



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 54 OF 2018

JUDITH JULIA WANJIRO NJOROGEPLAINTIFF /RESPONDENT

VS

SAMUEL NGERU MWANGIDEFENDANT/APPLICANT

RULING

1. The Defendant filed the Notice of Motion dated 27/6/19 seeking orders that the judgment entered on 28/2/19 be set aside and the suit be heard on merit.
2. The application is brought under the provisions of Order 12 Rule 7 and Section 3A and on the grounds that the Defendant/Applicant was not served with the judgment notice and summons to enter appearance amid other Court documents. That the Defendant was not aware of the suit. That the Defendant Applicant has a good case with chances of success. That the suit relates to land, an emotive issue, and it is in the best interest of justice to grant the application.
3. The Defendant filed his supporting affidavit and echoed the grounds on the face of the application. He deposed that he was not aware of the suit until he was informed by the magistrate Court in Kandara CMCR 609/18 that there was a decree from this Court.
4. The Defendant has attached copies of affidavits of service and the proceedings of this Court. He deposed that on application, he was given a copy of the proceedings in April 2019.
5. The Plaintiff responded to the application and stated that the Defendant has always been aware of the suit and this application is intended to delay the execution of the judgement so that he continues with the destruction on the suit land. That the Defendant has no interest in the suit land.
6. That the Defendant is a violent man. That she made several attempts to serve him with the decree the last successful one was at Kandara law Courts when he accepted service after the Hon Magistrate warned him of the repercussions of declining service.
7. At the hearing of the application, the Applicant prayed that the judgment be set aside and the case be heard on its merit. That he was served with summons to enter appearance, plaint, certificate of urgency and the notice of motion in the month of May 2018 and upon receipt he proceeded to Thika Law Courts whereupon he was advised that the case was not filed at Thika.
8. The Respondent submitted that there is no defence that has been attached on the application. That the Defendant was served with the decree on 3/4/2019, the application has been brought with inordinate delay. Earlier the judgement notice was served as per the affidavit of service dated 25/2/19.
9. From the record, the Court entered ex parte judgment in favour of the Plaintiff on 28/2/19. The Court noted that the Defendant had been served with summons to enter appearance and the hearing notice which did not elicit his attendance on the hearing date. See paragraph 3 of page 2 of the judgment. The affidavits of service are also indicative of the manner in which the Defendant was served. The time and place is set out, the Defendant acknowledged service of summons and signed the process servers copies.
10. It is to be noted that the Defendant has not called the process server for cross examination. He however admitted receipt of service of summons and the pleadings in his supporting affidavit.
11. The proceedings are also clear that the Court ordered the Deputy Registrar to issue judgment notice to parties on 15/1/2019, the judgment was adjourned and delivered on 28/2/19 when the Defendant had been served with notice, See proceedings dated 15/1/19 and affidavit of service dated 25/2/19.

12. From the facts presented by parties during this application, it is also common ground that the Defendant was served with summons in May 2018 and the decree in April 2019 at Kandara criminal Court. This application was brought after the decree and proceedings had been received by the Defendant /Applicant.

13. Service of process is the procedure employed to notify the Defendant of the presence of a claim against him to enable the Defendant to respond to the proceedings before Court. In ancient Kingdoms service of summons was termed a royal edict that called for serious consequences such as punishment by death if not obeyed. In our jurisdiction the penalty for ignoring Court summons will ordinarily be a default judgement.

14. The provisions of Order 12 Rule 7 empowers the Court with discretion to set aside *ex parte* judgment where there was default of appearance by the Defendant. The Court has unfettered discretion to grant or decline the said orders and is guided by the overriding objectives set out in Sec 3A,1A and 1 B of the Civil Procedure Act.

15. The legal threshold for setting aside *ex parte* judgment was laid out in the case of **Patel Cargo –Vs-E. A Handling Services Ltd** [1974] EA75 and **Shah –Vs- Mbogo (1967) EA 116** as follows;

“Whether there is a meritable defence; the prejudice that will be occasioned to the parties; and explanation for the delay in bringing that application to set aside judgement. Where the summons were served and the Defendant failed to file defence and or enter appearance within the timelines the Plaintiff obtains a regular judgment. This judgment may be set aside on reasonable terms and conditions which the Court would deem fit in the circumstance.”

16. In the case of **Tree Shade Motors Ltd -vs- DT Dobie &Anor [1995-1998] 1EA 324** it was held that even if service of summons is valid, the judgement will be set aside if defence raises a triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, 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* judgement aside.

17. A Court would proceed as set aside the judgment (if deserving) because the main interest of the Court is to protect the Defendant's right to be heard as envisaged under Article 50 of the Constitution. The Court also seeks to protect a party from suffering hardship or injustice and thus opts to give a party a fair hearing and have matters determine on merit. Under such circumstances the Court awards costs to the Respondent and proceeds to rehear the case or orders that cases be re-opened for cross examination and determination of issues.

18. However, where the summons was not served and /or service was not within the provisions of the law and thus not certain, the Court will set aside the judgment *ex debito justicie*(unconditionally). This was the case in **Gandhi Brothers v H.K. Njage t/a H.K Enterprises HCCC No. 1330 of 2001** where Ringera J. (as he then was) held that if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is irregular one which the Court must set aside *ex-debito justicie* (as a matter of right) on the application by the Defendant and such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.

19. The Defendant does not dispute that summons were duly served upon him. He submitted that upon receipt of summons he went to Thika Court where this case had been filed before it was transferred to this Court. The Defendant does not dispute the affidavits of service on record. The matter proceeded *ex parte* when the Court confirmed that he had been served with the hearing notice. The Defendant failed to enter appearance and /or file defence before judgment.

20. The Court entered a regular judgment in this case and may only set it aside upon satisfaction that the grounds discussed in para 15 were established by the Applicant. I shall now proceed to examine the grounds.

21. In respect to whether or not there is a meritable defence, the Defendant did not attach a copy of the draft defence for consideration by the Court. The effect is that the Court is not able to confirm if he has a good defence. The supporting affidavit is mute on his line of defence on the issues raised in the suit.

22. In the case of **Patel -vs- E.A. Carge Handling Services Ltd [1974] EA75 at page 76 C and E** the Court held as follows: -

“That where there is a regular judgement as is the case here, the Court will not usually set aside the judgement 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.’

23. In respect to whether or not there was delay, the application was brought after 4 months from the date of judgment. The Defendant was also served with the judgment notice, that would have been the right time to file application for setting aside the proceedings to enable the Court consider his defence (if any). Upon receipt of the decree the Defendant waited for 2 months and opted to file this application after the Plaintiff had already moved the Court for enforcement of the eviction orders against him.

24. The Defendant had been indolent and he seems to have been awakened by the Plaintiff’s attempts to remove him from the land. That has been his conduct during the subsistence of the trial since he failed to take action since May 2018 when he received summons to enter appearance, he ignored the summons and failed to attend Court for the hearing.

25. My perusal of the file is that this suit was filed in Thika ELC Court as on the 19/6/2018 and on the 20/6/2018 this suit was transferred to Muranga ELC Court. On the 28/6/2018 the Defendant was served by one Daniel Maithya, the process server in the company of Police Constable Mwoki from Ithanga Police Station. The Defendant argued that he went to Thika Court and was advised that the suit was not in Thika. He did not adduce any evidence to support his averment.

20. It is to be noted that the Appellant has not called the process server for cross-examination. The onus to prove that he was not served rested on him and it was his duty to cross-examine the process server to prove that indeed he was not served. Having failed to take that action, it is presumed that the evidence of the process server stands unchallenged and the court takes it to be credible.

27. Further on the 28/9/2018 the Defendant was served with the mention notices as well as the Court orders issued on the 7/8/2018 by the same Process server. He was accompanied by PC Mwoki and PC Kariuki from Ithanga Police station. Para 7 states as follows;

“That I greeted him(Applicant) and did the introduction and the purpose of my visit to which he acknowledged my greetings saying that he remembers me and PC Muoki as we had earlier visited him with Court documents. I served him with the said Court order and mention notice in the presence of the two police officers to which he accepted service but declined to sign on my copy stating that he has to confirm from his Advocates clerk first if indeed the documents are genuine since the last Court documents served upon him were fake and that he had attended Court on that date only to find that the said case did not exist either in Muranga nor Thika Law Courts.”

28. From the above para, it is clear that the Defendant was served and this time the documents bore the Muranga ELC Court. He may be excused for attending to the Thika Court (if he did) in the first instance but this time the documents clearly showed the case was at Muranga ELC Court.

29. On the 27/6/2019, the Defendant was served with hearing notice for the application dated the 6/5/19 which was scheduled for the 9/7/19. This time he was served at the Ithanga Police station which he accepted but declined to sign as pleaded by the process server in the Affidavit of service dated the 3/7/19

30. From the above instances it is clearly demonstrated that the Defendant failed to take appropriate action despite being served with summons, the pleadings, hearing notices including the judgment notice. There is also a demonstrable trend that the Defendant is a very uncooperative person given the manner in which he is served in the company of law enforcement officers. In one instance it is said that he called some two people to harass the process server but was stopped by the police officers in his company. In the Kandara Law Courts attempts to effect service by the state counsel in Court only succeeded after the intervention of the Hon Magistrate. Service of Court documents by a duly authorised process server is a legitimate process and upon service one's inaction is to his peril and detriment.

31. From the record and the proceedings, it is also manifestly demonstrated that the Court took adequate measures to require that service was effected on the Defendant in line with the Constitutional tenets in relation to the right to be heard.

32. The delay in bringing the application is not explained. In the case of **Benjoh Amalgamated Limited and Another –Versus- Kenya Commercial Bank Limited [2012]eKLR** the Court of appeal held that a claimant in equity is bound to prosecute his claim without undue delay because equity aids the vigilant and not the indolent and where the claimant has slept upon his right and acquiesced for a great length of time, the Court of equity will refuse to aid the stale demands (like those barred by statutory time of limitation). See Halsbury's Law of England, 4th Edition.

33. It is the finding of the Court that there was a regular judgement, the Defendant having been fully swerved with the pleadings and the hearing notices. The Defendant failed to file any statement of defence thus the Court is unable to determine if he has a defence on merit. There are no grounds to exercise discretion in favour of the Defendant in the circumstances.

34. This application is unmeritorious. It is dismissed with costs to the Respondent.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANGA THIS 12TH DAY OF MARCH 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndwiga HB for Lukorito for the Plaintiff/Respondent

Defendant/Applicant: Present in person

Irene and Njeri, Court Assistants