearance together with the defence and I shall make the appropriate orders in the end.

17. In the case of **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE (1982-88) 1 KAR 1036** the Court stated:-

“The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure”

18. At Page 1040 of the said judgment, the Judge added:

“I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

19. In addition, our Constitution speaks very loudly at Article 50, on fair hearing;

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court...”

20. In this case it is the finding of the Court that this is a case that I should exercise discretion and set aside the judgment so that the parties may be heard on merit.

21. With respect to the prayer for injunction, guided by order 40 rule 1 of the Civil Procedure Rules, this Court orders status quo be maintained pending the hearing and determination of the suit.

22. Although costs are awarded pursuant to the discretion of the Court, and costs follow the event, in this case though the Applicant has succeeded, I order that he pays throw away costs in favour of the Defendant in the sum of Kshs 30,000/- payable within the next 30 days.

23. Thereafter parties are directed to fix the matter for hearing on priority basis.

24. Final orders & disposal;

a. The Judgement and Decree given on 15th July 2021 together with all consequential orders thereto be and are hereby set aside and this suit to proceed to full hearing and determination on merit.

b. Prayer (d) is spent.

c. Status quo be maintained pending the hearing and determination of this suit.

d. The Applicant to pay throw away costs in the sum of Kshs 30,000/ in favour of the Plaintiffs within the period of 30 days from today.

25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mr. Gitau for 1st – 11th Plaintiffs

1st Defendant – absent

2nd Defendant – absent

Nyaberi for the 3rd Defendant

4th – 6th Defendants – absent

Ms. Phyllis Mwangi – Court Assistant