



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 103 OF 2013

ANDREW KIMANI NG'ANG'A

MARY WACUKA KIMANI

KAREN CENTRUM LIMITEDPLAINTIFF/RESPONDENT

VERSUS

PETER NJUGUNA NGUGI

JOSEPH WAITITU NGUGI

LINSOURSE ENTERPRISES LIMITED

THE CHIEF LAND REGISTRAR

THE PERMANENT SECRETARY,

MINISTRY OF LANDS

THE ATTORNEY GENERALDEFENDANTS

RULING

The plaintiffs filed a suit against the six defendants herein claiming damages following a failed land transaction as set out in the plaint filed on 28th March, 2013. The defendants were served with summons to enter appearance which they complied with followed by the filing of their respective statements of defence.

On 6th November, 2014 the plaintiffs filed an application by way of Notice of Motion under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 13 Rule 2 of the Civil Procedure rules for orders that judgment be entered against the defendants jointly and severally as prayed in the plaint, and that the suit be set down for assessment of general and exemplary damages. That application was directed to all the defendants as set out in the grounds on the face of the application and the supporting affidavit of the 1st plaintiff.

For purposes of record, on 29th July, 2015 judgment was entered in favour of the plaintiffs against the 1st, 2nd and 3rd defendants based on a letter dated 25th June, 2015 and filed in court on 29th June, 2015 by the advocate appearing for the plaintiffs on one hand and the advocate for the 1st, 2nd and 3rd defendants on the other. In effect therefore, the determination of the application by the plaintiffs filed on 6th November, 2014 could not include the 1st, 2nd and 3rd defendants.

The plaintiffs' application aforesaid was subsequently listed for hearing on 5th April, 2016 but when it was called out for hearing, the Attorney General who is on record for the 4th, 5th and 6th defendants did not appear, notwithstanding the fact that the hearing notice had been served. At the instance of counsel for the plaintiffs, the application was allowed and judgment entered in favour of the plaintiffs against 4th, 5th and 6th defendant as prayed in the plaint, and an order made that a date for hearing by way of formal proof, may be taken in the registry.

Subsequently the jurisdiction of this court was challenged by the 4th, 5th and 6th defendants by way of preliminary objection filed on 18th June, 2018. By a ruling dated 4th April, 2019 the preliminary objection was dismissed with costs to the plaintiffs. On 29th June, 2018 the 4th, 5th and 6th defendants filed an application to set aside the proceedings in this matter for lack of jurisdiction, set aside the judgment on admission entered on 5th April, 2016, and stay further proceedings until that application is determined. That is the subject of this ruling.

The application was premised on Order 51 Rule 1 of the Civil Procedure Rules, Article 159 of the Constitution and Sections 1A,1B, 3A and 63 (e) of the Civil Procedure Act. There is a supporting affidavit sworn by Edwin Munoko Wafula, a Senior Land Registration Officer. The application was opposed and there is a replying affidavit sworn by the advocate for the plaintiffs in addition to grounds of opposition both filed on 13th September, 2018. Parties have also filed submissions and cited several authorities. I must point out that all the notices, letters and pleadings directed to the 4th, 5th and 6th defendants were acknowledged by the office of the Attorney General.

The issue of whether or not this court has jurisdiction to deal with this matter was settled by the ruling of this court delivered on 4th April, 2019. I note from the record that a Notice of Appeal dated 15th April,2019 has been lodged to the Court of Appeal by the Attorney General on behalf of the 4th, 5th and 6th defendants.

In the statement of defence filed on behalf of the 4th, 5th, and 6th defendantS on 29th May, 2013 the plaintiffs' claim was denied. Several issues were raised in that defence in answer to the plaint.

Order 13 Rule 2 of the Civil Procedure Rules upon which the plaintiffs' application dated 5th November, 2014 was premised reads as follows,

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

It will be noted that the said Order is silent on whether or not an aggrieved party may apply to set aside such an order or judgment. In effect, the application as presented by the 4th, 5th, and 6th defendants herein may not have grounding under the said rules. Order 51 Rule 1 cited by the defendants herein only provides the procedure to be followed.

It will be noted that Order 10 Rule 11 of the Civil Procedure Rules expressly provides for the setting aside of a judgment, following non-appearance, default of defence or failure to serve. If it was intended that a party may move the court to set aside a judgment entered under Order 13 aforesaid, the rules would have expressly provided so. In my view, the fact that the rules are silent in that regard means, an aggrieved party may only challenge such an order or judgment by way of an appeal.

Having said so, the order sought to set aside the said judgment is misplaced and therefore declined. The 4th, 5th and 6th defendants having moved to the Court of Appeal by way of the notice already lodged relating to the jurisdiction of this court, may ask that court to stay proceedings in this court but on my part, any stay order, if granted, shall delay the determination of long standing dispute. The end result is that, the application dated 26th June 2018, is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Nairobi this 5th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE