



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1356 OF 2014

KEROKA HIGHWAY SERVICE STATION LTD.....PLAINTIFF

=VERSUS=

MAURICE ODONGO OGOT.....DEFENDANT

RULING

After being served with Summons to enter appearance, the defendant instructed the firm of Nzamba Kitonga & Co. Advocates to act him. The said firm of advocates entered appearance and filed a statement of defence on behalf of the defendant on 18th December, 2014. On 23rd February, 2016, the said firm of advocates filed in court a notice to the effect that it had ceased to act for the defendant in this suit and that all future correspondence and pleadings be served upon the defendant directly through his physical and postal addresses that were given in that notice.

On 13th April, 2017, the Deputy Registrar fixed this suit for hearing on 16th May, 2017 during service week. The hearing date was given in the presence of the advocate for the plaintiff who was ordered to serve a hearing notice upon the defendant. When the matter came up for hearing on 16th May, 2017, the court was not satisfied with the service upon the defendant because instead of serving a hearing notice, the plaintiff's advocates had served upon the defendant a mention notice. The matter was adjourned to 23rd May, 2017 for hearing and the plaintiff's advocate was directed to serve the defendant personally with a hearing notice.

When the matter came up for hearing on 23rd May, 2017, the defendant did not attend court. The court after satisfying itself that the defendant was served with a hearing notice allowed the plaintiff to prosecute its case the absence of the defendant notwithstanding. On 20th September, 2017, judgment was entered for the plaintiff against the defendant in the matter. The defendant was ordered to vacate the suit property, namely, L.R No. NBI/BLK97/0759/152 Tassia Estate, Nairobi within 90 days from the date of delivery of the judgment in default of which he was to be forcefully evicted from the property. The defendant was also ordered to pay to the plaintiff Kshs. 50,000/= as general damages together with the costs of the suit. The defendant did not vacate the suit property as ordered by the court. The plaintiff did not however take any action in the matter until one year later on 4th December, 2018 when it filed an application for the forceful eviction of the defendant from the suit property in execution of the said judgment of 20th September, 2017.

On 7th December, 2018; three (3) days after the plaintiff had filed the said application for the eviction of the defendant from the suit property, the defendant brought an application by way of Notice of Motion dated 5th December, 2018 seeking the setting aside of the said judgment of 20th September, 2017 in favour of the plaintiff. This is the application which is the subject of this ruling. The application was brought on the ground that the defendant was not served with a hearing notice for the hearing that took place on 23rd May, 2017 and as such the judgment of the court made on 20th September, 2018 was irregular and should be set aside. The defendant contended that he has a good defence to the plaintiff's claim which he should be given an opportunity to put forward.

The application was opposed by the plaintiff through a replying affidavit sworn by its director, Abdirizak Hillow Ibrahim on 4th March, 2019. In the affidavit, the plaintiff contended that the defendant was duly served with a hearing notice. The plaintiff averred that after judgment was entered against the defendant, he was also served with a copy of the decree. The plaintiff averred that the defendant was guilty of indolence having gone to sleep after instructing the firm of Nzamba Kitonga & Co. Advocates to act for him in the matter. The plaintiff averred that the defendant was not deserving the exercise of the court's discretion in his favour. The plaintiff averred that the defendant had not shown any justifiable cause why his application should be allowed. The plaintiff averred that the defendant decided to come to court only when he realised that his eviction from the suit property was imminent.

The application was argued orally on 17th December, 2019, when Ms. Muyai appeared for the defendant while Mr. Kangethe appeared for the plaintiff. In her submissions, Ms. Muyai relied entirely on the defendant's affidavit in support of the application and urged the court to allow the same. Ms. Muyai reiterated that the defendant was not served with a notice of the hearing that took place on 23rd May, 2017. In his submission in reply, Mr. Kangethe submitted that the defendant was duly served with a hearing notice. He submitted that the defendant was indolent and had not been keen on defending the suit. Mr. Kangethe urged the court to dismiss the application.

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 and the submissions by counsels. The issue that I have been called upon to determine is whether the defendant has put forward sufficient grounds to warrant the setting aside of the judgment entered herein on 20th September, 2017. Order 10 Rule 11 of the Civil Procedure Rules gives this court discretionary power to set aside judgment entered in the absence of a party upon terms as are just. The court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

The principles applied by the court in applications for setting aside ex parte orders and decrees were set out in Shah v Mbogo (1967) E.A 116 as follows:

“... the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

In Patel v E. A. Cargo Handling Services [1974] E. A 75, the court stated as follows at page 76 regarding the court's power to set aside ex parte judgments:

“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 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 defence on the merits does not mean in my view a defence that must succeed, it means as Sheridan J. put it “a triable issue: that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In the same case, it was held that:

“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.”

It is on the foregoing principles that the defendant's application falls for consideration. Before proceeding with the hearing on 23rd May, 2017, the court was satisfied that the defendant had been served with a hearing notice. The court stated as follows before starting the hearing: *“Service was effected. I have seen A.O.S”*. The defendant has contended that he was not served with a hearing notice and that the affidavit of service sworn by Charles Kangethe on 19th May, 2017 and filed in court on 22nd May, 2017 on the strength of which the plaintiff was permitted to prosecute the suit in the absence of the defendant was a fabrication. In Miruka v Abok & Another [1990] KLR 541, it was held that:

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect..... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”

In Karatina Garments Ltd. v Nyanarua [1976] KLR 94, the court stated that:

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”

The burden was on the defendant to convince the court that the process server swore a false affidavit. I am not satisfied that the defendant has discharged this burden. In his affidavit of service sworn on 19th May, 2017 Charles M. Kangethe stated that he went to the defendant's house on 19th May, 2017 at around 1:00 O'clock and effected service upon him. Although the defendant has claimed that neither he nor his wife was at home at the material time, that is a mere allegation. The defendant placed no evidence before the court showing that they were at the places which he claimed he and his wife were at the material time. The defendant did not also bother to summon the process server for cross-examination on his affidavit. An allegation that a process server who is an officer of the court lied on oath is a matter which the court takes very seriously. In the circumstances, a mere allegation cannot rebut a presumption that service has been effected as stated in an affidavit of service. I have noted that after judgment was entered in favour of the plaintiff, the plaintiff took over one (1) year to move the court to execute the same. This demonstrates that the plaintiff was not out to take a shortcut or to steal a match against the defendant. Due to the foregoing, it is my finding that the defendant was duly served with a hearing notice and chose for reasons only known to himself not to attend court for the hearing. Since the defendant was served with a hearing notice, the hearing that took place on 23rd May, 2017 and the subsequent judgment that was delivered on 20th September, 2017 were regular. The court can only set aside a regular judgment for good reason. The defendant had contended that he has a good defence to the plaintiff's claim. I am not satisfied that that is the case.

The defendant has not demonstrated that he has been paying National Social Security Fund (N.S.S.F) for the suit property. The defendant did not place before the court evidence of any payment that he has made to N.S.S.F for the suit property since 2009. In his list of documents, the defendant attached a statement of his account with N.S.S.F as at 5th July, 2011 which showed that he owed N.S.S.F Kshs. 1,001,138.29. This

suit was filed after about 3 years from the date of that statement. The defendant did not demonstrate that between 2011 and 2014 when this suit was filed, he had made any payment for the suit property. In the absence of evidence that the defendant was paying for the suit property, I am not convinced that the repossession of the suit property and sale of the same to the plaintiff was illegal.

Despite of the foregoing findings, I would in the interest of justice give the defendant an opportunity to defend himself having regard to the fact that what is in dispute is his residential home. In Nchapi Leiyagu v I.E.B.C & 2 others, [2013] eKLR, the court stated that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

In Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 1033 at 1040, Apaloo J.A. stated as follows:

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

I am not persuaded that the plaintiff would suffer prejudice that cannot be put right by payment of costs and a suitable order for security for any loss that may ensue should the defendant lose the case. In conclusion, I hereby allow the defendant’s application dated 5th December, 2018 in terms of prayers (c) and (d) on the following conditions;

1. The defendant shall pay to the plaintiff thrown away costs and the costs of this application, assessed at Kshs. 50,000/= payable forthwith and in any event not later than 30 days from the date hereof.
2. The defendant shall deposit in court as security Kshs. 500,000/= within 30 days from today as security for the loss the plaintiff is likely to incur as a result of the defendant’s continued occupation of the suit property if the defendant loses the case at the retrial.
3. In the event that the defendant fails to comply with the foregoing conditions (1) and (2) or any of them, the orders given herein setting aside the judgment delivered on 20th September, 2017 and ordering a fresh hearing shall stand set aside and the said judgment shall stand reinstated without any further reference to the court and the plaintiff shall be at liberty to proceed with the execution thereof.

Delivered and Dated at Nairobi this 2nd Day of July 2020

S. OKONG’O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kangethe for the Plaintiff

Mr. Mugambi for the Defendant

C. Nyokabi-Court Assistant