



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC 69 OF 2012

MAGARE OMBULO

BARABAS OPONDO OBOCH.....PLAINTIFF

VERSUS

VITALIS AKUMU NJEGA.....DEFENDANT

RULING

1. The applicant herein – **VITALIS AKUM NJEGA** – filed this application here on 8/2/2013. The application is a Notice of Motion brought under S.3A of Civil Procedure Act (Cap 21), Order 9 Rule 5, Order 10 Rule 11 and Order 51(1) of Civil Procedure Rules. It is brought against the two plaintiffs – **MAGARE OMBULO** and **BARNABAS OPONDO OBUCH** – who filed the present suit against the defendant on 13/4/2012.
2. The application is seeking leave to have the firm of **E.M MASHETI & CO. ADVOCATES** come on record for the applicant herein. It also seeks to have the judgment entered on 25/6/2012 set aside and to grant leave to the applicant to enter appearance and file defence. Provision for costs of the application is also asked for.
3. The application is premised on the grounds that the firm of E.M Masheti & Co. Advocates wishes to come on record for the defendant but can't do so without leave of court as judgment is already entered against the defendant. The applicant is also said not to have been served with summons to enter appearance or copy of plaint nor even with notice of entry of judgment which was entered against him on 25/6/2012. The applicant is said to have become aware of the suit through his advocate who stumbled upon his file during a visit at Kisumu law Courts on unrelated business on 30/7/2012. The applicant is said to have a strong defence against the plaintiff and it is therefore in the interests of justice to hear him.
4. The applicant's supporting affidavit reiterates that the defendant was never served; that he wishes representation by the firm of **M/s E.M MASHETI & CO. ADVOCATES**; that the affidavit of service filed purporting to show service on him is actually false; and that he has been ailing and has always been in hospital for medication.
5. The plaintiffs opposed the application vide a replying affidavit filed on 12/3/2013. The defendant's application is said to be full of lies and is termed an abuse of the Court process. The defendant is said to have been served on 7/5/2012 at about 11.30A.m at his home at Komono. Despite service, the defendant didn't enter appearance and/or file defence. Owing to this failure, exparte judgment was entered against him on 25/6/2012. The plaintiffs would like the defendant's application dismissed.
6. In this matter, parties decided to file submissions in lieu of oral arguments. The applicant's

submissions were filed on 19/7/2013 and are dated 9/7/2013. The submissions attempt a summation of the grounds upon which the application is based. The applicant, it was submitted, was never served and the affidavit of service on record is said to contain falsehoods. The applicant is said to have a strong defence, as can be seen in the draft defence availed. The subject matter is land, a sensitive issue requiring canvassing before Court interpartes. The court was therefore asked to allow the application.

7. The respondents submissions were filed on 16/7/2013 and are dated 6/7/2013. The submissions begin by taking the issue of representation of the applicant by counsel seeking to come on record. The applicant is said to have invoked the wrong law viz: Order 9 Rule 5 of Civil Procedure Rules, 2010, instead of order 9 rule 9 and 10. According to the respondent, the applicant has brought an Omnibus application forgetting that order 9 rule 9 and 10 provide that the issue of representation should be tackled first. The other prayers in the application ought not to be there and the application, according to respondent, should be struck out.

8. The respondent maintained that the applicant was served. Such service, it was submitted, was done by one **FRANCIS OMIRE** on 7/5/2012 at or around 11.30A.m at applicant's homestead at Komono, **LINAO** Village, Siaya County.

9. The exparte judgment entered was said to be regular as the applicant was duly served but failed to do the needful within the requisite period.

10. The applicant is accused of delay in failing to enter appearance and/or file defence thus leading to request for, and entry of, interlocutory judgment. He is therefore undeserving of exercise of Court's discretion in his favour. The decided case of **EXPRESS (KENYA) LIMITED VS MANJU PATEL, NAIROBI C.A.C.A NO.158/01**, was availed as a useful guide on this issue.

11. The draft defence is also attacked. The argument raised is that the defence cannot successfully counter the plaintiff's case as circumstances seem to point to inexplicable change of title to defendant's name.

12. I have considered everything that was laid before me. The respondent has tried to itemize the issues for determination. The issues concern representation of the applicant by counsel; service or lack of it; the regularity or otherwise of the judgment entered; delay in entering appearance and/or filing defence; and whether the defence filed has triable issues. It is true that these issues capture the contention between the parties concerning the application.

13. It is apt to address the issues now. The first issue is representation. According to respondent, the issue of representation should be handled first. The inclusion of other prayers in the application makes it an omnibus application which should be struck out. That, according to respondent, is the import of order 9 Rule 9 and 10. A further argument on the issue is that the applicant has invoked the wrong law.

14. These are technical points of procedure whose prominence must be underplayed in view of the provisions in Sections 1A, 1B and 3A of Civil Procedure Act and article 159(d) of our current constitution. The cumulative thrust of these provisions is that substantive justice should not be sacrificed at the alter of procedural technicalities. In any case, there is mis-reading of the relevant procedural law by the respondent when he tries to push for the striking out of the application on the ground that it is an omnibus application. Order 9 rule 10 of Civil Procedure Rules, 2010, clearly provides that an application making a prayer for representation under order 9 rule 9 can also have other prayers. All what is required in such application is that the issue of representation be tackled first, which is what I am doing here. I therefore reject the respondents argument on this issue. I will not strike out the application on that ground and I will not reject it because the applicant misquoted some provisions of law. It is fair and right to the applicant to have a counsel of his choice and I allow the prayer for representation.

15. The other issue, which is second, concerns service. The applicants argument on this is that he was never served. He only got to know of the case, he argued, when his advocate stumbled on his file at

court registry. It is easy to ask: Did the advocate know him before? How did a counsel, in Court on unrelated business, apparently uninstructed, notice the applicants file among many in the Court registry and, while still having no instructions, proceed to contact the applicant? I find it hard to accept this story as told by the applicant. I have a feeling that the explanation is contrived to be a smart lie but a look at it shows it is completely devoid of either logic or common sense.

16. In contrast, a fairly clear and comprehensive affidavit of service was filed showing how, where, and when the applicant was served. Places are mentioned, time and date specified and mode of service clarified. I have no reason to doubt the service herein. So, while the applicant would be entitled to setting aside of *ex parte* judgment **EX- DEBITO JUSTICIAE** if service had not been proved, it is not the case here. Service was effected and he now has to rely on judicious exercise of court's discretion. On this issue therefore, I agree with the respondent that the applicant was served.

17. My finding on the issue of service makes me quickly settle the third issue viz: Was the judgment entered regular? The applicant was served. He didn't enter appearance or file defence. If we want to be absolutely technical, no judgment was supposed to be entered in this case. Order 10 rule 6 provides that such judgment be only entered in a claim for pecuniary damages or for detention of goods. This is not one such claim. In a claim like this one, Order 10 rule 9 provides that the suit be set down for hearing.

18. But in view of the provisions of law at paragraph 14 of this ruling, such approach is not appropriate. To the extent that the judgment herein was entered after failing to enter appearance and/or file defence, I refuse to fault the judgment on the grounds advanced. I therefore reject the applicant's argument on this issue.

19. The fourth issue concerns delay. The respondent argues there was a delay of over one month by the applicant. It is true that the applicant failed to enter appearance or file defence within the period. But while this delay is obviously there, the court must consider whether it was inordinate. And I think it was not. By the time the applicant acted, it is not shown that there were post – judgment steps taken by the respondent to give effect to the judgment. For instance, the applicant has argued that he was not served with notice of entry of judgment. The respondent has not demonstrated such service. The respondent has not shown too that he had started the process of execution. The fact of the matter is that there was delay but it is not delay that I would term inordinate. The respondent therefore does not find favour with the court on this argument.

20. The final issue concerns the defence. The respondent's position is that the defence has no triable issues. I have looked at the defence. The respondent is wrong. The defence has very many triable issues. For instance, according to plaintiff, 3 people owned parcel No. **EAST UGENYA/KATHIENO "B"/160**. According to defendant, his father owned the land. Both sides are ready to demonstrate their assertions. Can we deny them this? No. The defendant asserts that this suit violates provisions of Limitation of Actions Act, particularly sections 7 and 16. This is a weighty allegation. Why can't the plaintiff wait to prove otherwise? All these are triable issues and there is no wishing them away.

21. Finally, then, which way for the application? Representation is already allowed. It is clear that the judgment herein cannot be faulted on grounds of service or irregularity as argued in the submissions of both sides. And the delay has been found not to be inordinate. It has been suggested that the applicant has been sickly. The respondent has not responded to this. This application hinges on the exercise of courts discretion. In **C.M.C HOLDINGS LIMITED VS NZIOKI (2004) 1 KLR 173**, it was held, *inter alia*, that such discretion must be exercised upon reasons and judiciously. In **WAIBOCI & ANOTHER VS PASHITO HOLDINGS LTD & 7 OTHERS: (2004) 2 KLR 415**, **Ojwang J** (as he then was) held, *inter alia*, that an entirely regular interlocutory judgment can be set aside where the defendant happens to have and places before court a reasonable defence on the merits. And an assessment of such merits may be made on the basis of the draft defence.

22. In this case, I have already observed that there is a draft defence with various triable issues. The possible merits of that defence can only be properly considered after a full trial. To deny the

applicant the opportunity to ventilate his issues before the court is to act unfairly. He has demonstrated his readiness to defend the suit. He should be allowed to do so. Accordingly, the court's discretion should be exercised in his favour. And it is so exercised. The application herein is therefore allowed but with costs to the respondent.

A.K KANIARU – JUDGE

7/10/2014

7/10/2014

A.K. Kaniaru – Judge

Diang'a George – Court clerk

No party present

Interpretation – English/Kiswahili

COURT: Notice to deliver ruling was sent to counsels on record on 18/9/2014. This is now read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K.KANIARU – JUDGE

7/10/2014

AKK/va