



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 77 OF 2018

THE ESTATE OF JOSEPH RAMINYA

(Represented by MARGARET AWOOR RAMINYA.....PLAINTIFF

VERSUS

TUWAN FARM LIMITED.....1ST DEFENDANT

WILSON JUMA OMOLO.....2ND DEFENDANT

RULING

1. This is a ruling on the application dated **14/2/2019** and filed in court on the same date. That application has been brought by the 2nd defendant seeking the following orders:-

- (1) That this application herein be certified as urgent and service of the same thereof be dispensed with in the first instance.**
- (2) That the ex-parte interlocutory judgment entered in favour of the plaintiff against the 2nd defendant/applicant herein on 23/11/2019 and all its consequential orders be set aside pending the hearing and determination of this application inter-partes.**
- (3) The applicant herein be granted leave to file his statement of defence out of time and defend the suit.**
- (4) That costs of this application be provided for.**

2. The application is premised on the provisions of **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Order 10 Rule 11, Order 51 Rule 1** and **4** of the **Civil Procedure Rules 2010**.

3. The grounds on which the said application is made are that the 2nd defendant/applicant has a good defence to the plaintiff's claim which raises triable issues; that failure to file defence and to participate in the proceedings by the 2nd defendant was neither deliberate nor intentional but was occasioned by lack of funds on the part of the applicant which resulted to his failure to acquire legal services of an attorney; that no Notice of Entry of Judgment was ever served upon the applicant herein by the plaintiff as is provided in **Order 22** of the Civil Procedure Rules; that moreover, the plaintiff has never served the applicant with a Formal Proof Notice indicating that the matter herein is listed for formal proof hearing; that setting aside the ex-parte interlocutory judgment entered herein and allowing the applicant to file a defence will serve the interest of justice; that save for costs no injury will be occasioned to the plaintiff for allowing this application and plaintiff can be adequately compensated by way of costs and that if the interlocutory judgment and the consequential orders thereto are not set aside, the applicant stand to suffer prejudice for no fault on his part.

4. The application is supported by the affidavit of the applicant sworn on **14/2/2019**. That affidavit reiterates the same matters set out in the grounds above.

5. In his opposition to the application, the plaintiff filed replying affidavit sworn on **26/2/2019**. He stated that the instant application was brought after great delay; that interlocutory judgement was entered **23/11/2018**; that prior to the said judgment the matter had proceeded with the full knowledge of the defendant/applicant as admitted in his affidavit and having filed a memorandum of appearance on **27/10/2018** the applicant was aware that a defence to the matter was required yet he never filed any within the required time and has never taken any action between the date of filing the appearance and the date of filing this instant application which period the plaintiff deems inordinately long and unexplained. Further the plaintiff avers that the defence filed contains mere denials and has no triable issues. It is denied that the law requires service of notice of entry of interlocutory judgment as alleged by the applicant and that the application is meant to scuttle the hearing scheduled for **19/3/2019**.

6. The plaint in this suit was filed on **9/8/2018**. A memorandum of appearance was date stamped at the court registry on **26/10/2018**. A request for judgment was filed on **16/11/2018** vide a memo dated **22/11/2018** the Deputy Registrar directed the matter be fixed for formal proof.

7. I have noted that the suit herein was filed in **August, 2018**; that there was an intention on the part of the 2nd defendant to defend the suit as evidence by the memorandum of appearance he filed in person on **26/10/2018**; that the 2nd defendant never filed any defence to the suit within the requisite time thus leading to a request for judgment; that the hearing of this suit has never taken place although a date had been taken before the instant application has been filed which herein the plaintiff suspects that the defendant wished to scuttle by way of this application; that the orders made by the deputy registrar on **22/11/2018** were only to the extent that the matter should be set down for formal proof and that the suit does not involve a claim for pecuniary damages.

8. The plaintiff filed submissions on **13/3/2019**. The 2nd defendant filed submissions on **13/3/2019**.

9. It is clear that the issues that arise are as follows:

(a) **Whether the application has been filed timeously;**

(b) **Whether service of notice of entry of judgment and notice of formal proof were required;**

(c) **Whether there is any interlocutory judgment that should be set aside.**

(d) **What orders should issue?**

10. On the first issue it is clear no hearing has taken place and the application was filed within three months of the directions by the Deputy Registrar issued on **22/11/2018**; it is clear that the Deputy Registrar must have noted that the claim herein is not a liquidated claim and hence recommended that the same be fixed for formal proof. Regarding this ground, I therefore find that the application was filed timeously and that the plaintiff may suffer little or no harm if this application is granted and that any prejudice occasioned to the plaintiff may be compensated for by way of damages.

11. No provisions are cited by the applicant to support the statement that notice of entry of judgment and notice of formal proof are a requirement under the law.

12. As to whether there is any interlocutory judgment that should be set aside I have already noted that this is not a pecuniary damages or a liquidated claim. I find that it does not fall strictly under the categories of the suits considered in **Order 10 CPR**. There is therefore no express interlocutory judgment to be set aside in the instant suit.

13. However this application is not fully amiss for the reason that it is the 2nd defendant's failure to comply with set rules that led to the application for judgment upon which the orders were issued that the matter be set for formal proof. I find that had he not made the application his sins of omission engendered in his failure to comply with **Order 7 Rule 5 CPR** and his consequential non-participation in essential pre-trial procedures under **Order 11 CPR** would have finally caught up with him in that this court may not have allowed him to call evidence. In any event this court would have been obliged to strike out the memorandum of appearance and make further orders as it deems fit under **Order 10 Rule 3 CPR**.

14. **Civil Procedure Rules** are the handmaidens of justice. They are there to ensure that all parties get the opportunity to be heard. A party can if they so wish expressly or impliedly waive that right to be heard. Default in compliance with the rules usually drags the progress of litigation unnecessarily and has serious consequences and in many instances a party in default is at the mercy of the court which examining the cause of default, has to determine whether that was willful default, and the best way forward in the circumstances.

15. A defendant impliedly waives the right to be heard if despite service as in the instant case the party fails to file the necessary defence to the claim by the date of hearing in which case the plaintiff merely appears in court not to controvert any serious challenges to his claim raised by a defendant but to present his evidence, and, occasionally, subject himself to cross examination, for a defendant who has failed to file a defence to a claim is entitled to cross examine the claimant for the truthfulness of the particulars set out in his claim.

16. It follows then that a formal proof does not guarantee the plaintiff a decree in his favour against a defendant who failed to file a defence, for, as stated in the now well-known case of **Moi vs Muriithi NBI Civil Appeal No. 240 of 2011, eKLR**, he must notwithstanding the absence of the defendant, prove his claim on a balance of probability.

17. However, a formal proof necessarily precludes the possibility of the defendant calling any evidence at the hearing; it only leaves the claimant with that right. Therefore were the 2nd defendant not so full of the desire to be assured that he could be allowed to testify and call evidence at the trial, there is great possibility that he would have been barred from doing so in the absence of express orders of this court granting him leave.

18. There is therefore a judgment against the defendant in that he having been in default, and an order of formal proof having been issued, he can not call evidence without leave of this court.

19. The final question is what orders should issue in this matter.

20. This court has examined various decisions regarding setting aside of judgment and found that the court has unfettered discretion to set

aside any judgment on such terms as it deems just. (See the cases of **Patel -vs- E.A. Cargo Handling Services Limited, Phillip Kiptoo Chemwolo and Mumias Sugar Co. Ltd -vs- Augustine Kubende 1982 -1988 KAR page 1036, Mburu Kinyua -vs- Gachini Tuti**).

21. I find that the situation that the defendant paint is that of a person who tried to seek legal representation but was unable to obtain any in sufficient time to avert the fixing of the matter for formal proof in absence of his defence.

22. This is a court of justice. Shutting out a litigant from being heard for a procedural error while **Article 159 (2) (d)** of the Constitution of Kenya frowns on such a practice should be the last resort. Indeed I find that the complaint by the plaintiff to fall under the category of a procedural technicality in that only the defence was not filed and that that default has been sufficiently explained by the 2nd defendant.

23. There is now albeit as a draft annexed to the instant application an **18** paragraph defence which contrary to plaintiff's submission cannot be referred to a mere denial. The Court of Appeal in the case of **Sebei District Administration V Gasyali & others (1968) EA 300** observed that where any defence has been put onto the record however irregularly it must be considered by the court.

24. Said the court in that case :

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.” (Emphasis mine.)

25. In my view the defendant should be allowed to ventilate the issues raised in his defence.

26. In the circumstances the most appealing direction for this court is that which will allow the parties respective cases to be conducted by way of setting out of their evidence to pave the way for a decision of the court on the merits.

27. In the final analysis I find that the 2nd defendant's application is merited and I grant it in terms of **prayer No. (2) and (3)** thereof. The costs of the application shall be in cause.

Dated, signed and delivered at Kitale on this 24th day of April, 2019.

MWANGI NJOROGE

JUDGE

29/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi holding brief for Kiarie for the plaintiff

Mr. Kidiavai for defendants absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/4/2019