



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 92 OF 2014

SAMSON NJUGUNA KIMANI.....PLAINTIFF

VERSUS

SIMON MBUTHIA KIMANI.....DEFENDANT

RULING

1. Judgment was delivered in this matter on 20th June 2018 in favour of the plaintiff as follows:

a) The defendant and his agents or servants to vacate the parcel of land known as Dundori/Mugwathi Block 1/2700 (Wanyororo 'A') within thirty (30) days of service upon him of these orders. In default, the defendant and his agents or servants be evicted from the said property. The eviction to be done in accordance with the provisions of section 152G (1) (a), (c) to (i) of the Land Act, 2012.

b) A permanent injunction is hereby granted restraining the defendant and his agents or servants from dealing in any manner whatsoever with the parcel of land known as Dundori/Mugwathi Block 1/2700 (Wanyororo 'A').

c) Costs of this suit are awarded to the plaintiff.

2. About four months later, the defendant filed Notice of Motion dated 24th October 2018, seeking setting aside of the judgment. That application is the subject of this ruling. The defendant stated in the supporting affidavit that he was not served with any notice of institution of the suit nor of hearing. In his replying affidavit, the plaintiff stated that the applicant was served with summons to enter appearance, was all along aware of the suit and had even filed an affidavit in this matter on 6th April 2014. The plaintiff thus urged the court to dismiss the application.

3. When the application came up for hearing, an order was made at the defendant's request that Hebron Odhiambo Omolo the process server who swore affidavit of service in respect of the hearing notice to attend court so that he could be examined on the contents of his affidavit. He however did not attend court on the appointed date.

4. In brief oral submissions counsel for the applicant argued that the defendant was not served with summons to enter appearance and that the affidavits of service on record are unreliable. On his part, counsel for the respondent relied entirely on the replying affidavit and urged the court to dismiss the application.

5. I have considered the application, the affidavits filed and the submissions. The principles that guide the court when considering an application seeking setting aside are well settled and were recently restated by the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** as follows:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. ...

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of

whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.

6. I have perused the record to determine if an affidavit of service in respect of service of summons to enter appearance is available. I do so bearing in mind that beyond stating that the applicant was served with summons to enter appearance, the respondent did not annex any such affidavit to his replying affidavit. My perusal has not yielded any affidavit of service in respect of summons to enter appearance. I am aware that this matter was certified ready for hearing and the plaintiff allowed to fix it for hearing as far back as 12th May 2015. Subsequently when the matter came before me for hearing on 19th September 2017 the hearing proceeded since I was persuaded that service of hearing notice was effected in respect of the hearing. Nevertheless, the moment the applicant disputed service of summons to enter appearance it was incumbent upon the respondent to specifically respond to that allegation of non service by producing the affidavit of service. What's more, the respondent was given a chance to avail the process server for examination to ascertain service but the process server did not show up. I further note that virtually all the affidavits of service on record herein are sworn by the said Hebron Odhiambo Omolo.

7. The respondent argued that the applicant was aware of the matter and that he had even filed an affidavit in this matter on 6th April 2014. I have perused the copy that was annexed by the respondent. The deponent in the said affidavit is Samson Njuguna Kimani while the defendant in this matter is Simon Mbuthia Kimani. No explanation has been offered as to the difference in names. The deponent of the said affidavit cannot therefore be said to be the applicant.

8. In view of the foregoing discussion, I am not persuaded that the applicant was served with summons to enter appearance or even any of the hearing notices. That being the case, he was deprived of an opportunity to be heard and is therefore entitled to setting aside as a matter of right as is sought in Notice of Motion dated 24th October 2018.

9. In the end, I set aside the judgment dated 20th June 2018, the decree and all the consequential orders. Costs of the application are awarded to the applicant.

Dated, signed and delivered in open court at Nakuru this 29th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the defendant/applicant

Ms Amulabu holding brief for Mr Otieno for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomo