



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 351 OF 2012

HENRY ORINA OKAO.....PLAINTIFF

VERSUS

TIMOTHY OGUCHA OMATODEFENDANT

RULING

1. What I have before me is the defendant's application by way of Notice of Motion dated 23rd June, 2014 in which the defendant has sought the setting aside of the judgment entered herein on 31st January, 2014. The defendant's application that was brought under Order 10 rules 10 and 11 of the Civil Procedure Rules and section 3A of Civil Procedure Act was premised on the grounds that the defendant was not served with the Summons to enter appearance and that the defendant has a good defence to the plaintiff's claim. In his affidavit sworn on 23rd June, 2014 in support of the application, the defendant contended that the plaintiff is a stranger to him and that he has never entered into any agreement for sale of land with the plaintiff as alleged in the plaintiff's amended plaint or at all. The defendant contended that he was never served with Summons to enter appearance and that the affidavit of service on the basis of which interlocutory judgment was entered against him in default of appearance is full of lies. The defendant contended that he came to know of the existence of this suit after his friend who had some business to transact at Kisii Law Courts notified him that he heard an auctioneer inquiring about this matter. The defendant contended that he has a good defence to the plaintiff's claim that he should be allowed to put forward. The defendant annexed to his affidavit a draft statement of defence in which he has denied that he entered into any agreement for sale of land with the plaintiff. In the alternative, the defendant has contended that if he did enter into any such agreement, the same is unenforceable at the instance of the plaintiff because the plaintiff had failed to fulfill his obligations under the said agreement.

2. The defendant's application was opposed by the plaintiff through a replying affidavit sworn on 31st July, 2014. In his affidavit, the plaintiff contended that the defendant was duly served with Summons to enter appearance. The plaintiff also maintained that the defendant had entered into an agreement with him for the sale of all that parcel of land known as **LR No. West Kitutu/Bomatara/1782** (hereinafter referred to as "**the suit property**") and that the plaintiff had breached the terms of the said agreement by failing and/or refusing to transfer the said property to him. The plaintiff contended that the defendant has no defence to the plaintiff's claim. The plaintiff termed the defendant's draft defence as full of falsehoods.

3. When the matter came up for hearing before me on 17th July, 2014, Mr. Ochoki advocate appeared for the defendant while the plaintiff who is acting in this matter in person did not appear. Since the hearing date for the application was given in court in the presence of the

plaintiff, I allowed the defendant's advocate to proceed with the application the absence of the plaintiff notwithstanding. Mr. Ochoki reiterated the contents of the defendant's affidavit in support of the application and submitted that the defendant was not served with the Summons to enter appearance and that the defendant has a good defence to the plaintiff's claim which he should have an opportunity to put forward.

4. I have considered the defendant's application, the replying affidavit by the plaintiff in opposition thereto and the oral submissions that were made before me by the defendant's advocate. The defendant's application was brought under order 10 rules 10 and 11. In the court of appeal case of, **Pithon Waweru Maina vs. Thuku Mugiria (1982-88)1KAR 171**, Potter J.A stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or defence or upon failure of either party to attend a hearing; **"This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948, to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law. Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E: "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. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules." Secondly, as Harris J. said in Shah vs. Mbogo [1967] EA 116 at 123B, "This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice". That judgment was approved by the court of appeal in Mbogo vs. Shah [1968]EA 93 and in Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48 Biggs JA said at 51 "I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised"**.

5. The plaintiff's claim against the defendant herein is set out in the amended plaint dated 29th May, 2013. In the said plaint, the plaintiff has contended that on 23rd August, 1997, he entered into an agreement for sale with the defendant by which the defendant agreed to sell and he agreed to purchase all that parcel of land known as **LR No. West Kitutu/Bomatara/1782** ("the suit property") at a consideration of Ksh. 210,000/=. The plaintiff has contended that although he fulfilled his part of the bargain under the said agreement, the defendant failed to do so in that the defendant failed and/or refused to transfer the suit property to him. The plaintiff sought an order compelling the defendant to transfer the suit property to him and in the alternative, a refund of the purchase price that he paid to the defendant together with default damages.

6. I have noted from the record that the defendant is said to have been served two(2) times before judgment was entered against him herein on 31st January, 2014 and once after judgment was entered. According to the affidavit of service sworn by one, Peter Nyanusi Moenga a process server of this court on 12th October, 2012, the defendant was served with Summons to enter appearance on 1st October, 2012 at the gate of Gusii Stadium near Golf House. When this suit was listed for hearing on 23rd May, 2013, the said process server once again is said to have served the defendant with a hearing notice on 10th May, 2013 near Kisii Zonic Hotel. After the judgment was entered against the defendant on 31st January, 2014, the said process server is said to have served the defendant with a notice of entry of judgment on

11th March, 2014 outside Kenya Commercial Bank Ltd. Kisii. The said process server has filed three (3) separate affidavits of service detailing how he effected service upon the defendant on the three occasions. The defendant has denied service of Summons to enter appearance and notice of entry of judgment. The defendant has not commented on the service that is said to have been effected on him of a hearing notice for the hearing that took place on 23rd May, 2013. The law is now settled that where a process server has sworn and filed an affidavit to the effect that he/she has effected service of a document on a person, there is a rebuttable presumption that the person has been served.

7. The onus is upon the person challenging service to prove that service was not effected. The defendant has made mere allegations that he was not served. The process server has given the date, time and place where he effected service upon the defendant. The defendant has not denied that he was not at the places where he is said to have been served on the dates and at the times when he is said to have been served. The defendant did not seek leave of the court to cross examine the process server on his said affidavits of service. I have no reason from the material before me to disbelieve the affidavits of service filed herein to the effect that the defendant was served with the Summons to enter appearance and notice of entry of judgment. The defendant has also not come out very clearly on how he came to know of these proceedings. The defendant has claimed that he came to know of these proceedings through a friend who overheard an auctioneer at Kisii Law Courts inquiring about this matter. The names of the said friend and the auctioneer who was inquiring about this matter are not disclosed. I have also noted from the record that no application for execution has been filed and as such I wonder how an auctioneer would have come in to inquire about this matter. It is my finding therefore that the defendant was served with both the Summons to enter appearance and notice of entry of judgment. The judgment that was entered against the defendant herein on 31st January, 2014 was therefore a regular judgment.

8. Apart from lack of service, the other ground that the defendant had put forward in support of his application herein is that he has a strong defence to the plaintiff's claim. In my view the defendant has not put forward what can be termed as a good defence to the plaintiff's claim herein which arose from agreement for sale of land which he claims to have entered into with the defendant. The draft defence attached to the defendant's affidavit to me amounts to a mere denial. In his affidavit in support of the present application, the defendant stated on oath that he is a stranger to the plaintiff and that he has never entered into any agreement for sale with him. In the draft defence the defendant has denied that he entered into any agreement for sale of land with the plaintiff. The defendant has however gone further to plead that if at all he entered into any such agreement with the plaintiff then the same is unenforceable due to the fact that the plaintiff did not comply with the terms thereof. The defendant has not provided the particulars of the plaintiff's alleged non-compliance. The defendant has contended further that the plaintiff's claim is defective, incompetent and misconceived. No particulars have been provided to support these allegations. Due to the foregoing, I am not satisfied that the defendant has a good or reasonable defence to the plaintiff's claim herein.

9. As was stated in the case that I have cited above, this court has a very wide discretion while considering an application to set aside judgment entered in default of appearance. This discretion must however be exercised judicially. In the application before me, it is not clear to me why the defendant failed to enter appearance after being served with Summons. It is also not clear to me why he did not take steps immediately to apply to set aside the judgment that was entered herein on 31st January, 2014 once he was notified of the same on 11th March, 2014. I cannot rule out the possibility that the defendant's failure to act was intended to evade, obstruct or delay the course of justice. The defendant has also failed to demonstrate that he has a good defence to the plaintiff's claim. Although, the defendant has not given valid reasons for his failure to enter appearance and has also not convinced the court as to the defence he would wish to put forward, I am inclined to give him an opportunity to put forward whatever defence he has to the plaintiff's claim. The plaintiff has not stated in his affidavit in reply that he stands to suffer injury or prejudice if the orders sought by the defendant are granted that cannot be

compensated for by costs. There is also no suggestion that a fair hearing would not be possible if the judgment entered herein ex parte is set aside. I am of the opinion however that from the facts of this case, it would be unjust to set aside the judgment entered herein on 31st January, 2014 unconditionally.

10. For the above reasons, I will allow the defendant's Notice of Motion application dated 23rd June, 2014 in terms of prayer 3 thereof on condition that the defendant shall deposit in an interest earning bank account in a reputable bank in Kisii within thirty (30) days from the date hereof a sum of Kenya Shillings Five Hundred Thousand (Ksh.500,000/=) in the joint names of the plaintiff and the defendant's advocates. In default of making the said deposit on due date, the judgment entered herein on 31st January, 2014 shall stand reinstated automatically without any further reference to the court and if any defence would have been filed by the defendant pursuant to the orders made herein, the same shall stand struck out. The defendant shall file and serve its statement of defence within 14 days from the date hereof. The plaintiff shall have the costs of the application dated 23rd June, 2014 and thrown away costs assessed at a total sum of Ksh. 15,000.00 payable forthwith.

Delivered, signed and dated at KISII this 5th day of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Plaintiff present in person

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE