



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1356 OF 2014

KEROKA HIGHWAY SERVICE STATION.....PLAINTIFF

VERSU

MAURICE ODONGO OGOT..... DEFENDANT

RULING

On 20th September, 2017, judgment was entered herein for the plaintiff against the defendant for the eviction of the defendant from all that parcel of land known as Nairobi Block 97/0759/152 Tassia Estate (hereinafter referred to as “the suit property”) and Kshs.50,000/= as general damages for trespass. The defendant did not attend the hearing pursuant to which the said judgment was made. The court was informed that he had been duly served with a hearing notice but neglected to attend court.

On or about 5th December, 2018, the defendant became aware of the said judgment and brought an application by way of Notice of Motion of the same date seeking the setting aside of the said judgment and all consequential orders on the ground that he was not served with a hearing notice in respect of the hearing which took place on 23rd May, 2017 giving rise to the judgment of 20th September, 2017.

The defendant’s application was fixed for hearing on 12th March, 2019 and the defendant was ordered to serve the same upon the plaintiff. When the application came up for hearing on 12th March, 2019, the plaintiff’s advocates did not attend court. The defendant’s advocate Ms. Muyai informed the court that the plaintiff’s advocates had been served with the application with a hearing date endorsed thereon. The court after satisfying itself that the plaintiff’s advocates had been served, allowed the application as unopposed. The effect of the order made on 12th March, 2019 was that, judgment that had been made on 20th September, 2017 against the defendant was set aside and the hearing of the suit was to commence a fresh.

What is now before the court is the plaintiff’s application brought by way of Notice of Motion dated 19th March, 2019 seeking the setting aside of the orders that were made in favour of the defendant on 12th March, 2019. The plaintiff has contended that the defendant obtained the said orders through deceit and misrepresentation. The plaintiff contended that in the copy of the application dated 5th December, 2018 that was served upon its advocates, the defendant’s advocates had falsely indicated that the application was coming up for hearing on 13th March, 2019 and not on 12th March, 2019 which was the date given by the court for the hearing of the application. The plaintiff contended that its advocates did not attend court on 12th March, 2019 because they were not aware that the application was coming up for hearing on that date. The plaintiff averred that when its advocates attended court on 13th March, 2019, the matter was not listed and this is when they came to learn that the matter was to be heard on 12th March, 2019 and that the court had proceeded with the same on that day.

The Plaintiff averred that the defendant’s advocates intentionally mislead its advocates that the application was coming up on 13th March, 2019 instead of the correct date of 12th March, 2019 so that they could obtain the orders they had sought in the application ex parte. The plaintiff averred that it intended to oppose the application and had prepared a replying affidavit for that purpose. The plaintiff averred that the orders that were obtained by the defendant through deceit should not be allowed to stand.

The application was opposed by the defendant through a replying affidavit sworn on 11th June, 2019 by his advocate Ms. Josephine Achieng Muyai. The defendant denied that the plaintiff’s advocates were served with an application bearing a hearing date of 13th March, 2019. The defendant maintained that the application served upon the plaintiff’s advocates had a date of 12th March, 2019. The defendant contended that it was the plaintiff’s advocates who had altered the hearing date on the application to read 13th March, 2019 instead of 12th March, 2019 so as to justify their failure to attend court on 12th March 2019. The defendant contended that plaintiff did not intend to oppose the application since it had not filed a replying affidavit by the time the application came up for hearing. The defendant denied that it had obtained the orders sought to be set aside through deceit. The defendant averred that the plaintiff’s application had no basis and urged the court to dismiss the same.

The plaintiff’s application was heard on 26th June, 2019 when the parties relied entirely on their affidavits in support of and in opposition to the application. I have considered the application together with the affidavit filed in support thereof. I have also considered the defendant’s

affidavit in reply filed in opposition to the application. It is not disputed that this court has powers to grant the orders sought. What is disputed is whether sufficient grounds have been put forward to warrant the granting of the said orders. Whether or not to set aside an order made in the absence of a party calls for the exercise of the court's discretion. It is settled that the discretion of the court must be exercised judiciously and not whimsically or capriciously. The parties have made very serious allegations against each other which border on professional misconduct on the part of the advocates involved. The plaintiff has contended that although the defendant's application was given a hearing date of 12th March, 2019 by the court, the defendant's advocates intentionally and deceitfully served the application with a hearing date of 13th March, 2019 in order to obtain the orders sought in the application in the absence of the plaintiff's advocates so that the defendant could remain in occupation of the suit property.

The defendant has denied this allegation and has contended that it was the plaintiff's advocates who altered the hearing date of 12th March, 2019 in the application that was served upon them to read 13th March, 2019 so as to justify their failure to attend court on 12th March, 2019 when the application was coming up for hearing. I have noted from a copy of the Notice of Motion application attached to the plaintiff's affidavit which the plaintiff's advocates claimed to have been served upon them that there is an alteration of the hearing date from 12th March, 2019 to 13th March, 2019. The parties as I have stated above are not in agreement as to who made this alteration. The plaintiff has claimed that it was made by the defendant's advocates so as to mislead the court and the plaintiff's advocates. The defendant's advocates on the other hand have claimed that the alteration was made by the plaintiff's advocates to find a basis for the current application after they failed to turn up on court.

I am unable to determine with certainty from the material before me as to who is telling the court the truth as between the plaintiff and the defendant. However, it is highly probable in my view that the alteration of the date took place at the plaintiff end. This is because, first, any gain that would have accrued to the defendant as a result of the alteration of the hearing date would have been only of a short term nature. Secondly, as rightly pointed out by the defendant, the plaintiff was not ready for the hearing of the defendant's application dated 5th December, 2018 as it had not responded to the application by the time it came up for hearing on 12th March, 2019. Even if the application was to come up for hearing on 13th March, 2019, the plaintiff would not have been in a position to oppose the same.

Although the plaintiff appears to have no reasonable and convincing explanation for its advocates' failure to attend court on 12th March, 2019 when the defendant's application came up for hearing, I am inclined to exercise my discretion in its favour. Having considered the case as a whole, I am of the view that no prejudice would be occasioned to the defendant if the plaintiff is allowed to defend the application dated 5th December, 2018. I am of the view that any inconvenience to the defendant can be compensated in costs.

For the foregoing reasons, I hereby make the following orders: -

1. The orders made on 12th March, 2019 are set aside.
2. The defendant's Notice of Motion application dated 5th December, 2018 shall be heard afresh.
3. Pending the hearing and determination of the application, there shall be a temporary stay of execution of the judgment dated 21st July, 2017 and delivered on 20th September, 2017.
4. The defendant shall have the costs of the application.

Delivered and Dated at Nairobi this 26th day of September 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Mugi h/b for Mr. Kangethe for the Plaintiff

Ms. Muyai for the Defendant

C. Nyokabi-Court Assistant