



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1001 OF 2015

JEAN VERA WAMBUI.....PLAINTIFF

=VERSUS=

DOMINIC GATHECA KINYUA.....DEFENDANT

RULING

1. This is the notice of motion dated 30th August 2019 brought under section 1A, 1B, 3A of the Civil Procedure Act, 40 rule 7, order 50 rule 6, order 51 rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

(1) That this honourable court be pleased to set aside the injunction entered for the plaintiff against the defendant on 16th June 2019 and the defendant be granted unconditional leave to defend the application dated 12th October 2015.

(2) That this honourable court be pleased to extend time within which to defend this suit and the defendant be granted unconditional leave to defend this suit.

(3) That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (f).

4. The application is supported by the affidavit of Dominic Gatheca Kinyua, the defendant/applicant herein sworn on the 30th August 2019.

5. The application is opposed. There is a replying affidavit sworn by Jean Vera Wambui, the plaintiff/respondent, herein sworn on the 16th September 2019.

6. On the 27th May 2020 the court with the consent of the parties directed that the application be canvassed by way of written submissions.

The defendant's/applicant's submissions

7. The court issued final orders on an application. The defendant/applicant did not publish the orders issued by the court in the Daily Newspaper and he only learnt of the same when his advocates perused the court file. Failure to enter appearance, and defend the application was not intentional and only arose since the defendant was not aware of the suit.

8. The plaintiff had not taken action against the defendant prior to the filing of the suit including issuance of the demand which could have alerted the defendant of the plaintiff's claim and the intended action against him. The plaintiff claims ownership of plot No. 575 (previously 534) on LR No. 8469/4 and the defendant claims ownership of Plot No. 572 (previously 533) on LR No. 8469/4 Kasarani which plot is distinct from the Plot claimed by the plaintiff.

9. Order 40 rule 7 of the Civil Procedure Rules 2010, provides that any order for an injunction may be discharged or varied or set aside by the court on an application made thereto by any party dissatisfied by such order.

He has put forward the case of **CMC Holdings Limited vs Nzioki [2004] eKLR**.

10. The defendant did not learn about this suit until sometime on or about 15th July 2019. The failure to enter appearance was not intentional and that the defence raises triable issues. Justice demands that this suit be heard and determined on merits to ensure that the court delivers an informed judgment on merits having considered both the plaintiff and defendant's case.

11. Setting aside the injunction issued against the defendant and granting the defendant leave to defend this suit will ensure that this matter is determined on merits. He has put forward the case of **Winnie Wambui Kibinge & 2 Others vs Match Electricals Limited [2012] eKLR**. He prays that the application be allowed.

The Plaintiff's/Respondent's submissions

12. On 19th June 2019 the honorable court having been satisfied that the application was duly served, heard the application on merits and granted the orders sought. On 24th June 2019 this court issued an injunction against the defendant from entering, trespassing or in any way interfering with the suit property. The defendant was duly served by way of advertisement in the Daily Nation Newspaper.

13. The defendant/applicant has not demonstrated reasons to warrant the orders of injunction to be set aside. She has put forward the case of **John Mukuha Mburu vs Charles Mwenga Mburu [2019] eKLR**. The draft defence raises no triable issues and the same is fatally defective.

14. The plaintiff/respondent will be prejudicial if the injunction is set aside as the defendant will continue with unlawful construction on the block of flats on the plaintiff's property. It is in the interest of justice that the suit property be preserved and not sold and/or alienated. She has put forward the case of **Anne Mumbi Hinga vs Gaitho Oil Ltd [2013] eKLR**.

15. The defendant/applicant has not offered any reasonable explanation for the delay in making the instant application for setting aside of the said injunction. The defendant/applicant has not demonstrated that he would suffer any substantial loss of these orders are not granted. She has put forward the case of **Scooby Enterprises Ltd vs Kisii County Assembly Service Board [2016] eKLR**.

16. The defendant/applicant has not demonstrated sufficient cause for extension of time to be allowed to defend his suit. He has not faulted the mode of service therefore it is not in dispute that he was properly served. She has put forward the case **Haile Menkerios vs Francis Mureithi & Another**.

17. The defendant/applicant has been indolent and is not entitled to any reliefs. She prays that the application be dismissed with costs.

18. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions and the authorities cited. The issue for determination is whether this application is merited.

19. The plaintiff/respondent filed this suit against the defendant/applicant. She also filed the notice of motion dated 12th October 2015. On the 3rd October 2018, the plaintiff's/respondent's counsel informed the court that they were unable to serve the defendant personally.

20. She then filed the notice of motion dated 11th December 2017 seeking to serve the defendant by substituted service by way of advertisement in one of the Daily Newspapers. The application was allowed.

21. The notice of motion dated 12th October 2015 was then fixed for hearing on 19/6/2019. On the 19th June 2019 Mrs Beacco for the plaintiff told the court the defendant had been served by way of advertisement in the Daily Newspapers. There is an affidavit of service sworn by Salome M Beacco, Advocate of the plaintiff on the 24th October 2018. In paragraph 4 she depones:-

“That on 23rd October 2018, the Daily Nation Newspaper caused the application dated 12th October 2015 to be advertised on the classified section of the said newspaper (annexed hereto and marked “SMB-2” is the true copy of the newspaper advertisement).”

22. Upon confirming that the defendant had been served, court granted the orders as prayed on the notice of motion dated 12th October 2015. The court was satisfied that the defendant had been duly served hence the orders.

23. **Order 40 rule 7** of the Civil Procedure Rules provides that:-

“Any order for an injunction may be discharged or varied, or set aside by the court on application made thereto by any party dissatisfied with such orders”.

It is clear that the above provision is discretionary

24. It is the plaintiff's case that the defendant has constructed on block of flats on her plot. The defendant on the other hand claims the plot being claimed by the plaintiff is distinct from his, as the two plots bear different numbers.

25. From the foregoing, it is in the interest of justice that the subject matter be preserved pending the hearing and determination of this suit. I therefore see no basis to interfere with the orders granted on 19th June 2019. I decline to discharge, vary and/or set aside the said orders.

26. I find that the defendant/applicant is entitled to be heard in this suit. In the case of **CMC Holdings Ltd vs Nzioki [2004] eKLR**. The Court of Appeal held thus:-

“Our view is, that in law, the discretion that a court of law has in deciding whether or not to set a side ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion, if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such exercise of discretion would in our mind be wrong in principle....

The law is now well settled that in an application for setting aside ex parte judgment the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues..... court has wide discretion in such cases to set aside ex parte judgment.”

27. I am guided by the above by the above authority. It is the defendant’s/applicant’s contention that failure to defend suit was not intentional.

28. I hereby exercise this court’s discretion in favour of the defendant/applicant only to the extent that he is allowed to defend this suit. This application succeeds in part.

29. Accordingly, the notice of motion dated 30th August 2019 is allowed in the following terms:-

1. That the defendant is hereby granted leave to defend the suit.

2. That the defendant do file and serve a statement of defence within (21) twenty one days from the date of this ruling with corresponding leave to the plaintiff to file a reply to defence within fourteen (14) days thereafter.

3. That costs of this application be borne by the defendant/applicant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 3rd day of December 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Nzioka for the plaintiff

Mr. Kariuki for the Defendant

Steve - Court Assistant