



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC NO. 497 OF 2014
(Formerly Nyeri HCCC No. 28 of 2011)

STEPHEN WAWERU PLAINTIFF

VERSUS

JOSEPH GAKOBO MWANGI 1ST DEFENDANT

THE REGISTRAR, MURANG'A LANDS REGISTRY..... 2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Background

1. By a plaint dated **14th March, 2011** the plaintiff brought the current suit seeking judgment against the defendants jointly and severally for:-

- a) **A declaration that the 1st defendant's award obtained from Kangema division Land Dispute Tribunal in respect of Land Parcel No. Loc.Ichichi/863 in is illegal/null and void;**
- b) **A declaration that the caution lodged by the 1st defendant in Land Parcel No. Loc.Ichichi/863 is illegal/ null and void;**
- c) **An order compelling the 2nd defendant to lift and or cancel and or remove the 1st defendant's caution registered on land parcel No. Loc. Ichichi/863;**
- d) **A permanent injunction to restrain the 1st defendant from entering or remaining and/or cultivating land parcel No. Loc.9/Ichichi/863.**
- e) **Costs of the suit.**

2. Upon service of summons to enter appearance, the 2nd and the 3rd defendants entered appearance and filed their respective statements of defence within the time stipulated in law.

3. The 1st defendant failed to enter appearance within the time stipulated in law and at all. He however

appointed an advocate, who filed an notice of appointment and a statement of defence long after the plaintiff had applied for and obtained an interlocutory judgment against him.

4. Because of the aforementioned state of affairs, the plaintiff filed the notice of preliminary objection dated **14th October, 2014** challenging the statement of defence filed by the 1st defendant on the ground that it was filed and served out of time. Through the said notice of preliminary objection, the plaintiff prays that the 1st defendant's statement of defence be struck out with costs.

5. The P.O was disposed of by way of written submissions.

Submissions

6. In the submissions filed on behalf of the plaintiff, it is reiterated that the statement of defence filed on behalf of the 1st defendant ought to be struck out for the reasons that the 1st defendant violated mandatory provisions of the law regarding filing a memorandum of appearance and defence; that there was inordinate delay in filing the defence and that the 1st defendant neither applied for extension of time within which he ought to have filed his defence nor applied for setting aside of the interlocutory judgment entered against him.

7. It is also submitted that the plaintiff's right under the interlocutory judgment herein had crystallized against the 1st defendant and that allowing the defence to stand would affect his rights under the said judgment. For those reasons the plaintiff urges the court to strike out the defence with costs.

8. On behalf of the 2nd and the 3rd defendants, reference is made to the provisions of **Section 1A** and **1B** of the Civil Procedure Act; **Article 159** of the Constitution of Kenya, 2010 and the case of **Bakex Millers Limited v. Esgee Industries Limited (2014) e KLR** and submitted that since the 1st defendant has been adversely and materially accused in the plaint, he ought to be given an opportunity to defend himself. Further, that striking the 1st defendant's defence would unfairly deny him an opportunity to defend himself against the adverse allegations made against him by the plaintiff.

9. It is also submitted that the issues raised in the 1st defendant's statement of defence are triable and that the 1st defendant is a necessary party to the suit as stated in the case of **Bakex Millers Limited** (*supra*) that:-

“Ideally cases should be determined on tested evidence at a full hearing. Striking out pleadings should thus be an exception and not the norm....In addition, regard must be had to Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act. The court is enjoined to do substantive justice to the parties.”

10. At the time of writing this ruling no submissions had been filed on behalf of the 1st defendant.

Analysis and determination:-

a) Entry of interlocutory judgment:

11. As pointed out herein above, after the 1st defendant allegedly failed to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the 1st defendant. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment can only be entered in respect of a liquidated claim only.

12. In this regard, see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request in

Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.

13. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

“Jowwit’s Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

14. Since the plaintiff’s case is for recovery of land, it does not fall under the claims for which interlocutory judgment could have been entered in his favour under **Order 10 Rule 2**. The plaintiff ought to have proceeded under **Order 10 Rule 9** which provides as follows:-

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

15. In view of the foregoing, I find the interlocutory judgment entered in favour of the plaintiff to have been without any basis in law and as such incapable of conferring any rights on the plaintiff.

16. Concerning the statement of defence filed by the 1st defendant, it is not in dispute that it was filed out of time and without first seeking extension of the time within which the 1st defendant ought to have filed the same. That being the case, I agree with the plaintiff that the same was filed in violation of the provisions of **Order 7 Rule 1** of the Civil Procedure Rules which provides as follows:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

17. Although this court is enjoined by **Article 159** of the Constitution of Kenya and **Section 1A** and **1B** of the Civil Procedure Act to discharge substantive justice to parties who appear before it, it can only do so to a party who has moved it to do so. And whereas under **Section 3A** of the Civil Procedure Act and **Order 50 Rule 6** of the Civil Procedure Rules this court has power to enlarge time within which the 1st plaintiff ought to have filed his statement of defence, it cannot do so without being prompted or moved by the 1st defendant. In this regard see the provisions of **Order 50 Rule 6** which provides as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice

of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall

be borne by the parties making such application, unless the court orders otherwise.”

18. In the instant case, the 1st defendant merely filed a statement of defence when he knew that the time he ought to have done so had lapsed. There is no application before me for regularisation of the procedural impropriety concerning the statement of defence filed by the 1st defendant. That being the case, I can do no better than to agree with the plaintiff that the defence filed by the 1st defendant is improperly on record.

19. The upshot of the foregoing is that the Preliminary Objection has merit and is allowed as prayed. The plaintiff is directed to fix the matter for hearing on its merits as contemplated under **Order 10 Rule 9** of the Civil Procedure Rules.

20. The 1st defendant shall have liberty to address the court during the hearing of the case.

Dated, signed and delivered at Nyeri this 8th day of July, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiminda h/b for Mr. Muchoki Kangatta for the plaintiff

Mr. Makori for the 2nd defendant

N/A by the 1st defendant

Court assistant - Lydia