



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 761 OF 2012

JOHNSON KYAI NDOO.....PLAINTIFF

VERSUS

BERNARD WAMBUA KILONZO.....1ST DEFENDANT

HARRISON MUEMA KYOVE.....2ND DEFENDANT

BONIFACE KIUNDI.....3RD DEFENDANT

RULING

What is before me is the defendant's application brought by way of Notice of Motion dated 31st August, 2017 seeking the setting aside of the judgment that was entered against them herein on 12th March, 2014 and leave to file a statement of defence.

The application was brought on the grounds that the defendants were not served with summons to enter appearance and that they had a good defence to the plaintiff's claim. The defendants averred that they came to know of the suit herein after the delivery of judgment when the plaintiff went to their respective parcels of land claiming that the same belonged to him. The defendants averred that they acquired their respective parcels of land for valuable consideration and have developed and occupied the same for several years. The defendants averred that they should be given opportunity to defend the plaintiff's claim. The defendants contended that if their application was not allowed, they would have been condemned unheard in breach of the rules of natural justice. The defendants annexed to their affidavits in support of the application the agreements for sale pursuant to which they acquired their respective parcels of land which are being claimed by the plaintiff. The defendants also exhibited photographs of some of the developments they have undertaken on their respective parcels of land.

The application was opposed by the plaintiff through a replying affidavit sworn on 18th September, 2017. The plaintiff averred that the defendants were all served with summons to enter appearance and subsequently with hearing notices but chose to ignore the same thinking that the plaintiff was joking. The plaintiff averred that he personally assisted the process server in serving the court process upon the defendants. The plaintiff denied that he acquired title to L.R No. Emali Township Block 1/220 ("the suit property") fraudulently. The plaintiff averred that the defendants' claim if any, lies against the persons from whom they purchased portions of the suit property under their occupation. The plaintiff averred that the defendants had no cause of action against him and that they should be evicted from the suit property. The plaintiff averred that the defendants had not put forward valid grounds to warrant the grant of the orders sought.

The application was heard by way of written submissions. The defendants filed their submissions on 29th November, 2017 while the plaintiff filed his submissions in reply on 29th May, 2018. I have considered the defendants' application together with the affidavits filed in support thereof. I have also considered the plaintiff's replying affidavit in opposition to the application. Finally, I have considered the written submissions by the parties and the authorities cited in support thereof. In the case of *Shah v Mbogo and Another (1967) E.A 116* it was held that:

“.....the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice....”

I am satisfied from the affidavits of service annexed to the plaintiff's replying affidavit that all the defendants were served with summons to enter appearance and subsequently with hearing notices whenever the suit was fixed for formal proof. The plaintiff who seems to have known all the defendants personally accompanied the process server in many of the occasions he went to effect service upon the defendants. In his various affidavits of service, the process server gave detailed accounts on when and where he effected service. In some instances, he even gave the telephone contacts of some of the defendants. The 1st defendant was served through out in his house. The affidavits of the process server annexed to the plaintiff's replying affidavit were not challenged in any material respect. The 1st defendant did not deny in his affidavit that the plaintiff knew his house and that he was in his house when he is said to have been served. The 2nd defendant on the other

hand did not deny that he owned telephone number 0720427592 and that he was contacted by the process server through the said number on 8th February, 2014. Although the 3rd defendant denied that he had a firm manager by the name Mr. Maina, he did not deny that he had a firm and that there was someone managing the same. He did not also comment on the telephone number 0725***** which the process server gave as belonging to the said manager. Although the defendants challenged the process server's affidavit of service, they did not request the court to summon him for cross-examination. In the Court of Appeal case of Dickson Daniel Karaba v John Ngata Kariuki & 2 others, Nairobi Civil Appeal No. 125 of 2008, it was held that there is a presumption that the court process is properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect. It was held further that where service is denied it is normally desirable that the process server be put in the witness box and opportunity given to those who deny service to cross examine him. That was also the holding in the case of Miruka v Abok & Another [1990] KLR 541.

The defendants denied that they were served with summons to enter appearance. The onus was upon them to show that the affidavit of service that was filed in court by the process server which explained how service of summons to enter appearance was effected upon them was false. In this case the presumption in favour of the process server was not rebutted. It is my finding therefore that the defendants were duly served with summons to enter appearance and hearing notices for the formal proof. The interlocutory judgment and subsequent judgment that was entered against the defendants after formal proof were therefore entered regularly.

That said, the court has unfettered discretion to set aside ex parte judgment. I have noted from the defendants' affidavits filed in support of the application that some of them have developed the portions of the suit property in their possession with permanent structures. I have also perused their draft statements of defence. I am of the view that the same raises triable issues. In the circumstances, I am inclined to give the defendants an opportunity to defend the suit. This opportunity will however be given conditionally in view of the manner in which the defendants have conducted themselves.

In conclusion, the defendants' application dated 31st August, 2017 is allowed in terms of prayer 3 thereof. The defendants shall file their statements of defence within 21 days from the date hereof and shall jointly and severally pay to the plaintiff thrown away costs assessed at Kshs.30,000/= within 21 days from the date hereof in default of which the plaintiff shall be at liberty to apply for the attachment of their properties for the recovery thereof. It is so ordered.

Delivered and Dated at Nairobi this 17th day of January, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendants

Catherine-Court Assistant