



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 19 OF 2019

JAPHETH KIBIWOTT RUTO(Suing as Legal Personal Representative of the

Estate of KIBIWOTT ARAP MWOLOMET (Deceased).....PLAINTIFF

VERSUS

VIRGINIA NJERI MAINA.....1ST DEFENDANT

VINCENT RONGEI KOTOKOTO.....2ND DEFENDANT

RULING

The Application

1. By a notice of motion dated **11/6/2020** and filed on **12/6/2020** the 1st defendant seeks the following orders against the plaintiff:
 - a. **That this court be pleased to set aside the interlocutory judgment entered herein on 23/7/2019 against the 1st defendant/applicant and all consequential orders and proceedings thereto.**
 - b. **That this court grants to the 1st defendant/applicant herein leave to enter appearance and file defence out of time.**
 - c. **That the costs of this application be in the cause.**
2. The application is brought under **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Order 10 Rule 11** and **Order 51** of the **Civil Procedure Rules 2010** and **Article 159 (2)** of the **Constitution of Kenya 2010**.
3. The application is supported by an affidavit of the 1st defendant sworn on **11/6/2020**. The application is premised on the grounds that the 1st defendant herein was never served with Summons to Enter Appearance; that she purchased her piece of land way back in the year **2009** and even processed a title over the same in the year **2010**; that if the plaintiff proceeds to formal proof hearing it would be to her detriment as she will be condemned unheard yet she has a good defence and that the hearing of this suit is scheduled for **5/10/2020**.
4. The supporting affidavit amplifies the above grounds.
5. I have perused the court record and I have found no reply filed by the plaintiff in this matter. None of the parties filed any submissions on the application.

Determination

6. The issue that arises in the instant application is whether there is interlocutory judgment and whether it ought to be set aside.
7. The plaintiff filed a request for judgment against the 1st defendant on **18/7/2019** after filing an affidavit of service dated **24/3/2018**. The request was prompted by the apparent non-filing of a memorandum of appearance and defence by the 1st defendant.
8. Pursuant to this request the Deputy Registrar endorsed that the matter be set down for formal proof on **23/7/2019**. That order formed the basis of the instant application. It is evident that the order made by the Deputy Registrar on **23/7/2019** precluded the applicant from filing her

defence and not the memorandum of appearance, for a memorandum of appearance could still be filed after her order.

9. However, it is noteworthy that **Order 10 rule 9** of the **CPR** 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”.

It is evident that the plaintiff’s only and proper recourse under **Order 10** of the **Civil Procedure Rules** was to set down the matter for hearing and not request for judgment since the situation he was in is not provided for under the other provisions of **Order 10**.

10. However, notwithstanding the foregoing comments, the 1st defendant’s application is still appropriate as **Order 10 Rule 3** provides that:

“Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.”

11. The only difference between this claim and a liquidated claim is the need to adduce evidence in proof of the plaintiff’s claim and it was not entirely amiss for the Deputy Registrar to order that the matter do proceed for formal proof on the basis of the prevailing circumstances. She needed not have made the orders. Immediate provision of the suit with a hearing date would have been sufficient response to the plaintiff’s request; nevertheless, her order still had the same effect as the granting of an application for a hearing date if it had been sought by the plaintiff in the circumstances.

12. The instant application has been brought by the 1st defendant. The application is not opposed. Further by making the application *per se* the applicant has exhibited to this court her need to be heard in the matter, and that the suit do proceed on its merits. If the application is not granted the applicant may be shut out of the hearing. **Article 50** of the **Constitution of Kenya 2010** provides that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.”

13. This court is of the view that the application before it has merit. The same is granted in terms of **Prayers Nos. (a) and (b)** thereof. The order of the Deputy Registrar issued on the **23/7/2017** is effectively vacated. The costs of the application shall be in the cause.

14. Further the 1st defendant’s memorandum of appearance and defence in this suit shall be filed and served within **15 days** from the date of this order, and this suit shall be mentioned on **14/10/2020** to ascertain compliance.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 22nd day of September, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.