



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.41 of 2008

JOHN KIPKOROS KILEL.....PLAINTIFF

V E R S U S

OMAR JUMA.....1ST DEFENDANT

SARAH SHEIKDON.....2ND DEFENDANT

MARY ACHIENG.....3RD DEFENDANT

JOSHUA LANGAT.....4TH DEFENDANT

NANCY TOO.....5TH DEFENDANT

RUTH BIOMDO.....6TH DEFENDANT

AGNESS WANJIRU.....7TH DEFENDANT

R U L I N G

1. The Application coming for consideration in this ruling is dated 13/5/2020 seeking the following orders.

i. THAT the matter is certified urgent and service be dispensed with in the first instance (SPENT)

ii. THAT this Court be pleased to issue an order of stay of Execution of the Judgment delivered on 28/7/2010, the decree issued therein, eviction order, the ruling dated 16th November, 2010 ruling dated 10/12/2019 and the Eviction Notice dated 17th April, 2020 pending hearing and determination of this Application interpartes.

iii. THAT this Court be pleased to set aside the Exparte Judgment entered herein against the 1st, 2nd, 6th and 7th Defendant/Applicants

iv. THAT pursuant to granting prayer No.3 above, this Court be pleased to grant the 1st, 2nd, 6th and 7th Defendant/Applicants leave to file their statements of defence.

v. THAT the costs of this Application be borne by the Plaintiff/Respondent.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of the 1st Defendant/Applicant in which he has deposed as follows:-

i. THAT the has authority from the 2nd, 6th and 7th Defendant/Applicants to swear this Affidavit

ii. THAT the summons to enter appearance herein were not served upon him and upon the 2nd, 6th, and 7th Defendant/Applicant.

iii. THAT the Affidavit of service which was relied on to obtain the interlocutory Judgment was in contravention of the mandatory requirements of order 5 of the Civil Procedure Rules and further, that Article 50 of the Constitution guarantees every individual the right to a fair hearing of any claim leveled against them.

- iv. THAT the Defendant/Applicant have a good defence with triable issues that they intend to ventilate in a full trial.
- v. THAT they came to know about this case when they were served with the Notice of Eviction dated 17/4/2020.
- vi. THAT they are ready to abide by any directions or conditions set out by this court.
- vii. THAT the Defendant/Applicants will suffer irreparable loss unless the orders of stay of Execution are granted.

3. The Plaintiff/Respondent opposed the Application and filed a Replying Affidavit dated 21/5/2020 sworn by JOHN KIPTORUS KILEL(the Plaintiff/Respondent) in which he has deposed as follows:-

- i. THAT the said application is defective as the deponent of the Supporting Affidavit did not file authority by the 2nd, 6th and 7th Defendants to plead and swear Affidavits on their behalf.
- ii. THAT the Plaintiff/Respondent is the duly registered lessee from the Government of Kenya according to the annexed copy of title and copy of rent clearance certificate.
- iii. THAT the Applicants have not demonstrated any legal interest over the suit property except confirming that they are indeed trespassers.
- iv. THAT the matter proceeded Exparte against some of the Defendants but the trial court was satisfied that the Defendants were duly served with the summons to enter appearance and the hearing notice
- v. THAT THE 3RD, 4TH AND 5TH Defendants managed to participate in the proceedings and yet all of them live on the same suit property
- vi. THAT the 1st, 2nd 6th and 7th Defendants have not demonstrated that they have an arguable defence if given opportunity to be heard as they allege that the suit property belongs to the County Government of Kericho.
- vii. THAT all the Defendants vide letter dated 27/05/1997 addressed to the Senior District Commissioner, Kericho District confirmed that the suit property had been allocated to the Plaintiff and that they were seeking for an alternative place to be given to them
- viii. THAT the Applicants who have confirmed that they have only erected temporary structures have not demonstrated that they have been in occupation of the suit property from 1980s.

4. The parties filed written submissions in this application which I have duly considered. The Applicants submitted that they were not served with the summons to enter appearance or file a defence and therefore the Exparte Judgment should be set aside Ex debito Justitiae as a matter of right.

5. The Applicants further submitted that the Court has unfettered and unrestricted jurisdiction to set aside an Exparte Judgment and the test for setting aside an Exparte Judgment are as follows:-

- i. Whether there is a defence on merits.
- ii. Whether there would be any prejudice to the Plaintiff.
- iii. What is the explanation for any delay?

6. The Plaintiff/Respondent submitted that the process server from his Affidavit of Service filed in Court effected personal service on the Applicants and the Court entered interlocutory Judgment against the Applicants and the other Defendants and further that the other Defendants were granted leave to file their joint defence out of time but they failed to do so.

7. The Plaintiff/Respondent submitted that the hearing notice was also properly served and the court ordered that the hearing proceeds exparte. Further that the Applicants who alleged that they were not served did not call for Examination of the process server.

8. The Plaintiff/Respondent also submitted that the Applicants have not shown that they have a defence that raises triable issues or other justifiable reasons to warrant setting aside of the judgment.

9. Further, that the suit property is not in the names of the Applicants and neither have they demonstrated any proprietary interest capable of being litigated.

10. The issues for determination in this Application are as follows:-

- i. Whether the Judgment herein is regular.**

ii. Whether the defence by the Defendant/Applicants raises triable issues.

iii. Whether the Exparte judgment herein should be set aside.

iv. Who pays the costs of the Application?

11. The Court entered interlocutory Judgment pursuant to an Affidavit of service dated 13/2/2009 in which the process server stated that he served the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants with summons to enter appearance and the plaint herein on 13/1/2009 and I find that judgment herein is regular.

12. The Court has a discretion to set aside an exparte judgment under certain circumstances.

13. In the case of **Shah vs Mbogo (1967) EA 166**, the Court held as follows on the issue of exercising the discretion to set aside ex-parte judgments;

“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.”

14. The discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties and the Court must consider whether the Applicant has a defence that raises any triable issues.

15. In the case of **Patel vs E.A. Cargo Handling Services Ltd (1974)**, the Court held as follows;

“That where there 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 the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.”

16. The Court also held in the case of **Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324** as follows;

“Even if service of summons in valid, the judgment will be set aside if defence raises triable issues. 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.”

17. There is evidence that the 1st, 2nd, 6th and 7th Defendant/Applicants occupy the same suit property with the 3rd, 4th and 5th Defendants who entered appearance but did not file any defence and the hearing proceeded Ex-parte.

18. I find that the draft defence filed by the Applicants herein raises no triable issues.

19. I find that the Applicants alleged that the Plaintiff/Respondent obtained the title fraudulently but no particulars of fraud are pleaded.

20. The Plaintiff/Respondent has title documents and he has demonstrated that he pays rent and rates to the County Government of Kericho.

21. I find that there is no basis for setting aside the exparte Judgment herein as the same is regular and the Defendant/Applicants have not demonstrated that they have a defence that raises triable issues.

22. I accordingly find that the Application dated 13/5/2020 lacks in merit and the same is dismissed with costs to the Plaintiff/Respondent.

Delivered, signed and dated at Kericho this 6th day of November 2020.

A. N. ONGERI

JUDGE