



No. 410

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.166 OF 2009

JULIUS LEPERES NGILAS..... PLAINTIFF

VERSUS

JONATHAN NKARO MUNERYIA..... DEFENDANT

RULING

1. What I have before me is the defendant's application by way of Notice of Motion dated 23rd May, 2012 in which the defendant has sought a stay of execution and the setting aside of the judgment entered herein on 22nd March, 2011. The defendant's application that was brought under Order 10 rule 11 of the Civil Procedure Rules and sections 1A, 1B, 3 and 3A of Civil Procedure Act was premised on the grounds that the defendant was not served with the Summons to enter appearance and that the defendant has a good defence to the plaintiff's claim. The defendant has also contended that the plaintiff did not serve him with a notice of entry of judgment of the said judgment pursuant to the provisions of Order 22 rule 6 of the Civil Procedure Rules and as such the execution thereof is premature and unlawful.
2. In his affidavit sworn on 23rd May, 2012 in support of the application, the defendant contended that he learnt of this suit through a phone call from O.C.P.D Trans-Mara District on 21st May, 2012. The said officer had called to notify him that a warrant for his eviction from the parcel of land in dispute herein namely, **LR No. Trans-Mara/EndonyoNkopit/29** (hereinafter referred to as "**the suit property**") had been issued by this court. Upon receipt of the said information, he left his place of work at Eldoret and travelled to Kilgoris to the office of the said O.C.P.D who handed over to him a copy of the decree that was issued herein on 5th April, 2012 for his eviction from the suit property. The defendant contended that he was never served with the Summons to enter appearance in this suit. The defendant contended that he entered into the suit property in the year 1995 pursuant to a lawful agreement for sale that the plaintiff had entered into with the defendant's brother one, Konchellah Ole Muneria with respect to the portion of the suit property in his possession.
3. The defendant contended that he has occupied the said portion of the suit property openly, continuously and without any interruption by the plaintiff for over 15 years and as such he has acquired a right of ownership over the same by adverse possession. The defendant has averred further that since the judgment entered herein on 22nd March, 2011 was an ex parte judgment, the plaintiff was under a legal duty to serve upon him a notice that the said judgment had been entered against him before he could apply for execution. Since no such notice was served, the defendant has contended that the application for execution and the warrants issued herein for the defendant's eviction were all irregular.
4. The defendant's application was opposed by the plaintiff through a replying affidavit sworn on

- 28th May, 2012. In his affidavit, the plaintiff contended that the defendant was duly served with Summons to enter appearance and chose for reasons only known to him not to enter appearance. The plaintiff contended further that the defendant has no defence to the plaintiff's claim herein. He termed the defendant's proposed defence which is based on the alleged agreement for sale between the plaintiff and his (the defendant's) brother, a sham and the defendant's claim to the suit property on account of adverse possession baseless.
5. When the matter came up for hearing before me on 1st December, 2014, Mr. Nyasimi advocate appeared for the plaintiff while Mr. Ochwangi, advocate appeared for the defendant. Mr. Ochwangi and Mr. Nyasimi informed the court that they would wish to rely on the affidavits on record in support of and in opposition to the application. They urged the court to determine the application on the basis of the said affidavits.
 6. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the plaintiff in opposition thereto. The defendant's application was brought under order 10 rule 11 of the Civil Procedure Rules. In the court of appeal case of, **Pithon Waweru Maina vs. Thuku Mugiria (1982-88)1KAR 171**, Potter J.A stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or defence or upon failure of either party to attend a hearing; **"This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948,to set aside an exparte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law. Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E: "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. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules." Secondly, as Harris J. said inShah vs. Mbogo [1967] EA 116 at 123B, "This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice". That judgment was approved by the court of appeal in Mbogo vs. Shah [1968]EA 93and in Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48Biggs JA said at 51 "I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised"**.
 7. It is on the foregoing principles that I would consider the defendant's application. I would wish to add that, where it is proved that no service of Summons to enter appearance was effected upon a defendant, the court has no discretion in an application by such defendant to set aside judgment entered against him in default of appearance. The judgment must be set aside *ex debito justitiae*. It is not in dispute that the proceedings leading up to the judgment that was entered herein were conducted *ex parte*. The judgment of 22nd March, 2011 was entered against the defendant following formal proof that was conducted on the basis that the defendant was served with the Summons to enter appearance but failed to do so. In proof of service of Summons to enter appearance upon the defendant, the plaintiff filed in court an affidavit of service sworn by one, Josephine S. Nangea, a process server of this court on 26th November, 2009.
 8. In the said affidavit, the said process server stated that the defendant is a police officer and at the material time he was based at Makupa Police Station in Mombasa. She stated further that she served the defendant with the Summons to enter appearance at Kilgoris through the O.C.S Kilgoris Police Station who sent to the defendant "a signal" at Makupa Police Station. I have found this mode of service strange indeed. There is no provision in the Civil Procedure Rules for service of Summons to enter appearance through "signal". It is also not clear to me why the plaintiff or the process server chose the said mode of service whereas they knew where the defendant could be found for the purpose of personal service. The law is clear that service of

Summons to enter appearance must be effected upon the defendant personally or with leave of the court, through substituted service. The purported service that was effected upon the defendant herein by Josephine N. Nangea was in my view neither personal nor substituted in the conventional sense. It was therefore not a lawful service. An unlawful service of Summons to enter appearance amounts to no service unless the defendant enters unconditional appearance.

9. For the foregoing reasons, I am in agreement with the contention by the defendant that he was not served with the Summons to enter appearance. The judgment that was entered herein against him in default of appearance was therefore irregular. As I have stated above, where judgment in default of appearance or defence is irregular, the court has no discretion in the matter. The defendant is entitled as of right to have the same set aside. I have also noted from the record that the plaintiff did not serve upon the defendant a notice of entry of judgment sought to be set aside herein. The defendant's contention that no such notice was served upon him has not been controverted by the plaintiff. In the absence of such notice, the execution proceedings that were undertaken by the plaintiff herein were in breach of the express provisions of Order 22 rule 6 of the Civil Procedure Rules. The same were therefore irregular, null and void.
10. For the above reasons, it is my finding that the defendant's Notice of Motion application dated 23rd May, 2012 has merit. The same is allowed in terms of prayer 3 thereof. The defendant shall file his statement of defence to the plaintiff's claim within 15 days from the date hereof. The costs of the application shall be in the cause.

Delivered, dated and signed at KISII this 6th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ojala h/b for Nyasimi for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE