



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 152 OF 2015

ABDULLAH ALI NASSIR..... PLAINTIFF

VERSUS

SOPHI MWANGHUNDA..... DEFENDANT

RULING

1. The Notice of Motion dated 7th August 2018 brought by the defendant seeks the following orders;

(a) Spent;

(b) Spent;

(c) That the court be pleased to set aside the judgment entered on 14th June 2017 and grant the applicant unconditional leave to defend the suit;

(d) Costs of the application be provided for.

2. The motion is supported by 8 grounds listed on its face inter alia;

(a) That the respondent intends to execute the judgment and/or decree issued herein.

(b) That the respondent is in the process of executing the ex-parte judgment herein and will proceed to evict the applicant any time from now and destroy the applicant's goods worth a colossal sum of money.

(c) That indeed there's eminent danger as the applicant risks losing her properties crippling her business to an irreparable state, consequently suffering irreparable loss unless this honourable court comes to the aid of the applicant in view of upholding principles of justice and fairness.

(d) That allowing execution of the ex-parte judgment will be condemning the applicant unheard. This is against the spirit of the constitution of Kenya and principles of natural justice.

(e) That the judgment and subsequent decree herein were obtained irregularly.

(f) That the defendant/applicant was never served with any demand letter, summons to enter appearance or plaint.

(g) That the defendant/applicant should not be denied his right to audience as the same goes against the cardinal principles governing procedure in courts of law as well as natural justice that a party should not be condemned unheard.

(h) That it is only fair and just that the orders sought in the application of instance be allowed as prayed.

3. The application is also supported by the affidavit sworn by the defendant. In the affidavit, the applicant has annexed a draft defence which she deposes raises triable issues. She also deposed that she was not served with S.T.E.A or notice of entry of judgment.

4. The application is opposed by the replying affidavit sworn on 7th September 2018. The plaintiff deposed that the defendant was served

with;

i) Demand letter dated 9th July 2015,

ii) S.T.E.A, plaint and list of documents but refused to acknowledge service.

5. The plaintiff deposed further that he is the purchaser of the leasehold interest of 99 years of plot No. 12519 1.1 MN as per copies of the certificate of title and transfer dated 9th January 2013 annexed to his replying affidavit. That the exercise of discretionary powers to set aside an ex-parte judgment in the face of unmeritorious application ought to be declined. He urged the court to dismiss the application.

6. The grounds to be considered in exercise of discretion to set aside a judgment was settled in the case of **Shah –Versus- Mbogo (1967) E. A 116** and **Patel –versus- E. A Cargo Handling Services Ltd (1971) E.A.** In the affidavit of service of Abdulsamad Said, it is deposed that the defendant was served on 27th July 2015 in the suit premises where she operates a retail shop. In denying this claim, the defendant responded that on 27th July 2015 she was at home nursing her baby and not present at the suit premises.

7. The defendant thus denied being served but the plaintiff in his submissions stated that having failed to apply to cross-examine the process server, the issue of non-service is not contested. The matter indeed proceeded ex-parte. The questions for this court to determine are two;

(a) Whether the defendants inadvertence in filing a defence is excusable or is intended to obstruct the cause of justice

(b) Whether the draft defence annexed raises a meritorious defence.

8. This suit was filed on 9th July 2015. The plaintiff deposed that before filing the suit, he had served the defendant with a demand letter dated 20th June 2015 so the defendant was aware of his claim. The plaintiff however does not disclose how this letter was served since there is no such indication on the face of the letter. Why is service of this letter of relevance in this application? At paragraph 4 of the process server's affidavit, he deposed thus; "That the defendant confirmed her identity as the defendant and aware of the matter and therefore accepted service but declined to sign on my principal copy."

9. If this was the first time the defendant was being served with the S.T.E.A, she would be aware of this matter from what background? The process server does not explain this to the court. As soon as the execution process commenced, the defendant moved the court. Therefore for the missing link on how the demand letter was served and how the defendant was previously made aware of the matter, I find her request to be given hearing is not intended to obstruct the cause of justice.

10. Does the draft defence raise any triable issue in light of the certificate of lease annexed showing registration in favour of the plaintiff? My answer is yes because at paragraph 4 of the draft defence, the defendant denies that there exists plot No. 12519/1/MN situated within Nyali, Mombasa. At paragraph 5, the defendant pleaded that the property belongs to her because she has been in exclusive and uninterrupted possession for a period in excess of 18 years.

11. Consequently, I find that the application has merit. The plaintiff urged the court to award him Kshs100,000/= as thrown away costs in the event the application is found in favour of the defendant. He relied on the decisions of **Abdulahakim Abdulla Mohamed –versus- KPLC Co. Ltd (2016) eKLR** and **KPLC Co. Ltd –versus- Esther Wanjiru Wokabi (2014) eKLR**. I have considered the two decisions. Relaying them to the facts of this case, I note that from the time the interlocutory judgment was entered, the plaintiff has been attended to in the registry thrice and the advocate has attended court once (for hearing) since the judgment was delivered in their absence. For the services rendered before the judgment was delivered I find that a sum of Kshs25,000/= is reasonable compensation for the award of thrown away costs. The application is thus allowed on terms that;

(a) The defendant is granted leave to file and serve her statement of defence within 14 days of today.

(b) The defendant shall pay the plaintiff, thrown away costs of Kshs25,000/= within 30 days of today in default, the plaintiff is at liberty to execute.

(c) Each party to meet their costs of prosecuting this application.

Dated, Signed and Delivered at Mombasa this 21st day of June 2019.

A. OMOLLO

JUDGE.