



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 57 OF 2018

MAULID MOHAMED OGONA.....PLAINTIFF

VERSUS

JIKOMI SAID MARO.....DEFENDANT

RULING

1. The defendant/Applicant brought a Notice of Motion dated 25th June, 2019 seeking to set aside the ex-parte judgment entered herein on 22nd January 2019 and for the defendant's defence and counter-claim deemed as properly filed on payment of the requisite court fees. The defendant further seeks orders of temporary injunction to issue against the plaintiff, his agents, servants employees and/or anyone acting on his behalf from interfering, allotting, evicting, intruding and/or otherwise dealing with the applicant's occupancy in PLOT NO. KILIFI/KIIPWA/54 pending hearing and determination of this suit. The application is supported by the affidavit of Jikomi Said Maro, the applicant sworn on 26th June 2019.
2. The applicant avers that she has lived on the suit land together with her family for over 50 years and are now threatened with eviction. That ex-parte judgment was entered in favour of the plaintiff prematurely as there is a pending notice of preliminary objection on record and which ought to be heard first. The preliminary objection which is dated 13th September, 2018 is on the grounds that the suit is res judicata and therefore an abuse of the court process. The Applicant has attached judgment in Kilifi CMCC NO. 53 of 2011.
3. In opposing the application, the plaintiff filed grounds of opposition dated 12th November, 2019. It is the Plaintiff's contention that the application is misconceived, non-meritorious, frivolous, scandalous, vexatious and an abuse of the process of court. The plaintiff further avers that the application is bad in law and incompetent.
4. Directions were given that the application be canvassed by way of written submissions. Only the defendant filed submissions on 27th November 2019.
5. The issues for determination are whether the interlocutory judgment entered on 22nd January 2019 should be set aside and the defendant granted leave to file her defence out of time and thereafter whether the orders for temporary injunction should issue.
6. From the record, it is evident that interlocutory judgment was entered on 22nd January 2019, as a result of the plaintiff's request for judgment filed on 18/1/2019. It is also apparent that the defendant had filed a notice of preliminary objection on 14th September 2018 on the grounds that the plaintiff's suit is res judicata. The said notice of preliminary objection has not been heard and is still pending. In the present application, the defendant has annexed a judgment in Kilifi CMCC No. 53 of 2011 between the same parties and over the same subject matter as in this case.
7. The law on the setting aside of ex-parte judgment is now settled. The principle guiding the setting aside ex-parte orders are trite that the court has wide powers to set aside such ex-parte orders, save that where the discretion is exercised, the court will do so on terms that are just. See the case of **Patel –v- East Africa Cargo Handling Services Ltd (1974) EA 75** and **Shah –v- Mbogo (1967) EA 116**.
8. In this case, the defendant does not dispute the fact that the summons to enter appearance was served. The defendant filed a notice of preliminary objection but did not file defence on time. The judgment was therefore regularly obtained. However, as at the time the interlocutory judgment was entered, the defendant had annexed a judgment in a previous suit over the same subject, matter and between the same parties. Besides taking into account the reason for failure of the defendant to file defence, I have to consider whether the intended defence raises triable issues.
9. The defendant has annexed to the affidavit in support of the application a draft defence and counter-claim. The defendant has denied the plaintiff's claim and claims the suit property through adverse possession. In my view, the intended defence raises triable issues which call for

trial. The plaintiff's case is yet to be heard by way of formal proof and the application was filed on 10/7/2019. The plaintiff has not demonstrated that he will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit. The overriding objective of the court would no doubt come to the aid of the Applicant.

10. The defendant also seeks an order of temporary injunction against the plaintiff. The defendant's case is that she has lived on the suit land for over 50 years and is claiming the same by way of adverse possession. The plaintiff did not file affidavit to challenge the defendant's averments. The principles to be applied when considering an application for injunction are well settled. In the case of **Giella –v –Cassman Brown & Co. Ltd (1973) EA 358**, the applicant must show that he has a prima facie case with a probability of success, that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and if the court is in doubt it will decide the matter on the balance of convenience.

11. In the case of **Mrao Ltd- v- First American Bank of Kenya (2000) eKLR**, a prima facie case was said to be one in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

12. In this case, it is apparent that both the plaintiff and the defendant are claiming the suit property. The plaintiff's case is that he is the registered owner of the suit property and that the defendant trespassed onto the suit land in the year 2014. The plaintiff wants the defendant evicted. On her part, the defendant claims to have occupied the suit land for over 50 years. In my view, both claims can only be ascertained at the trial. Until that is established, it is only fair that the status quo prevailing be maintained.

13. Arising from the above reasons, I find merit in the defendant's application dated 25th June 2019. Accordingly, the application is allowed in the following terms:

- 1) The interlocutory judgment entered herein is hereby set aside.**
- 2) The defendant to file and serve her defence within 14 days from the date of this ruling.**
- 3) An order of a temporary injunction is hereby issued restraining the plaintiff from evicting the defendant from PLOT NO. KILIFI/KIJIPWA/54 until the case is heard and determined.**
- 4) Considering the circumstances of this case, I order that each party to bear their own costs.**

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of March 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kenga for plaintiff/respondent

Ondieki holding brief for Shimaka for defendant/applicant

Yumna Court Assistant

C.K. YANO

JUDGE