



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 204 OF 2014

NAKURU AUTOMOBILE HOUSE LTD.....PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU2ND DEFENDANT

RULING

1. By Notice of Motion filed on 25th October 2019, the second defendant seeks setting aside of the proceedings of 7th October 2019 herein. The application is supported by an affidavit sworn by Winnie Cheruiyot, Litigation Counsel at the Attorney General's Chambers who has conduct of this matter on behalf of the second defendant. She deposed that due to challenges of obtaining documents which the applicant required to support its case from the land registrar, the applicant was unable to file the documents in time as ordered by the court in the ruling of 12th June 2019. She added that the applicant has no vested interest in the matter but only an interest to assist the court come to a just determination of the suit and that no prejudice will be suffered by the respondents if the orders are granted.

2. The first defendant opposed the application his replying affidavit in which he deposed that the applicant's failure to comply with the orders in the ruling of 12th June 2019 cannot be blamed on anyone but itself and that the application is *res judicata*.

3. The plaintiff did not file any response to the application. Parties relied entirely on the material on record and urged the court to render a ruling.

4. So as to better appreciate the context of the application, it is necessary to sketch the backdrop against which it is brought. This suit proceeded for hearing whereat the plaintiff and the first defendant as well as their witnesses were heard, the respective cases were closed and the parties were ordered to file and exchange final submissions. The second defendant neither filed memorandum of appearance nor participated in the hearings. All along, counsel for the plaintiff satisfied the court through affidavits of service that the second defendant had been duly served. One day however, the second defendant sprang to life and filed Notice of Motion dated 3rd May 2018 seeking setting aside of the proceedings and an opportunity to file its defence. Having considered the application, I rendered a ruling dated 12th June 2019 in which I made the following orders:

i. The order of 6th March 2018 closing the defence cases and allowing for filing of written submissions is hereby set aside. Costs of Notice of Motion dated 3rd May 2018 are awarded to the 1st defendant and shall be borne by the 2nd defendant.

ii. The 2nd defendant to file and serve statement of defence and generally comply with Order 11 of the Civil Procedure Rules within 14 days from the date of delivery of this ruling. In default, order number (i) above shall stand vacated and *Notice of Motion dated 3rd May 2018 shall stand dismissed with costs to the 1st defendant.*

iii. Further directions regarding disposal of the matter and whether any of the parties may file further compliance documents will be given in due course depending on the 2nd defendant's compliance with (ii) above.

5. The matter later came up for mention on 17th September 2019 and on 7th October 2019. On 7th October 2019, counsel for the first defendant submitted that he was served that morning with the second defendant's statement of defence dated 4th October 2019 and filed in court that morning, way out of the time allowed in the ruling of 12th June 2019. According to him, Notice of Motion dated 3rd May 2018 stood dismissed in terms of the orders of 12th June 2019. He urged the court to give a date for final submissions in the suit. Upon considering submissions from all the parties, I made the following order:

The ruling of 12th June 2019 was quite clear that the 2nd defendant had to file defence and generally comply with Order 11 within 14 (fourteen) days from date of delivery of the said ruling. It is admitted that there was no compliance with the time frames. Even though Mr. Weche now says that a defence has this morning been filed and served upon Mr. Karanja, I do not see any such documents on record. I further note that Mr. Kimatta told the court on 17th September 2019 that he had been served with the 2nd defendant's compliance documents as at that date, an assertion which as is now manifest, was not true. Additionally, I note that counsel for the 2nd defendant did not attend court both on 12th June 2019 and on 17th September 2019. Looked at from any angle, one inevitably gets the impression that the 2nd defendant has not been keen to comply with the orders.

Court orders are not made in vain. A party who has sought the court's indulgence must act promptly and comply with orders given pursuant to his own application. In the totality of the circumstances herein, I see no reason to indulge the 2nd defendant any further. Notice of motion dated 3rd May 2018 stood dismissed with costs to the 1st defendant as at 27th June 2019. That remains the position.

6. That is the order which provoked the present application. In essence, the applicant seeks setting aside of the orders of 7th October 2019. As is manifest, those orders simply confirmed that the default clauses in the orders of 12th June 2019 had come into operation as a result of which Notice of Motion dated 3rd May 2018 stood dismissed with costs to the first defendant as at 27th June 2019.

7. The first defendant has argued that the application is *res judicata*. The doctrine of *res judicata* has statutory expression at **Section 7** of the **Civil Procedure Act** which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

8. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. "Suit" in this context means all civil proceedings including applications. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

9. Having considered the matter, I am persuaded that *res judicata* is not applicable herein since the issue of whether or not set aside of the orders of 7th October 2019 has never been considered or determined on the merits.

10. The orders of 12th June 2019 were made upon the second defendant's application and it is therefore clear that the second defendant was aware of the order and its requirements. The circumstances herein are akin to an application for setting aside where service is not denied. In such an application, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

... In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

11. In the ruling of 12th June 2019, I stated that the second defendant is the custodian of records regarding proprietorship of land and that it is therefore in the interest of justice that the court hears his version of the case to assist the determination of the real issues in dispute before the court. To achieve that end, I found it necessary to set aside the order closing the second defendant's case. I also held that the 1st defendant can be compensated by an award of costs. I still maintain that position. I will therefore give the second defendant one last chance to comply, purely in the interest of justice and without giving undue regard to procedural technicalities, as the court is indeed duty bound to act in the dispensation of justice.

12. In the result, I make the following orders:

a. The orders of 7th October 2019 are hereby set aside.

b. The second defendant to file and serve statement of defence and generally comply with Order 11 of the Civil Procedure Rules within 21 (twenty one) days from the date of delivery of this ruling. In default, order number (a) above shall stand vacated and both Notice of Motion dated 3rd May 2018 and Notice of Motion filed on 25th October 2019 shall stand dismissed with costs to the 1st defendant.

c. In the event that the second defendant complies with b) above costs of Notice of Motion filed on 25th October 2019 shall be in the cause.

13. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 18th day of June 2020.

D. O. OHUNGO

JUDGE