



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 51 OF 2016

JOSEPHINE KASYOKA MUSINGI.....PLAINTIFF

VERSUS

BENSON NZOKA LUA.....DEFENDANT

RULING

1. In the Notice of Motion dated 29th June, 2017, the Defendant is seeking for the following orders:

- a. That the firm of Ms. Anne M. Kiusya & Company Advocates be granted leave by this Honourable Court to come on record for the Defendant/Applicant.*
- b. That there be stay of taxation proceedings pending the hearing and determination of this suit.*
- c. That this court be pleased to set aside the ex parte proceedings, Judgment and decree together with all the consequential orders and that the Defendant/Applicant be allowed to defend this suit.*
- d. That the annexed draft Defence be deemed as duly filed upon payment of the requisite court fees.*
- e. That this court does grant such further and other orders that it may deem expedient and are in the interest of justice.*

2. The Application is supported by the Affidavit of the Defendant who has deponed that on 24th March, 2017, Judgment was entered in favour of the Plaintiff; that he was never served with Summons to Enter Appearance and that he has an arguable Defence to the Plaintiff's claim.

3. In reply to the Application, the Plaintiff deponed that the Defendant was served with Summons to Enter Appearance together with hearing notices; that the Judgment of the court has already been executed and that the draft Defence does not raise any triable issue.

4. The Defendant's advocate submitted that the principles that guide the court in setting aside an ex parte Judgment were laid down in the case of ***Shah vs. Mbogo & Another (1967) EA 116***; that the Defendant was never served with Summons to Enter Appearance and that the Judgment should be set aside.

5. The Plaintiff's advocate submitted that no Appeal has ever been lodged after the delivery of the Judgment; that in the absence of an Appeal, the prayer for stay of execution of the Judgment cannot be granted and that the Defendant was served with the Summons to Enter Appearance.

6. This suit was commenced by way of a Plaint dated 4th July, 2016. In the Plaint, the Plaintiff averred that she purchased a portion of undemarcated parcel of land from Peter Kitaa Musembi; that during adjudication, the registration of her parcel number as Simisi/Ilamba 34 and that of the Defendant as Simisi/Ilamba 35 was made by mistake and that the land she bought is the one registered in the Defendant's name as Simisi/Ilamba/35.

7. The matter proceeded for hearing in the absence of the Defendant. Judgment was entered in this matter on 24th March, 2017. The Defendant is seeking for an order of stay of execution of the Judgment and for the setting aside of the default Judgment.

8. The law relating to a stay of execution of a Judgment or order is provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules. That order is only applicable where the Applicant has filed an Appeal. In the absence of a pending Appeal in respect of the Judgment of this court, an order of stay of execution of the Judgement cannot issue.

9. This court has a discretion to set aside a regular Judgment if it is shown that the Defendant has a Defence that raises a triable issue. However, where the court finds that the default Judgment is irregular, then it has no discretion in such a situation. The court is obliged to set aside such a Judgment *ex debito justitiae*.

10. The Affidavit of Service sworn by the process-server on 18th August, 2016 shows the efforts the process-server made to serve the Defendant with the Summons to Enter Appearance. The Affidavit states that the process-server went to Kensiko market which is the area of operation of the Defendant.

11. The process-server deponed that he tried to trace the Defendant, who is a boda boda rider for more than four (4) hours, with the help of a Mr. Mbuvi who knew the Defendant. Indeed, he went upto the Defendant's home at Kilengoto village, near Kituvwi shopping center and found the Defendant's children.

12. The process-server deponed that he was informed that the Defendant had travelled to Kathamba-Thua River; that a neighbour informed him that the Defendant's wife was at Jesus Restoration Church grounds and that when he traced the Defendant's wife at the Church, she informed him that the Defendant had travelled far away. That is when he served her with Summons to Enter Appearance in the presence of Ndonyi Mbuvi.

13. The Defendant did not controvert the allegations made by the process-server about his whereabouts on 16th August, 2016. Indeed, the description of the Defendant's home was not controverted by the Defendant. The Defendant did not also call the process-server for cross-examination. In the circumstances, I am satisfied that the process-server served the Defendant's wife with Summons to Enter Appearance on 16th August, 2016 at Jesus Restoration Church grounds.

14. Order 5 Rules 12 of the Civil Procedure Rules provides that where in a suit, after reasonable number of attempts have been made to serve the Defendant, and the Defendant cannot be found, service may be made on an agent of the Defendant empowered to accept service or on any adult member of the Defendant who is residing with him.

15. Having made several attempts to trace the Defendant, and having failed to trace him, service of the Summons on the Defendant's wife was lawful. In the circumstances, I find that the Defendant was duly served with the Summons to Enter Appearance.

16. The only issue I should consider is whether I should exercise my discretion in favour of the Defendant and set aside the regular default Judgment. That discretion can only be exercised if the Defendant has a Defence that is arguable.

17. The Plaintiff's case is that she bought an undemarcated piece of land from the Defendant's neighbour; that during adjudication, the piece of land that she purchased was registered in favour of the Defendant while the Defendant's land was registered in her name. According to the Plaintiff, the mixing up of the two parcel numbers was a genuine mistake made by the demarcation officers.

18. In his draft Defence, the Defendant has averred that he is the registered proprietor of land known as Simisi/Ilamba "A"/34 and that no mistake was done during registration of the land. The Defendant however did not dispute that the Plaintiff is his neighbour.

19. Although the Defendant has claimed that he is the owner of parcel of land number 34, he has not stated in his Defence the acreage of the said land. The Defendant has not disputed in his Defence that indeed the Plaintiff is in occupation of the land which is between the land of Peter Musembi, which is parcel number 36 and a parcel of land shown as parcel number 35 of the map of Ilamba "A" Adjudication Section.

20. To the extent that parcel of land number 35 abutts parcel number 36, and appears on the map as the land that was curved from parcel number 36, it is obvious that the Plaintiff's land is parcel number 34 measuring approximately 29.12 Ha. On the other hand, the Defendant's land is parcel number 35 measuring approximately 11.15 Ha. That is the land that the Defendant is in occupation, a fact that has not been denied by the Defendant in the Draft Defence.

21. It is for the reasons I have given above that I find that the Draft Defence by the Defendant does not raise an arguable Defence. Consequently, I decline to set aside the default Judgment of 24th March, 2017.

22. For those reasons, I dismiss with costs the Application dated 29th June, 2017.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE