



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 135 OF 2016

STELLA C. TALLAM.....1ST PLAINTIFF

LINDA ROTICH.....2ND PLAINTIFF

VERSUS

JOHN K ROTICH.....1ST DEFENDANT

GEORGE KIMANI KARIUKI.....2ND DEFENDANT

RULING

1. The Court on 15th April 2019 delivered an exparte judgment against the defendants in the sense that neither the 1st defendant nor the 2nd defendant appeared to defend the suit. The suit was heard by way of formal proof. A decree was issued in the matter on 30th May, 2019.

2. The 1st defendant by an application dated 29th November 2019 filed on the same date under a certificate of urgency prayed for the following orders:-

(i) That the honourable court be pleased to stay execution of the decree issued on the 15th of April 2019 and issued on 30th May 2019 pending the hearing of the application interpartes.

(ii) That the Honourable Court be pleased to set aside the judgment delivered on 15th April 2019 by Hon Justice Munyao Sila together with all the consequential orders arising therefrom.

(iii) That the 1st defendant be granted unconditional leave to file his statement of defence and to defend the suit.

3. The application was grounded on the grounds set out on the face of the application and on the supporting affidavit sworn by John K Rotich, the 1st defendant herein. The 1st defendant deponed that he was never served with any court documents, summons or pleadings and that he was not aware of the suit. He stated he became aware of the existence of the suit when the 2nd plaintiff who is his daughter informed him and furnished him with a copy of the judgment. He further averred that the process server, one Mr Kinara Arasa never served him with any summons or any court documents as purported in the affidavit of service sworn by him. The 1st defendant averred that he had a good defence to the suit and unless the judgment is set aside and he is granted leave to defend he will have been condemned unheard and this will be prejudicial to him and will be contrary to the rules of natural justice.

4. The 1st plaintiff /respondent has sworn a detailed replying affidavit dated 13th January 2020 in response to the 1st defendant /applicant's supporting affidavit. The 1st plaintiff has in the affidavit explained that she on diverse dates accompanied the process server and that she pointed out the 1st defendant to the process server on the several occasions that service was effected on the 1st defendant at the Rift Valley Sports Club. Notably she deposes that she accompanied the process server on 19th May 2016, 15th February 2018, 26th July 2018 and 19th December 2018 when allegedly the 1st defendant was served with various court documents at the Rift Valley Sports Club. The documents allegedly served on the 1st defendant on 19th May 2016 included the summons to enter appearance, interim order, the plaint and the other accompanying documents. The 1st plaintiff thus asserts on the basis of the affidavits of service sworn by the process server it was clear and evident that the 1st defendant was served but he chose not to appear and he had offered no plausible reason why he failed to appear to defend the suit.

5. The process server, Mr Arasa Kinara has sworn an affidavit dated 11th May 2020 setting out when and how he served the 1st defendant. He

has clarified that it was on 26th May 2016 that he served the 1st defendant with summons to enter appearance and not 19th May 2016 as indicated on the affidavit of service annexed to the replying affidavit of the 1st plaintiff and marked "SCT1". The process server deposes that the error was inadvertent as the summons to enter appearance were issued on 24th May 2016 and were not available for service on 19th May 2016. The process server further deposes that apart from the summons to enter appearance he subsequently served the 1st defendant with other court process including chamber summons, amended plaint and hearing notice on 15th February 2018, 26th July 2018 and 19th December, 2018. Apart from the summons to enter appearance and the other documents served together with the summons which the 1st Defendant duly signed he never signed the subsequent documents served upon him as per the affidavits of services annexed to the process server's affidavit filed in support of the instant application.

6. The application was argued by way of written submissions. the 1st defendant's submissions were filed on 18th May 2020. The Respondents filed their submissions on 15th May 2020.

7. The Power to set aside an *ex parte* judgment is discretionary and the discretion of the court to set aside is unfettered. The discretion however must be exercised judiciously and not capriciously or at the whims of the Court. The Court's discretion however is only exercisable where there is a regular judgment and the defendant for one reason or another was prevented and or was unable or failed to enter appearance or to file defence resulting in default judgment being made against him. In such a scenario if the defendant proffers a plausible reason or explanation for the failure to enter appearance or file a defence, the Court in an appropriate application made under order 10 Rule 11 may set aside the default judgment and grant leave to the defendant to defend the suit either conditionally or unconditionally. In exercising its unfettered discretion to set aside or not to set aside, the Court ordinarily would consider the factors that led to the failure to appear or file a defence, the length of any delay and whether the intended defence raises triable issues; and whether any of the parties will suffer any prejudice. See the Court of Appeal case of **James Kanyitta Nderitu & Another –vs- Marios Philotas Ghikas & Another (2016) eKLR, Mbogo & Another –vs- Shah (1968) EA 93 an Patel –vs- EA Cargo Handling services Ltd(1975) EA75.**

8. Where a default judgment is irregular the Court has no discretion but to set the judgment aside . In the case of **James Kanyitta & Another -vs- Marios Philotas Ghikas & Another** (supra) the Court of Appeal stated as follows regarding irregular default judgment :-

“ In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment in its own motion. In addition, the court will not venture into considerations of whether the intended defence raise triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (see Onyango Olo V. Attorney General (1989) [EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1995 SC 664, at 711:

“(T)here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them”

9. In the present matter the 1st defendant states he was not served with the summons to enter appearance and that he was unaware of the suit until the 2nd plaintiff(his daughter) informed him and gave him a copy of the judgment. For her part the 1st plaintiff, who is the 1st defendant's wife insists the 1st defendant was indeed served by the process server and in her presence. If indeed the 1st defendant was not served with summons to enter appearance and the accompanying documents, then the judgment obtained by the plaintiffs would be irregular and would be liable to be set side. If on the other hand the 1st defendant was served, then the plaintiffs would have obtained a regular judgment and in such eventuality the consideration would be whether any factors exist that would warrant the court to exercise its discretion in favour of the 1st defendant/applicant.

10. I have carefully scrutinised the record and in particular the affidavits of service sworn by Arasa Kinara, the process server. It is intriguing that the affidavit of service relating to the service of summons to enter appearance, the plaint, the notice of motion and the Court orders issued *ex parte* on 5th May 2016 and 12th May 2016 is shrouded in controversy and is replete with discrepancies. The affidavit of service annexed as "SCT1" to the 1st plaintiff's replying affidavit gives, 19th May 2016 as the date of service and it is stated to have been sworn by the process server on 23rd May 2016 yet the summons to enter appearance were issued on 24th May 2016 and collected by the firm of Konosi and company advocates on the same date. All the documents said to have served on the said date, 19th May 2016, were allegedly all signed by the 1st defendant when he was served at the Rift Valley Sports Club. The process server has however in his affidavit stated the reference to the date of 19th May 2016 was inadvertent and it should have been 26th May 2016. Even if it is admitted the service was effected on 26th May 2016, that does not explain how he swore the affidavit on 23rd My 2016. The 1st defendant had denied signing the alleged documents in acknowledgment of service. He has stated the signatures are not his and are forgeries. It is noteworthy that in all the subsequent service of documents, the 1st defendant is said to have been served at the Rift Valley Sports Club and in all those subsequent occasions (4 in number) he declined to sign on the documents served in acknowledgement of the service. If he had willingly signed the documents served on him earlier on, how come he declined to sign the later documents? The process server on all the occasions says the 1st defendant was introduced to him by the 1st plaintiff before he served him. If the 1st defendant had been introduced to him in the first instance did he need to have him introduced to him in the subsequent instances when he served him? I do not think so since he would then have become known to him.

11. Further upon perusal of the records, it does appear that the plaintiffs initial interlocutory application dated 18th April 2016 was never disposed of finally. On 28th April 2016 the Deputy Registrar granted *ex parte* interim orders on the application and when the matter was

mentioned before Munyao J on 12th May 2016 he directed interpartes hearing of the application on 19th October 2016. On 19th October 2016 the application was not heard as there was no evidence of service on the defendant. That was the last activity regarding this particular application and hence by the time the suit was fixed for hearing and heard on 6th February 2019 this application was still pending hearing interpartes.

12. On the basis of the glaring discrepancies that I have alluded to in the critical affidavit of service stated to have been sworn by Arasa Kinara On 23rd May 2016 I am not able to conclude that indeed the 1st defendant was served with summons to enter appearance. If the summons to enter appearance were never served on the 1st defendant, there was no way for him to know of the existence of the suit and he could therefore not have filed a defence. The subsequent affidavit of service have the semblance of being choreographed as relates to service upon the 1st defendant and they are suspect.

13. As I have doubts as to whether the 1st defendant was appropriately served with summons to enter appearance I will resolve the doubt in favour of the 1st defendant and I accordingly hold that no proper service of summons to enter appearance was effected upon him. Having come to that conclusion I am obliged to set aside the exparte judgment unconditionally as the 1st defendant was under the law entitled to be served. The Court in the case of **Frigonken Lt –vs- Value pak food Ltd (2011) eKLR** Njagi J stated thus:-

*“ After considering the pleading and submissions of the respective parties, I note that the principles governing the setting aside of the exparte judgments are fairly clear . In the first instance, if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside **ex debito justitiae** on the application by the defendants. Such judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process. However, if the default judgment is a regular one the court still retains an unfettered discretion to set it aside and any consequential decree or orders upon such terms as are just---“.*

14. The net result is that I allow the 1st defendant’s Notice of Motion dated 29th November 2019. I set aside the judgment delivered on 15th April 2019 together with all the consequential orders arising therefrom. I grant leave to the 1st defendant to file his defence within 15 days of this ruling.

15. I order that the costs of the application be in the cause.

16. Orders accordingly

Ruling dated signed and delivered at Nakuru virtually this 29th day of July 2020.

J M MUTUNGI

JUDGE