



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 55 OF 2018**

**LEAH CHELULEI TELE.....PLAINTIFF**

**VERSUS**

**GLADYS MUTONYI SIMIYU.....DEFENDANT**

**RULING**

1. The defendant/applicant has come before this court vide an application dated **9/4/2019**, seeking orders of setting aside the ex-parte judgment delivered on **2/10/2018** and all consequential orders thereto and that the annexed statement of defence, witness statements and list of documents be deemed duly filed and served upon payment of the requisite court fees. The applicant also prays for costs of this application be provided for.
2. As seen from the grounds at the foot of the application and the supporting affidavit of the defendant sworn on **9/4/2019**, the basis of the application is that the defendant had filed a memorandum of appearance in this court on **12/6/2018** and served upon counsel for the plaintiff on the same date and hence he was entitled to service of a hearing notice; that the defendant was never made aware of the hearing of this matter; that the hearing having proceeded ex-parte, the defendant was similarly entitled to service of notice of judgment date and notice of entry of judgment by dint of **Order 22, Rule 6** of the Civil Procedure Rules 2010; that it is necessary that the defendant be heard in order to allow the court to determine the real issues in question in the matter; that the defence herein raises issues that ought to be decided on merit; that the application has been brought in good faith and timeously and that the pleadings herein shall not prejudice the plaintiff in any way.
3. The application is opposed. The affidavit of the plaintiff is filed in opposition thereto. The plaintiff depones that the applicant was aware of the hearing date and needed not be served with any hearing notice; that the applicant was in any event served but failed to file defence or attend court for formal proof yet his counsel was aware of the formal proof date; that the application has been brought after a long and unexplained delay, that the plaintiff had been in peaceful occupation until the applicant forcefully entered the land and erected a structure thereon.
4. The defendant filed his written submissions on **22/5/2019** while the plaintiff filed his on **14/6/2019**.
5. The power of court to set aside judgment or decree is unfettered and the court may in appropriate circumstances grant the orders setting aside the judgment on such terms as are just.
6. I have perused the record herein and found that a memorandum of appearance was filed on behalf of the defendant on **12/6/2018** by the firm of Samba and Co. Advocates. No defence however was filed on her behalf. It would appear that there was no appearance for the defendant on **28/5/2018** when the matter first came before this court in chambers and also on **31/5/2018**. On **31/5/2018** Mr. Waweru holding brief for Mr. Bungei appeared for the plaintiff and the file was placed aside until 10.00 am. At 10.00 am the defendant did not turn up and Mr. Murgor appeared for the plaintiff. An unopposed application for injunction dated **23/5/2018** was then granted. The court also scheduled the matter for formal proof for **24/9/2019**. On **24/9/2018** Ms. Nasike holding brief for Mr. Bungei appeared at 9.00 am and the court ordered that formal proof would proceed on 2.30 pm. Hearing proceeded at 2.30 pm as scheduled and in the absence of the defendant. There is no indication that the court satisfied itself that notice of the hearing had been served on the defendant.
7. It is trite law that a defendant who has filed a memorandum of appearance despite having filed no defence is entitled to be served with a hearing notice in respect of the formal proof. Only the calling of witness by such a defendant is barred by law and practice.
8. In this case there was no affidavit of service filed in the record showing that the defendant was served with any hearing notice in respect of the hearing scheduled for 24/9/2018 despite her having filed a memorandum of appearance on 12/6/2018. I have also examined the replying affidavit of the plaintiff and I find that it contains mere conclusory statements pointing to knowledge of the formal proof date on the part of the applicant and his advocate.
9. If the applicant did not know of that date she would not have been in a position to approach this court with any application as she has done now. The allegation of unexplained delay lacks any significance in the light of the fact that the applicant has not been shown to have been

aware of the formal proof date. The letter dated 17/1/2019 asking for release of title document to the plaintiff is copied to Samba & Co. Advocates but it appears to have been received one month later on 18/2/2019 while the instant application was filed on 9/4/2019. I do not find any justification for the submission that there is long and an unexplained delay given that the applicant took less than two months to lodge the instant application after that letter was received.

10. From the foregoing the applicant's application dated **9/4/2019** has merit and I grant it in terms of prayer No. **(2)** only. The applicant shall file and serve upon the plaintiff her statement of defence, witness statements and list of documents within **14 days** hereof. This matter shall be listed for a mention to ascertain compliance on **30/9/2019**.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**30/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

N/A for the plaintiff

N/A for the defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/7/2019**