



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 99 OF 2017

JUMA ASBORN KWANUSU WATIBA WERE.....PLAINTIFF

VERSUS

SIMON KIMARU BIRGEN.....1ST DEFENDANT

ABRAHAM SAMBU.....2ND DEFENDANT

RULING

1. The application dated **29/3/2019** and filed in court on the same date has been brought by the defendants/applicants seeking the following orders:

(1) ...spent

(2) ...spent

(3) That there be a stay of execution of the decree of this of court issued on 25/2/2018 and all other consequential orders pending hearing and determination of this application.

(4) ...spent

(5) That the *ex-parte* judgment entered on 25/1/2018 and all other consequential orders and proceedings emanating therefrom be and are hereby set aside forthwith and the defendant be given unconditional leave to defend the suit.

(6) That the proposed draft defence be deemed to have been properly filed and served subject to payment of requisite court fees.

(7) ...spent

(8) That the defendant/applicant be and is hereby granted leave to file defence and counterclaim or set off within a reasonable period that the court may deem fit to grant.

(9) Costs of this case be provided for.

2. The application is brought under **Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act, Order 10 rule 11 and Order 51 of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya.**

3. The application is supported by the affidavit of the 1st defendant, sworn on his own behalf and on behalf of 2nd defendant dated **19/3/2019** which largely reiterates the grounds at the foot of the application and also by a supplementary affidavit filed on **27/11/2019**.

4. The plaintiff filed grounds of opposition on **16/4/2019**. In those grounds he states that the defendants cannot be said to say that they were not aware of the suit and entry of judgment against them as they were duly served with the pleadings, summons to enter appearance and notice to show cause why execution should not be granted. He cites the affidavits of service on the court record; he further avers that the application has been brought after inordinate delay of more than a year after judgment was entered in favour of the plaintiff against the defendants; that this court being a court of equity cannot aid the indolent defendants who without sufficient cause failed to defend the suit when they were called upon to do so and that the application has been made in bad faith as it is merely intended to delay the plaintiff's enjoyment of the fruits of his judgment.

5. The defendants filed their submissions on 17/2/2020. I have perused the record and found no submissions on behalf of the plaintiff.

6. I have considered the application and the response including the filed submissions.

Determination

7. The main issues that arise for determination in the instant application are as follows:

(a) Whether the ex-parte judgment entered on 25/1/2018 and all other consequential orders and proceedings emanating therefrom should be set aside and the defendant be given unconditional leave to defend the suit.

(b) Whether the proposed draft defence should be deemed to have been properly filed and served subject to payment of requisite court fees.

(c) Whether the defendant/applicant be and is hereby granted leave to file defence and counterclaim or set off

(d) Who should bear the costs of the application?

8. The issues are discussed as herein below.

a. Whether the ex-parte judgment entered on 25/1/2018 and all other consequential orders and proceedings emanating therefrom should be set aside and the defendant be given unconditional leave to defend the suit.

9. The principles for setting aside judgment are now well established. The court has unfettered discretion to set aside a judgment and will issue a setting aside order, subject to any conditions the court may deem fit.

10. The following was said in the now renowned case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75**:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it 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, 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.”

11. In the instant case it is alleged that there was no service of the summons upon the defendants. Indeed one of the prayers in the application is that the process server who purports to have served the defendants be summoned for cross examination; midway through the proceedings regarding the instant application Mr Arusei informed this court on 13/11/2019 that he had decided to waive the summoning of the process server for cross-examination. Notably it is the 1st defendant who intended to cross-examine the process server. He is the surviving defendant in this suit. As at the time of the prosecution of the application the 2nd defendant was deceased and no substitution had been effected and the application is principally now by the 1st defendant.

12. Want of service formed an integral part of the grounds for the application. Without cross-examination of the process server as intended the court has only the defendant's supporting affidavit to compare with that of the process server. It should be noted that this court had in the judgment dated 25/1/2018 analyzed the contents of the process server's affidavit and concluded that the defendants were properly served on 14/6/2017. Of course I must now examine the supporting affidavit to the application to see if it casts any doubt as to that conviction that the defendants had been served.

13. The process server in his affidavit dated 6/7/2017 avers that he found the 2nd defendant outside his house listening to the radio and served him. He indicated that he was taken to the home of the 2nd defendant by a person called **Simiyu** who worked at the Chief's office. The 2nd defendant declined to sign on the copy of summons but retained copies thereof.

14. The process server also depones that he served the 1st defendant's wife in lieu of the 1st defendant. It is therefore true therefore as alleged by the 1st defendant that personal service was not effected upon the 1st defendant.

15. However service of persons in the defendants household is authorized by the rules and in this case it cannot be deemed to be improper service as it was effected on the 1st defendant's wife. The 1st defendant omits the issue of his wife, or her presence in the home on the date of service, or whether he was ever availed him the documents served. In my view it would be quite unusual for a wife to fail to avail the husband documents on court process while they are still living in the same house. I find that no good explanation has been given to fill in all these gaps in the 1st defendant's affidavit evidence; this lacuna be coupled together with the fact of withdrawal of the notice of intention to cross examine the process server, which must be construed as an indicator of the realization by the 1st defendant that nothing would come out of that cross-examination. That ground of non-service must fail.

16. However this is a court of justice and must look beyond service to see if there are other grounds upon which judgment, may be set aside.

17. The condition that there must be a defence on the merits on the record appeals to this court for examination. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the court observed that a defence on the merits does not mean, in my view, a defence that must

succeed, but one that in my understanding raises a triable issue.

18. The proposed defence states that plot no **245** is according to the official map, *far from the defendant's land*. It is not denied that the same is registered in the name of the plaintiff. Fraud is alluded to. The defendants claim that the plaintiff colluded with surveyors to hive off the defendant's parcel so as to accommodate the plaintiff, and in the same breath, they state that the survey plans were "*altered to accommodate Land Parcel Mois' Bridge Ziwa Block 17 Chekaita Sikaoni/245 near the defendants' land.*"

19. It is evident from the arbitration proceedings produced by the plaintiff as **PEXh 7** that the 1st defendant's father owned numerous parcels in the area and wished to expand his empire into the plaintiffs parcel by way of purchase of the same but met his demise before purchasing it. However it is apparent from that exhibit that his family had occupied and utilized the suit land.

20. This differs with the 1st defendant's inconsistent claims as to how the plaintiff's land came to be situated near the defendant's land. Besides, if a new parcel was to be carved out of their **parcel number 244** as alleged in the reply to demands by the plaintiff (**PEXh 11**), it is clear that that resultant subdivision would have to bear a number out of sequence (or the same number in this *case "244"* but with a suffix e.g. "*244A*" to denote creation of a new parcel out of the ancient numbering sequence employed at the time of demarcation and registration of **plot no 244**.) In this case the plaintiff's parcel bore the number **245**, which is just next in the ordinary sequence to no **244** owned by the defendants which suggests that the parcels may have been created at the same time. No evidence has been availed by the 1st defendant to cast doubt on this logic, which is based on judicial notice of the ordinary practice in the survey offices and land registries.

21. I find no good defence with a triable issue raised by the defendants in this matter to warrant the setting aside of the judgment. This ground too must fail.

b. Whether the proposed draft defence be deemed to have been properly filed and served subject to payment of requisite court fees.

22. In view of what I have stated in respect of issue no **(a)** herein above, this prayer must be rejected also.

c. Whether the defendant/applicant be and is hereby granted leave to file defence and counterclaim or set off.

23. In view of what this court has stated in respect of issues no. **(a)** and **(b)** above the answer to this issue is that no such prayer may be granted.

d. Who should bear the costs of the application?

24. Costs must follow the event. The 1st defendant must bear the costs of his own application as it has been unsuccessful.

CONCLUSION.

25. For the foregoing reasons, the application dated **19/3/2019** by the defendants must fail. I hereby dismiss the same with costs to the plaintiff.

26. Costs will be borne by the 1st defendant only.

It is so ordered.

Dated, Signed and Delivered via electronic mail at Nairobi on this 21st day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE