



REPUBLIC OF KENYA

IN THE ENVIRONMENT AN LAND COURT AT KAJIADO

ELC CASE NO. 188 OF 2017

(formerly Machakos HCCC No. 114 of 2012 ‘OS’)

MICHAEL OLE DIKIRR.....PLAINTIFF

VERSUS

TANANKO OLE KWENA.....1ST DEFENDANT

MOTONKA OLE NKOTIKO.....2ND DEFENDANT

TIPATEL OLE NTIMERI.....3RD DEFENDANT

PETER MOLINKE SEMEYIAN.....4TH DEFENDANT

RULING

What is before Court for determination is the Defendants’ Notice of Motion application dated the 11th June, 2018 brought pursuant to Section 1A, 1B, 3, 3A & 63 of the Civil Procedure Act; Order 50 rule 1 and Order 10 Rule 11 of the Civil Procedure Rules. The Applicants seek the following orders:

1. Spent
2. That pending the hearing and determination of this motion there be a stay of execution of the judgment made by Justice Christine Ochieng on the 7th day of February, 2018 and all consequential orders thereto.
3. That ex parte judgment and all the consequential orders thereto be as are hereby set aside ex debito justitiae.
4. That the costs of this motion be to the Applicants
5. That there be such other or further reliefs as the Honourable Court deems fair and expedient to grant in the circumstances of the case.

The application is premised on the summarized grounds that the Applicants are bona fide registered proprietors of land parcel number Kajiado/ Olchoro Onyore/ 746. The Applicants who are residents of Olchoro Onyore Ward, are farmers including business men well known to the administrators hence tracing them was an easy task. The affidavit of Joel Mburu Nganga is replete of falsehoods and fabrications as no service was effected by him upon the Defendants. At the time of filing this suit, the registered proprietors of the suit land were Motonka Ole Nkotiko, Tipatel Ole Ntimeri and Peter Molinke Semeiya. They explain that the aforesaid proprietors purchased suit land from the 1st Defendant on 27th May, 2010. Further, way back on 22nd February, 1989 the Respondent feigned the purchase of the suit land from the 1st Defendant and its thus puzzling how the same person was claiming adverse possession 23 years later. The evidence adduced before the trial court by the Respondent were falsehoods unsupported with any authentic documentation of service upon any of the applicants. There was no proper personal service upon each of the Applicants and the affidavit of service confirms this assertion.

The Application is supported by the affidavit of TANANKO OLE KWENIA the 1st Defendant herein where he deposes that the 2nd, 3rd and 4th Defendants, are registered proprietors of the suit land which they purchased from him on 27th May, 2010. He confirms that they are residents of Olchoro Onyore Ward and are prominent farmers including businessmen. He contends that the claim predates the existence of the title to the suit land and the Respondent claim of adverse possession is false farfetched, misconceived as well as bad at law.

The Plaintiff MICHAEL OLE DIKIRR opposed the application and filed a replying affidavit where he deposes that the Applicants were

properly served with notices, summons, motions and hearing notices as he personally accompanied the process server John Mburu Nganga to the respective homes. He contends that the process' server's affidavit sworn on 4th July, 2012, which was filed in court on 5th July, 2012 correctly confirms that he witnessed the service to the Applicants. He avers that what the process server stated in true, correct and not fabricated as alleged by the Applicants. Further, that they make no credible challenge of the service effected. He claims the Applicants have no triable issues. Further, that the searches confirm that indeed the suit land belongs to him and he acquired a good title. He provides a history of the title to the suit land and insists he has always resided thereon since 1981 when he bought it. Further, that he has remained in uninterrupted, exclusive and in actual possession of suit land where together with his family, they derive their livelihood. He reiterates that the Defendants have never objected to his use of the suit land for the last 37 years.

The Plaintiff and Defendants filed their respective submissions that I have considered.

Analysis and Determination

On consideration of the Notice of Motion dated the 11th June, 2018 including the Plaintiff's replying affidavit and written submissions, the only issue for determination is whether the ex parte judgement delivered on 7th day of February, 2018 should be set aside.

The Defendants have contended that they were not served with summons to enter appearance and hence ex parte judgement entered herein on 7th February, 2018 should be set aside. The Defendants in their submissions contended that setting aside of judgement is discretionary. Further, that there was no personal service upon them. They relied on the cases of **Wachira Karani V Bildad Wachira (20160 eKLR; Yamko Yadpaz Industries Limited V Kalka Flowers Limited (2013) eKLR and James Wanyoike & 2 Others V CMC Motors Group Limited & 4 others (2015) eKLR** to buttress their arguments. The Plaintiff opposed this application by filing his replying affidavit including submissions. In the submissions he relied on various cases including **Kodak Kenya Limited V Edward Kamau Ndungi T/A Edkan Photo Studio (2005) eKLR; Shadrack Arap Baiywo V Bodi Bach (1987) eKLR; Kenya Orient Insurance Limited V Cargo Stars Limited & 2 Others (2017) eKLR; Stephen Wanganga Njoroge V Stanley Ngugi Njoroge & Another (2017) eKLR; Kingsway Tyres & Automart Ltd V Rafiki Enterprises Ltd (1996) eKLR; K- Rep Bank Limited V Segment Distributors Limited (2017) eKLR; Kenneth K. Mwangi V City County of Nairobi & 2 Others (2017) eKLR; Scoby Enterprises Ltd V Kisii County Assembly Service Board (2016) eKLR; Derby Registrars Limited V Kenya National Assurance Co. 2001 Ltd (2019) eKLR and Nicholas Kiptoo Arab Korir Salat V Independent Electoral and Boundaries Commission & 6 others (2013) eKLR** to support his arguments opposing the application to set aside judgment.

Order 10 Rule 11 of the Civil Procedure Rules provides that ; **'where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.'**

In **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75 at page 76 C and E** the court held as follows:-

'There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.'

The court further held as follows:-

'That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication'

In the current case, the Defendants are seeking to set aside the judgment herein. They claim they were not served with summons to enter appearance. According to the Court records the Defendants were all served with the Originating Summons, Supporting Affidavit and Verifying Affidavit on 21st May, 2012 by one Joel Mburu Nganga and an affidavit of service sworn on 4th July, 2012 was duly filed in Court.. Judgement in default of appearance was duly entered on 8th July, 2012 but subject to formal proof. The matter proceeded for formal proof on 15th December, 2014 but was later transferred to this Court after which the matter proceeded de novo on 2nd November, 2018 with judgment being entered in favour of the Plaintiff on 7th February, 2018. The Defendants have claimed their Defence raise triable issues but failed to annex a draft Statement of Defence for the Court's consideration. In the case of **Shadrack Arap Baiywo V Bodi Bach (1987) eKLR** the Court of Appeal while dealing with an issue of service held thus: **'There is a presumption of services as stated in the process server's report and the burden lies on the party questioning it to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.'** In the current case, the process server outlined how he served the Defendants. The Defendants never sought leave to cross examine him despite challenging the affidavit of service. In the circumstance and relying on this Court of Appeal decision, I have no reason to disregard the affidavit of service filed in court confirming that the Defendants were duly served. On the question of setting aside the ex parte judgment, from the application and supporting affidavit, I note the same was filed after a delay, which was not explained. Further, there is no draft Statement of Defence for the Court to consider as to whether it raises triable issues or not. In the case of **K- Rep Bank Limited V Segment Distributors Limited (2017) eKLR** the Court while dealing with an application to set aside a judgment where a Defendant had failed to annex a draft Defence held that; **'...It did not exhibit a draft Defence to demonstrate whether indeed there are triable issues raised worth setting aside the regular judgement for. I therefore find no merit in the application dated 5th October, 2016 and would dismiss it with costs.'**

Based on my analysis above and in associating myself with the two cited decisions, I find that there is no evidence of triable issues raised to warrant the setting aside of the judgment. Further, I note that the Defendants filed the instant application after the Plaintiff had already executed the Decree herein.

In the circumstance, I find the Notice of Motion application date 11th June, 2018 unmerited and will proceed to dismiss it with costs.

Dated and Delivered in Kajiado this 25th day of November, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Ojwang Agina for the defendant/applicant

No appearance for plaintiff/respondent (Plaintiff in person)

Court assistant Mpoye