



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 620 OF 2017

(Formerly Nairobi ELC Case No. 617 of 2016)

PAMELA WAITHERA MBURU.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT

RULING

By an amended Notice of Motion dated the 29th October, 2019 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 2 (c), Order 45 Rule 1 (a) and Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules, the Defendant seeks the following order:

1. Spent.
2. That there be a stay of execution of the judgement and decree herein pending the hearing and determination of this application.
3. That the Plaintiff whether by herself or her agents, servants, employees or any other person be prohibited from executing the ex parte judgment delivered herein on 14th March, 2018 whether by public auction, private treaty or otherwise pending the hearing and determination of this application.
4. That there be a stay of proceedings of the Judicial Review application filed herein by the Plaintiff on 26th March, 2019 and dated 25th March, 2019 pending the hearing and determination of this application.
5. That the Plaintiff's process server be summoned for cross examination.
6. That the judgement and the decree herein be set aside and the Defendant be allowed to file its defence and this matter to proceed for hearing de novo.
7. That the Costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of Maurice Kaikai the County Attorney where he deposes that the Defendant originally learnt of this suit when it was carrying out its usual legal audit from the courts to enquire on the status of the cases against it. He contends that neither the Defendant or any of its agents and/or officers were served with the Notice of Entry of Judgement or the proclamation herein before the Plaintiff took out a Decree and Certificate of Order against the government. He avers that for quite a number of months, the County Government grappled with a predicament where the Court Processes were being served on different offices making it difficult for the legal office to keep track of pleadings and litigation. He explains that at the Court Users Committee, it was decided that the County Government come up with a Notice on service of court process. Further, that the County Government came up with a notice and placed it on the court notice board. He sought for the process server to be called for his alleged service. He states that it is only just and fair that the orders sought herein are granted based on the mode of service in that the County Secretary receives voluminous documents in a day and it is difficult if not near impossible for the said documents to be dispatched in time to the various departments for their further actions. He insists the Plaintiff is a person of unknown means and may not be able to refund the decretal sum if the Defendant successfully defends this suit.

The Plaintiff filed her Grounds of Opposition and replying affidavits sworn by Pamela Waitthera Mburu and Moses Tumu. In the Grounds of Opposition she contends that the application is frivolous, vexatious and intended to further delay the fruits of judgement in favour of the Plaintiff. Further, the application is an afterthought and full of conjectures including half truths. The Application is a waste of the court's time after Defendant having been served with various documents and has come to court to feign ignorance. The Defendant has complied with some of the orders contained in the Decree except for payment of the decretal sum.

In the affidavit sworn by Pamela Waithera Mburu she deposes that the County Secretary was indeed served by summons to enter appearance and acknowledged receipt. She insists the Defendant was served with all hearing and mention notices including letters in relation to this suit whose receipt was acknowledged through the office of the County Secretary. Further, that the Applicant was served with a judgment notice way back in 2018 as well as the Bill of Costs and Taxation Notice. She claims the Applicant is frustrating her efforts to access the decretal sum culminating in her instituting judicial review application in the High Court which was transferred to this court. She contends that the Applicant's actions are in bad faith and singularly meant to scuttle the judicial review application.

In the affidavit sworn by Moses Tumu who is an Advocate in conduct of the matter on behalf of the Plaintiff, he confirms personally serving the Applicant on several occasions with various notices as evidenced in the affidavits of service which he deposed. He referred Court to the records and contended that the Maurice Kaikai County Attorney for the Defendant even filed a Memorandum of Appearance in 2017 which was never served upon them. He explains that he severally visited the County Attorney's office over this matter and had the impression that the County was fully aware of the Decree culminating in the County hurriedly closing the road traversing the Plaintiff's parcel of land in compliance with the said Decree. However, to date no payment has been made in satisfaction of the decretal sum. He insists that on 20th November, 2017 which was the hearing date of this matter, he personally called the County Attorney to attend court but he did not show up despite service of the hearing notice in sufficient time.

The Defendant/ Applicant and the Plaintiff/Respondent filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 29th October, 2019 including the respective affidavits as well as the rivalling submissions, the only issue for determination is whether the judgement dated the 14th March, 2018 and the decree dated 7th May, 2018 should be set aside and the Defendant allowed to file its defence out of time.

The Defendant in its submissions reiterated its claim above and relied on the following decisions: **Patel Vs E A Cargo Handling Services Ltd (1974) EA 75; Shah Vs Mbogo (1967) EA 166; Wachira Karani v Bildad Wachira (2016) eKLR; and Richard Murigu Wamai Vs Attorney General & Another (2018) eKLR** to buttress its arguments. The Plaintiff in her submissions insisted the Defendant was properly served. Further, that the Defendant had failed to annex a draft statement of Defence to enable the Court assess if the said Defence raises triable issues. She relied on the following decisions: **Frigoken Limited Vs Value Pak Food Limited (2011) eKLR; Patel Vs E A Cargo Handling Services Ltd (1974) EA 75; Shah Vs Mbogo (1967) EA 116; and Mary Mucugu Kinyua Vs Joseph Irungu Mwangi & Another (2019) eKLR** to support her averments.

Order 10 Rule 11 of the Civil Procedure Rules provides that; **'where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.'**

In **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75** at page 76 C and E the court held as follows: -

'There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 to fetter the wide discretion given it by the rules.'

The court further held as follows: -

'That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication'

Further, in the case of **James Kanyita Nderitu & Another [2016] eKLR**, the court of Appeal stated thus: **"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others..'**

In the current scenario, the fulcrum of the dispute herein revolves around trespass on the Plaintiff's parcel of land. The Defendant claims it was not served with summons to enter appearance but upon perusal of the court records, the County Attorney Maurice Kaikai who deposed the supporting affidavit actually filed a Memorandum of Appearance dated the 21st June, 2016 on 28th April, 2017 after this file had been transferred from Nairobi ELC to this Court. I however note that he did not file a Defence after that. This is hence contrary to his averments that he only learnt of this suit when they were undertaking legal audits from the courts to enquire on status of the cases against it. The Defendant has further claimed it was not served with a Notice of Entry of Judgement or proclamation. However, upon perusal of the court records, I note the Defendant was actually served through the office of the County Secretary with Mention Notice dated the 7th April, 2017 that was received on 20th April, 2017; Mention Notice dated 24th May, 2017 which was received on 25th May, 2017; Notice of Entry of Judgement dated the 20th March, 2018 together with a Decree which was received on 17th May, 2018; Certificate of Order Against the Government dated the 12th November, 2018 which was received on 14th November, 2018; Notice of Taxation of the Bill of Costs dated the 16th May, 2018 together with the Bill of Costs which was received on 17th May, 2018. As a Court, I find the affidavits of service and evidence of the County Secretary's stamp on the respective documents conclusive proof of service upon the Defendant. I have no reason to

doubt that the Defendant was indeed served with various documents but opted not to participate in the proceedings herein. Infact the Defendant actually admitted at paragraph 6A of the supporting affidavit that the County Secretary receives voluminous documents in a day and it is difficult for the said documents to be despatched in time to the various departments for further actions. The Defendant has further claimed there was a Notice that was issued on mode of service to it and on perusal of the said Notice, I note it was issued after it had actually entered appearance. I opine that this Notice could not stop a party from effecting service upon the County Secretary. To my mind, it seems the Defendant though duly served severally but failed to participate in this matter, seems to be looking for an excuse which to me is unconvincing.

The Defendant has sought to be granted leave to file its Defence but failed to annex the Draft Defence to enable the Court decipher whether the same raises triable issues or not. Further, it has not controverted the fact that it has actually implemented part of the Decree by closing the road that was traversing through the Plaintiff's land and the only issue left is settlement of the decretal amount.

Based on my analysis above and relying on the cited legal provisions as well as associating myself with the quoted decisions, I find that the Defendant has failed to provide adequate reasons as to why the Judgement and Decree herein should be set aside.

In the circumstance, I find the application dated the 29th October, 2019 unmerited and will proceed to dismiss it with costs to the Plaintiff.

Dated Signed and Delivered via email this 7th Day of July, 2020.

CHRISTINE OCHIENG

JUDGE