



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 65 OF 2015

SAVANNAH FARMS LIMITED.....PLAINTIFF

VERSUS

MUTHEU KYULE.....1ST DEFENDANT

RAEL NDUNGE.....2ND DEFENDANT

ANNA KALOKI.....3RD DEFENDANT

MR. NG'ANG'A.....4TH DEFENDANT

RULING

1. This Ruling pertains to the Judgment rendered by this court on 16.6.2017. In the said Judgment, the court allowed the Plaint in the following terms:

a) A permanent injunction be and is hereby issued restraining the Defendants, their agents, employees, families, relatives, servants and or any person acting under them from trespassing, entering, remaining, cultivating, constructing and or in any manner dealing with parcel of land known as Mavoko Town Block/3/2322 situated within Machakos County.

b) An order of eviction be and is hereby issued evicting the Defendants, their agents and or servants from the parcel of land known as Mavoko Town Block 3/2322.

c) This order to be executed by the court bailiff with the assistance of the OCS, Athi River Police Station.

d) The Defendants to pay the costs of the suit.

2. The 1st Defendant has filed the Notice of Motion dated 17th April, 2019 seeking for the following orders

a. Spent

b. Spent

c. That this honorable court be pleased to set aside the judgement and decree issued in this matter.

d. That the 1st defendant be granted leave to file its defence and the annexed draft defence be deemed as duly filed upon payment of the requisite fees.

3. The Application is supported by the Affidavit of Mutheu Kyule, the 2nd Defendant, who deponed that she was not aware of the existence of the suit; that the summons to Enter Appearance were never served on her and that there was another suit being Machakos ELC No. 13 of 2017 where the subject matter is the suit property herein (*Mavoko Town Block 3/2322*).

4. The 1st Defendant deponed that ELC No. 13 of 2017 is pending Judgment; that she is an indigenous member of the Kivae Residents Organization, who are the owners of the suit property and that the title document for the suit premises was revoked and the Chief Land Registrar was directed to amend the register and transfer the land to them.

5. The 1st Defendant deponed that unless the Application is heard, she will be condemned unheard; that she has a good Defence and that the instant suit is a non-starter and defective. The Application was opposed vide the Replying Affidavit of Mungai Ngaruiya, the Plaintiff's Director, who deponed that service of summons were effected on the Defendants as evidenced by the Affidavit of Service.

6. The Defendant's Director deponed that after the Defendants were served with the Summons to Enter Appearance; that the 2nd-4th Defendants voluntarily vacated the suit land; that the 1st Defendant declined to vacate the suit property, neither did she defend the suit and that and the 1st Defendant was informed about the decision of the court.

7. The Defendant's Director deponed that he is the registered owner of the suit land and that the 1st Defendant does not have a triable Defence; that the 1st Defendant was evicted from the suit property in July, 2017 by auctioneers and that it is only recently that the 1st Defendant returned on the suit property and was committed to civil jail by this court. The Plaintiff's Director deponed that he is not a party to Machakos ELC Case No. 13 of 2017 and that no nexus has been shown between the said case and the instant matter.

8. The Application was canvassed by way of written submissions. On record are submissions on behalf of the Applicant. Learned counsel for the Applicant challenged the Affidavit of Service by the process server that referred to the Applicant as a "he" and yet the Applicant is a female. Counsel placed reliance on the case of *Yamco Yadpaz Industries Ltd v Kalak Flowers Ltd (2013) eKLR* and urged the court to note that there was no proper service. Counsel urged the court to exercise discretion and grant the orders sought.

9. The Plaintiff/Respondent submitted that the fact that there is a pending matter is not a justification to set aside the Judgement of the court; that this suit was filed in the year 2015 and that summons to enter appearance were served upon the Defendants on 9th March, 2019 as particularized in the Affidavit of Service.

10. Counsel submitted that upon being evicted from the suit property on 26th July, 2017, the 1st Defendant returned on the land prompting the Plaintiff to file an Application for contempt; that the Applicant was found to have been in contempt of the orders of the court and was imprisoned and that the Application should be dismissed. Both the Plaintiff's and the 1st Defendant's counsel relied on several authorities which I have considered.

11. The singular issue for determination in the current Application is whether the Applicant has shown sufficient cause to warrant the setting aside of the ex parte Judgement under Order 10 Rule 11 of the Civil Procedure Rules which provides as follows:

"Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

12. The principles governing the determination of what amounts to just cause for setting aside an ex parte judgement and decree under Order 10 Rule 11 have been pronounced in several decisions. See *Pithon Waweru Maina vs Thuka Mugiria (1982-88) I KAR 171*; *Patel vs EA Cargo Handling Services Ltd [1974] EA 75*; and *Mbogo vs Shah [1968] EA 93*.

13. In the *Pithon Waweru Maina* case (supra), it was stated thus:

"Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ..."

14. In *Patel Vs East Africa Cargo Handling Service (supra)*, Duffus, V-P stated as follows:

"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 to it by the rules. I agree that where it is a regular judgment as is in 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, a defence on merit does not mean in my view, a defence that must succeed. It means, as Sheridan put it, 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication."

15. In the case of *Tree Shade Motors Ltd vs. DT Dobie & Anor [1995-1998] 1EA 324*, the court held as follows:

"Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, 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 judgment aside."

16. However, where the court finds that a Defendant was never served with the summons to enter appearance, such Judgment should be set aside *ex debito justitiae*.

17. The 1st Defendant's case is that she was not aware of the suit and that she was never served with the Summons to Enter Appearance. The Applicant also stated that she has a good Defence and pointed out that the suit property is the subject of another suit that is pending before this court.

18. The Affidavit of Service shows that on 9th March, 2015, the process server, while in the company of the Plaintiff (*sic*), they travelled to Kivae area within Lukenya where all the Defendants were residing; that he served the Defendant with the summons and that the homes of all

the Defendants were within the same locality.

19. This suit proceeded for formal proof on 28th February, 2017, by which time none of the Defendants had entered appearance or filed a Defence. The court then rendered its Judgment on 16th June, 2017 ordering the Defendants out of the suit property.

20. The record shows that the Plaintiff extracted the Decree of the court on 10th July, 2017. On 18th July, 2017, Kindest Auctioneers extracted an Eviction order. On 31st July, 2017, the auctioneers did a letter addressed to the Deputy Registrar of this court informing the court as follows:

“We confirm that we carried out your order dated 18th July, 2017 on 26th July, 2017 with the assistance of the OCS Athi River Station. All were evicted on that day, we hereby return the eviction order duly executed.”

21. The assertion by the Plaintiff that the 1st Defendant was evicted from the suit property on 26th July, 2017 has not been controverted by the 1st Defendant. Indeed, no attempt was made to call the auctioneer who evicted the 1st Defendant for cross examination. That being the case, if the 1st Defendant was never served with summons to enter appearance, then she should have filed the current Application in the year 2017 when she was being evicted.

22. Indeed, the 1st Defendant also never called the process server for cross examination on his Affidavit of service. The requirement for the cross examination of a process server is founded upon the provision of Order 5 Rule 16 of the Civil Procedure which provides as follows:

“On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, and may make such further inquiry in the matter as it thinks fit.”

23. Where there is an Affidavit of Service, the law provides that there is a presumption of service in favour of the process server. That being so, the person who claims that the Affidavit of Service is false has the burden of proving that fact. One of the ways of doing so is by calling the process server for cross examination. The 1st Defendant did not do so.

24. The mere fact that the process server referred to the 1st Defendant as a ‘he’ and yet she is a lady is not good enough to show that she was not served with the summons. That could have been a typographical error, which is a common error that happens in most writings. Having not complained when she was evicted from the suit property on the basis of the court order in the year 2017, I find that the 1st Defendant was served with the Summons to Enter Appearance.

25. Although the 1st Defendant deponed that the suit property is also a subject in Machakos ELC Case number 13 of 2017, no evidence was adduced to show that parcel of land number Machakos Town Block 3/2322 is also the property that is under litigation in Machakos ELC No. 13 of 2017, and that the Plaintiff herein is a party to that suit. In any event, this suit was filed before Machakos ELC No. 13 of 2017 was filed. The Judgment of this court cannot therefore be set aside on the ground that a subsequent suit was filed.

26. I have perused the 1st Defendant’s draft Defence. The said draft Defence is a mere denial. Although the 1st Defendant has stated that she has been in active use of the suit property from the year 1960, she did not annex even a single photograph to show that indeed she is in occupation of the land.

27. Furthermore, the evidence that was adduced in this court shows that the Plaintiff was registered as the proprietor of the suit property on 2nd July, 2008. In the Draft Defence, the 1st Defendant has not alluded to the said title, neither has she prayed for the cancellation of the title. Consequently, it is my finding that the draft Defence annexed on the Application is a sham, and does not raise any triable issue.

28. For those reasons, I dismiss the 1st Defendant’s Application dated 17th April, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE