



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 142 OF 2012

KIMEU KITHAMBU *alias*

KIMEU GICHAMBO.....PLAINTIFF/RESPONDENT

VERSUS

NZULA MUTISYA.....1ST DEFENDANT/APPLICANT

KISILU MUTISYA.....2ND DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 20th June, 2019, the Defendants/Applicants have prayed for the following reliefs:

a. That this Honourable Court be pleased to set aside the interlocutory Judgment entered against the Defendants/Applicants on 3rd July, 2012 and final Judgment entered against the Defendants/Applicants on 19th December, 2014 and all consequential orders thereto be set aside.

b. That the Defendants/Applicants be granted leave to appear and file Defence out of time and the draft Defence annexed hereto be deemed as duly filed and served upon payment of the requisite fees.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that they were not aware of the existence of this suit; that the purported Memorandum of Appearance filed on 16th May, 2012 is a false document and that she does not sign documents by appending a thumb print.

3. According to the 2nd Defendant, the request for Judgment by the Plaintiff was not accompanied by an Affidavit of Service to show that they were ever served with the Summons to Enter Appearance as required by law and that they only became aware of the matter when they were served with an order of eviction from their home.

4. The 2nd Defendant finally deponed that they have a Defence which raises triable issues and that the Application should be allowed.

5. When the Application came up for hearing on 4th July, 2019, the Plaintiff had not filed a reply to the Application. The court reserved its Ruling. However, without the leave of the court, the Plaintiff filed a Replying Affidavit purportedly in response to the Application on 25th July, 2019. The filing of the Replying Affidavit way after the court had reserved its Ruling, and without the court's leave is mischievous and an abuse of the court process. The Replying Affidavit filed on 25th July, 2019 is therefore expunged from the court record.

6. The record shows that the Plaintiff filed a Complaint herein on 3rd May, 2012. In the said Complaint, the Plaintiff averred that he is the sole owner of land known as Muthetheni/Utithini/922; that the Defendants trespassed on the suit land and that the structures constructed on the suit land should be demolished.

7. The record shows that the Defendants entered appearance personally on 15th May, 2012. It is on the basis of the said Memorandum of Appearance that the court proceeded with the hearing of the Plaintiff's case on 27th October, 2014. The court delivered its Judgment on 19th December, 2014.

8. The Defendants have denied that they were served with Summons to Enter Appearance and the Plaintiff. The Defendants have also denied having signed and filed the Memorandum of Appearance dated 16th May, 2012 and filed on 15th May, 2012 (*sic*).

9. Although the Defendants have denied having been served with Summons to Enter Appearance, the Plaintiff did not bother to file an Affidavit of Service to prove that indeed the Defendants were served with the Summons to Enter Appearance. Order 5 Rule 15(1) of the Civil Procedure Rules provides as follows:

“(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

10. Having failed to file an Affidavit of Service, I find that the Defendants were never served with the Summons to Enter Appearance, and could not have been in a position to file a Memorandum of Appearance and Defence. The purported Memorandum of Appearance dated 16th May, 2012 and filed on 15th May, 2012 (*sic*) is therefore a forgery and was meant to mislead the court.

11. The failure by the Plaintiff to serve the Defendants with Summons to Enter Appearance calls for the setting aside of the default Judgment of 19th December, 2014 *ex debito justitiae*.

12. For those reasons, I allow the Application dated 20th June, 2019 as follows:

a. The interlocutory Judgment entered against the Defendants/Applicants on 3rd July, 2012 and final Judgment entered against the Defendants/Applicants on 19th December, 2014 and all consequential orders thereto be and are hereby set aside.

b. The Defendants/Applicants be and are hereby granted leave to appear and file a Defence out of time and in any event within fourteen (14) days of this Ruling.

c. The Plaintiff to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE