



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 195 OF 2018

(Formerly Nairobi ELC No. 1061 of 2015)

LETOIRE OLE NTIRORI.....PLAINTIFF

VERSUS

DANIEL MWARIA KINYINGI.....1ST DEFENDANT

DAVID NGUMO WACHIRA.....2ND DEFENDANT

MOHORU NJOROGE.....3RD DEFENDANT

JAMES GITHIGI NJOROGE.....4TH DEFENDANT

AND

ROBERT KOMBO NYAKANGO.....1ST APPLICANT/INTERESTED PARTY

DOMINIC MOCHABO MAOBE.....2ND APPLICANT/INTERESTED PARTY

RULING

What is before Court for determination is the Defendant's Notice of Motion dated 25th May, 2018 and Applicants/ Interested Parties' Application dated the 17th January, 2019. The Application dated 25th May, 2018 is brought pursuant to sections 3, 4(2), 13, 18 & 19 of the Environment and Land Court Act; Order 10 Rule 11, & Order 51 of the Civil Procedure Rules. The application dated the 17th January, 2019 is brought pursuant to section 3, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rules 2(1) & (3) as well as Order 50 Rules 1 & 2 of the Civil Procedure Rules. In the Application dated the 25th May, 2018, the Defendants seek for the judgement entered against them to be set aside and they be granted leave to file their Statement of Defence as per the annexed Draft. In the application dated 17th January, 2019, the Applicants seek leave to be enjoined as Interested Parties and for the setting aside of the default judgment entered against the Defendants.

The first application is premised on the summarized grounds that the Defendants were never served with summons to enter appearance. Further, that they legally acquired land parcel number Kajiado/ Kitengela/ 2603 from Mr. Letoire Ole Ntirori. The Defendants only became aware of the instant suit upon being served with pleadings for the High Court at Kajiado Judicial Review No. 20 of 2016. Ownership of Kajiado/ Kitengela/ 2603 has been determined by the Land Registrar's report in the High Court matter. Further, Judgment was entered based on the false Process server's affidavit. They have annexed a Draft Statement of Defence which raises serious issues which can only be resolved through trial. The Application is supported by the affidavit of DAVID NGUMO WACHIRA where he reiterates his claim above. The Plaintiff opposed the application by filing a replying affidavit where he confirmed that he indeed pointed out the Defendants to the process server who effected service upon them. The process server WYCLIFFE SHIKUKU M'MADA swore an affidavit explaining that the Plaintiff JOHN OSHUMU accompanied him to serve the Defendants with summons to enter appearance, whose receipt they acknowledged.

The second application is premised on the summarized grounds that the Applicants bought a portion of land Kajiado/ Kitengela/ 4102 measuring 4 acres from the 1st Defendant vide a Sale Agreement dated 26th May, 2000 for the sum of Kshs. 400,000/= only paid in accordance with the said Agreement. Further, land parcel number Kajiado/ Kitengela/ 4102 was subdivided on 28th June, 2000 into new parcels namely 11971 – 11974 with 11974 transferred to the 1st Applicant. Parcel number Kajiado/ Kitengela/ 11973 was transferred to the 2nd Applicant. Further, the Judicial Review No. 20 of 2016 dated 30th October, 2017 reaffirmed the entitlements of the Applicants who have established the existence of this suit that touches on their interests in respect to the aforementioned parcels of land. Judgment in default of

Defence was entered based on the false affidavit of service sworn by one Mr. Wycliffe Shikuku M'Mada. They have established that the Plaintiff died on 17th February, 2016 and no action should have taken place before he was substituted in the suit by his personal representatives.

The application is supported by the affidavit of ROBERT KOMBO NYAKANGO who reiterates their claim above.

The application is opposed by the Plaintiff who filed a replying affidavit sworn by JOHN OSHUMU where he deposes that the Applicants are introducing portions of land known as Kajiado/ Kitengela/ 4102; Kajiado/ Kitengela/ 5102; Kajiado/ Kitengela/ 11971 – 11974 which are not the subject lands in dispute herein. He contends that the subject matter in dispute is Kajiado/ Kitengela/ 2603. He insists there has never been any contractual relationship between the Plaintiff and the Applicants. Further, that the Applicants are strangers to the suit and propose to bring nothing but confusion herein. He insists the Applicants have not applied to be enjoined as co - defendants where their interest may be dealt with. He claims the Applicants have not shown the input they will bring to the suit in the pleaded fraud against the Defendants. He avers that the application by the Applicants is mischievous, vexatious, misconceived and an abuse of the court process, which ought to be dismissed in the first instance.

The Applicants, Defendants and the Plaintiff filed their respective submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 17th January, 2019 including the respective parties' affidavits and submissions, the following are the issues for determination:

- Whether the Applicants should be enjoined in this suit as interested parties.
- Whether the default judgment entered against the Defendants should be set aside.

As to whether the Applicants should be enjoined in this suit as interested parties. The Applicants in their submissions reiterated their claim and relied on Article 50 (1) of the Constitution. The Plaintiff submitted that the Civil Procedure Act and Civil Procedure Rules do not have provisions on joinder of an Interested Party. He relied on the cases of **Doune Farms Limited V Richard Soi & 4 Others (2017) eKLR; Marigat Group Ranch & 3 others V Wesley Chepkoimet & 19 Others (2014) eKLR and Trusted Society Of Human Rights V Mumo Matemu & 5 Others Petition NO. 12 of 2013** to buttress his arguments.

Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows: '*(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*'

Black's Law Dictionary, 9th Edition, and defines '*Interested Party*' as "*A party who has a recognizable stake (and therefore standing) in a matter*".

Further, in the case of **Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others (2015) eKLR** the Court defines an interested party as follows: '*(An) interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.*'

In associating myself with this decisions, I note the fulcrum of the suit herein revolves around ownership of the suit land herein which dispute is between the Plaintiff and the Defendants. Further, that the said land has since been severally subdivided. It is evident from the Land Registrar's report in the Kajiado HCCC Judicial Review No. 20 of 2016 that the Intended Interested Parties' parcels' of land all emanated from Kajiado/ Oloitikosh/ Kitengela/ 2603 which is the suit land herein. I hence beg to disagree with the Plaintiff that the Intended Interested Parties are strangers to the suit and propose to bring nothing but confusion herein. Further that they have not shown the input they will bring to the suit in the pleaded fraud against the Defendants. Insofar as he has cited authorities objecting to joinder of an Interested party, I wish to rely on Article 50 (1) of the Constitution which provides that: '**(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 or, if appropriate, another independent and impartial tribunal or body.**' It is against the foregoing that I allow the Interested Parties to be enjoined in this suit as I deem their involvement necessary in these proceedings to enable the court effectually and completely adjudicate upon and settle all questions involved in the dispute herein. Further, that they will be affected by the decision arising from the suit herein.

As to whether the default judgment entered against the Defendants should be set aside. Judgment in default of the Defence was entered on 8th June, 2016. The Applicants have sought to have the said judgment set aside claiming they were not duly served. The Applicants have relied on the cases of **Weld – Con Limited V China National Aero Technology International Engineering Corporation & Another Civil Suit No. 5 of 2017 and Evans V Bartlam (1937) AC 473** to buttress their arguments. The Defendants in their submissions sought for the process server to be cross examined on how he effected service. Further, they insist their Draft Defence raises triable issues as they were issued with valid titles.

Order 10 Rule 6 which stipulates thus: '**Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.**'

Order 10 Rule 9 provides that: ' Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.' While Order 10 Rule 10 of the Civil provides that: ' The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.' Further Order 10 Rule 11 stipulates thus: ' Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.'

In the instant case, the Plaintiff's obtained default judgement against the Defendants on 8th June, 2016. On perusal of the Plaint, I note the claim is not of a liquidated nature but the Deputy Registrar still proceeded to enter interlocutory judgment contrary to the provisions of Order 10 rules 6, 9 and 10 of the Civil Procedure Rules which have been cited above.

In the case of **Altana Corporation Limited v Clarence Matheny Leadership Training Institute; National Land Commission & another (Interested Party) [2019] eKLR** Justice Chacha Mwita while setting aside an interlocutory judgement stated thus: ' Once the court arrives at the conclusion that the judgment was irregular, it must set it aside as a matter of course. In this regard, the Court of Appeal stated in James Kanyita Nderitu & another v Marios Philotas Lilikas & another [2016] that;

"In an irregular default judgment...the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, as a matter of right. The court does not even have to be moved by a party. Once it comes to its notice that the judgment is irregular, it can set the default judgment on its own motion. In addition the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system"

29. The right to be heard was underscored by the Supreme Court of India in Sangram Singh v Election Tribunal Kotah 1955 AIR 425 thus;

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

The impugned default judgment though was not entered because the Applicant had not been served but because the default judgment was entered prematurely. That is before time allowed by the rules of procedure had lapsed. The action deprived the Applicant an opportunity to be heard and was therefore condemned unheard.'

Further in the case of **Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P** at page 76 stated:

"... 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".

The Plaintiff insists the Defendants were duly served, a fact they dispute. The Defendants have annexed a draft statement of Defence which they contend raise triable issues.

On perusal of the judgement I note it raises triable issues which cannot be determined once the suit is set down for hearing. In associating myself with the two decisions, I proceed to set aside default judgement and allow defendants to file their defense.

It is against the foregoing that I find the two applications dated 25th May, 2018 and 17th January, 2019 merited and will proceed to allow them. I grant the Defendants leave of 14 days to file and serve their respective Defences

Costs will be in the cause.

Date signed and delivered in open court at Kajiado this 3rd day of February, 2020

CHRISTINE OCHIENG

JUDGE