



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 114 OF 2014

APOLLO MUINDE & 2 OTHERS.....PLAINTIFFS

VERSUS

ERNEST OYAYA OKEMBA.....DEFENDANT

RULING

(Application to set aside an ex-parte judgment; claim being over possession of land; defendant entering appearance through counsel but no defence filed; plaintiffs applying and obtaining interlocutory judgment and proceeding on formal proof; judgment entered for the plaintiffs; interlocutory judgment was irregular as there is no provision for entering interlocutory judgment in a land claim; interlocutory judgment being for a claim for pecuniary damages or detention of goods pursuant to Order 10 Rule 6; interlocutory judgment irregular and set aside; counsel on record for the defendant also not being served with hearing notice for the purported formal proof; in any event defendant demonstrating arguable defence; application allowed)

1. The application before me is that dated 24 July 2017 filed by the defendant. He wants orders that the ex-parte judgment herein be set aside and that he be allowed to file defence to the suit. The application is opposed.

2. To put matters into context, this suit was filed on 21 May 2014. The plaintiffs averred that they are the registered proprietors of the Plot No. 539 Miritini having purchased it from one Allan D. Njoroge. It was pleaded that in May 2012, the defendant wrongfully entered the suit land, took possession of it and erected structures. The plaintiffs sought orders inter alia that they be declared the rightful owners of the suit land and a mandatory injunction against the defendant. I have seen that a Memorandum of Appearance was filed on 9 July 2014 by the law firm of M/s George M. Kabebe Advocate, but no defence was filed. On 27 March 2013, a Request for Interlocutory Judgment was filed, purportedly pursuant to Order 10 Rule 6, for reason that no defence had been filed. I have seen that interlocutory judgment was entered but noted to be "subject to formal proof." The matter was then listed for "formal proof" on 22 June 2016 and it proceeded before my predecessor A. Omollo J. There was no appearance on the part of counsel then on record for the defendant and there is no proof that he was ever served with a hearing notice. Judgement was entered in favour of the plaintiffs on 12 April 2017. On 29 June 2017, the defendant filed a Notice to Act in Person and he later appointed another counsel, M/s Matete Mwelese & Company Advocates, who filed this application on his behalf. He has since reverted to acting in person.

3. In the application, he has averred that he had instructed M/s George M. Kabebe Advocates to defend the suit but the law firm failed to file defence. He has further stated that his erstwhile advocates were never served with any hearing notices. He has pointed out that in the judgment, it is said that he neither entered appearance nor filed defence yet he had actually entered appearance. He has claimed to be the genuine owner of the suit land as he purchased it from Mr. Allan Njoroge in the year 2007 after which he took possession and developed permanent structures on it. He has contended that he has a good defence to the case.

4. It is clear to me that the proceedings leading to the ex parte judgment were irregular. First, there is no provision for entry of interlocutory judgment in a case such as this. Interlocutory judgments, which are entered when no defence is filed, only apply to the matters specified under Order 10 Rule 6 of the 2010 Civil Procedure Rules. The said provision is drawn as follows :-

Interlocutory judgment [Order 10, rule 6.]

Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

5. It will be seen from the above that interlocutory judgment only applies in claims for pecuniary damages only, or a claim for detention of goods with or without a claim for pecuniary damages. If the defendant does not enter appearance in such a claim, or enters appearance and

does not file a defence (a situation covered by Order 10 Rule 7) the plaintiff may apply for interlocutory judgment, which can be entered and then set down the suit for assessment of damages. The so called "formal proof" is thus nothing beyond a hearing for assessment of damages in a case where one is seeking pecuniary damages and/or seeking damages for detention of goods.

6. The claim before this court was not one seeking pecuniary damages and neither was it one that was a claim for detained goods. It was a case seeking declaration of ownership of land and a mandatory injunction. Those are not prayers upon which one can apply for interlocutory judgment. In a situation where no appearance is filed to such a suit, or an appearance is filed and no defence is filed within the specified period, the avenue of the plaintiff is to apply for a date for hearing, and even then, since he has no interlocutory judgment in his favour, he needs to serve the defendant with a hearing notice, unless the court orders otherwise, for the matter will actually be proceeding for full hearing on merits and the defendant needs to be informed of this and opt whether to attend or not. If the defendant has actually made an appearance, then clearly, he must be served through his counsel, if he has one, or if in person, he must be personally served. "Formal proof" cannot be undertaken in a case where one claims a declaration of ownership of land or is seeking orders of permanent and/or mandatory injunction, or such other related claims.

7. From the foregoing, I do find that the interlocutory judgment was irregular and the same is hereby set aside. Even if it was regular, which it is not, the defendant's then counsel on record was never served with a hearing notice. The defendant therefore had no idea that the matter is proceeding for hearing so that he could opt to appear or not. He had counsel on record who deserved to be served. In my view, the whole proceedings were conducted under a cloak of darkness to the great prejudice of the defendant and the judgment herein cannot be allowed to stand. The above aside, it will also be seen that the defendant appears to have an arguable defence to the suit and he deserves to be given a chance to ventilate it.

8. I therefore find merit in this application and the same is allowed. I direct the defendant to file and serve his defence within 21 days from today. The defendant will also have the costs of this application as against the plaintiffs.

9. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of November 2019.

MUNYAO SILA

JUDGE

IN THE PRESENCE OF:

Applicant; absent

No appearance on the part of M/s Mwangi Njenga & Company Advocates for the plaintiffs/respondents.

Court assistant; David Koitamet.