



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 155 OF 2016

GRACE WAIRIMU GAKIO.....PLAINTIFF

VERSUS

EMILY CHELAGAT KURGAT.....1ST DEFENDANT

FRANCIS MWANGI NDIRANGU.....2ND DEFENDANT

NJOROGE MUGO.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 16th July 2018 brought by way of notice of motion by the 3rd Defendant/applicant seeking for orders:

- a) Spent
- b) That pending the hearing and determination of this application inter partes this court be pleased to stay all proceedings herein.
- c) That the honourable court be pleased to set aside the ex parte judgment entered against the defendants, if any and grant the 3rd defendant leave to defend this suit
- d) That the annexed draft defence be deemed as duly filed upon payment of requisite fees.
- e) That costs of this application be in the cause.

Counsel agreed to canvass this application vide written submissions which were duly filed.

3RD DEFENDANT'S WRITTEN SUBMISSIONS

Counsel for the 3rd defendant relied on the grounds on the face of the application and the replying affidavit of the defendant. It was his submission that the defendant was never served with the summons to enter appearance.

Counsel submitted that the principles for setting aside ex parte judgment are as were laid down in the case of (PHILIP ICEIPTO CHEMWOLO AND MUMIAS SUGAR CO LTD - V AUGUSTINE ICUBENDE (1982-1988)/ ICAR 1036.) :-

- (a) if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgment is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. (WINNIE VVAMBUI ICIBINGE & 2 OTHERS V MATCH ELECTRICALS LIMITED (2012)eKLR)
- (b) The court has unlimited discretion to set aside or vary judgment tendered in default of appearance upon such terms as are just in the light of facts and circumstances both prior and subsequent and of respective means of the parties.
- (c) Where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied there was a triable issue.

(d) In this case, there was a triable issue on contributory negligence which would affect the quantum of damages.

Counsel therefore submitted that it is against this backdrop that the 3rd defendant is seeking for the setting aside of the ex parte judgment on the grounds that he was not properly served as per Order 5 of the CPR. It was the 3rd defendant's contention that he does not reside at Annex where the purported service took place. Counsel further submitted that on perusal of the affidavit sworn by the process server on 16/6/2016 and filed on 5/7/2016 at paragraph 2, summons to enter appearance was not among the documents that were served on the defendants.

Counsel also submitted that where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied there was a triable issue. Counsel stated that the plaintiff is claiming trespass against the 3rd defendant but the defendant depones that in the draft defence annexed to the notice of motion, he is the proprietor of the suit property Chemalal/Baharini Provisions Plot No. 212 (C) having purchased the same from David Keter hence having a triable issue. Counsel therefore urged the court to allow the application as prayed.

PLAINTIFF'S SUBMISSIONS

Miss Karuga Counsel for the plaintiff opposed the application and submitted that the service on the 3rd defendant was properly effected in line with the statutory provisions and at no point did the 3rd Defendant make an application to have the process server summoned to buttress his affidavit nor have they made any report to the police noting that order 5 rule 15(2) criminalizes false swearing of affidavits. Further that the Defendants were served with an order issued by this honourable court on 9/6/2016 which all the Defendants complied with by stopping to construct the structure that was under construction on the suit land.

Miss Karuga Counsel for the plaintiff submitted that the 3rd Defendant has failed to adequately illustrate the reasons as to why he failed to honor the summons and file defence within the prescribed time and as such the court should not assist the indolent as justice delayed is justice denied.

Counsel for the plaintiff further submitted that it is important to note that the applicant was served with an application to amend the plaint on 31st August 2016 and affidavit of service to that effect is on record. He was also served with a prohibitory order issued on 9/6/2016 by Justice Ombwayo and wherein he indicated to the process server that he would be attending court on 18th October 2016 and his sentiments were noted in the affidavit of service.

Counsel submitted that on 28/6/2018, the court ordered the Plaintiff and the 1st and 2nd Defendants to file their submissions but to date the 1st and 2nd Defendants have not filed their submissions, Instead the Defendant filed the application before court on 17th July 2018 clearly indicating that the three defendants are working in cohorts to defeat justice as the chronology of events are clearly indicating that they are aiming at delaying the matter and abusing court processes.

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

Analysis and determination

This is an application by the 3rd defendant applicant for setting aside ex parte judgment entered in this case. This matter proceeded on 21st March 2018 when the plaintiff and 2 witnesses testified. On 28th June 2018 PW 4 testified and the defence was closed since they did not have their witnesses. The matter was fixed for mention for filing submissions on 26th July 2018 but while this was pending the 3rd defendant filed the current application for setting aside the ex parte judgment.

The issues for determination in an application for setting aside judgment are now well settled. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary as was held in the case of; Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75:-

"There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment 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 to fetter the wide discretion given it by the rules."

In the same vein, the Court in the case of; Shah vs Mbogo (1967) EA 166, held that:-

"this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

Further in the case of Burhani Engineers Ltd v Spectre International Limited [2015] eKLR, the court cited with approval the decision in ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR where the Court of Appeal had the following to say:

"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend... We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. EA. Cargo Handling Services Ltd. [1974/ EA. 75 at P. 76 Duffus P. said:-

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it

triable issue " that is an issue which raises a prima facie defence and which should go to trial for adjudication.

It should be noted that the discretion of the court in setting aside ex parte judgment should be exercised judiciously without causing any injustice or prejudice to any party.

The supporting affidavit and the replying affidavit are clear and indicates that there was proper service according to the rules and procedure. The 3rd defendant did not bother to summon the process server to come to court and establish the facts that are disputed on service. The 3rd defendant cannot have his cake and eat it and derail the court process. The 1st and 2nd defendant had been ordered to file their submissions but they did not do so. I agree with Counsel for the plaintiff that this application seems to be a ploy by all the defendants to derail the court process. It should be noted that the 1st and 2nd defendants did not file any response to this application. This leaves their stand in this case as questionable.

In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by both Counsel and the relevant law and authorities, I find that the 3rd defendant was properly served but ignored to file any response in this case. He only woke up when he realized that the case had proceeded and was awaiting writing of a judgment. That being the case, and in the interest of justice I will meet the defendant halfway and allow him to file a defence within 15 days, pay thrown away costs of Kshs. 15,000/ to the plaintiff within 20 days and be allowed to cross examine the plaintiff and her witnesses. Failure to comply with the above terms, the order shall lapse.

Dated and delivered at Eldoret this 28th day of March, 2019

M. A. ODENY

JUDGE

RULING READ IN OPEN COURT in the presence of:

Miss Kandie holding brief for Mr. Tororei for defendant and in the absence of Mrs.Karuga for the Plaintiff and the 1st and 2nd defendants.

Mr. Koech - Court Assistant