



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO.320 OF 2017

PETER MBIU NGALIUKA PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MUTETI NGULI DEFENDANT/APPLICANT

R U L I N G

1. What is before this court for ruling is the Defendant's/Applicant's chamber summons application dated 26/03/19 and filed in court on even date for orders: -

1. Spent.

2. This honourable court be pleased to set aside the Plaintiff/Respondent exparte judgment dated 21.6.2018 and decree issued on 05.07.2018 and the Defendant be granted leave to file memorandum of appearance and defence out of time and that this suit do start de novo.

3. Spent.

4. The costs of this application be provided for.

2. The application is premised on the grounds on its face and is supported by the supporting and further affidavits of Joseph Muteti Nguli, the Defendant/Applicant herein, both sworn at Machakos on 26th March, 2019 and 07th June, 2019 respectively.

3. Peter Mbulu Ngaliuka, the Plaintiff/Respondent herein has opposed the application through his replying affidavit sworn at Nairobi on the 3rd June, 2019 and filed in court on 06th June, 2019.

4. On the 11th June, 2019 the court directed that the application be disposed off by way of written submissions.

5. By the time of writing this ruling, it is only the Defendant's/Applicant's Counsel who had filed their submissions.

6. The Defendant/Applicant has indicated on grounds (a), (b), (c), (d), (e) & (f) that he was not served with any notice of judgement before execution, that he was not served with summons to enter appearance in the proper form, that he was not served with notice of intention to sue, that he has a good defence which raises triable issues, that he stands to suffer substantial loss unless stay is ordered and that there will be miscarriage of justice unless the application is allowed. The Defendant/Applicant has repeated the same grounds in paragraphs 6 and 7 of his supporting affidavit in addition to disposing in paragraphs 9 and 10 that the Plaintiff/Respondent will not suffer any prejudice if the application is allowed and that for the ends of justice to be met, it is only fair and equitable that the judgement herein be set aside, execution stayed and he be granted leave to defend the suit.

7. In his further affidavit the Defendant/Applicant has deposed in paragraphs 3, 4, 5, 6, 7 and 9 that he has been advised by his advocates on record that the Plaintiffs/Respondents replying affidavit is full of hollow averments, that he has never entered into any oral agreement or otherwise for the purchase of land parcel Makueni/Kilongo/283, that the only agreement he entered into was for the sale of land parcel number Makueni/Kilongo/5205 whose purchase price he paid in full, that it is not true that he was served with a demand letter and summons to enter appearance, that he takes court process seriously and he would have defended the suit vehemently if he had been served with court documents and that the Plaintiff/Respondent has not demonstrated any prejudice that he will suffer if the application is allowed.

8. The Plaintiff/Respondent has deposed in paragraphs 2, 4, 5, 6, 7, 9, 10, 12 and 13 of his replying affidavit that sometime in the year 2013, he entered into a unwritten sale agreement with the Defendant/Applicant in respect of his (Respondent's) land parcel Makueni/Kilongo/283, that the reason for not reducing the agreement into writing was because he trusted the Defendant/Applicant as a church pastor, that the Defendant/Applicant was to purchase his land at a price of Kshs.250,000/= of which the Defendant/Applicant paid a deposit of

Kshs.40,000/= and the Respondent allowed the Defendant/Applicant to cultivate on the land, that due to the trust he had in the Defendant/Applicant, he allowed the latter to till the land as he waited for him to complete payment of the purchase price, that when he followed up with the Defendant/Applicant for payment of the balance of the purchase price upon expiry of one year, the Defendant/Applicant kept on promising to pay but he did not do so until 2017 when the Plaintiff/Respondent instructed his advocate to write a demand letter (PM1) to him (Defendant/Applicant) which the Plaintiff/Respondent personally served upon the Defendant/Applicant through the chief Kikoko location, that the Defendant/Applicant was served with summons and plaint on 14th September, 2017 and an affidavit of service was filed in court and that the Defendant/Applicant refused and/or neglected to enter appearance and to file his defence.

9. In their submissions, O. N. Makau & Mulei advocates for the Defendant/Applicant cited **Order 10 of Rule 11 of the Civil Procedure Rules** which provides as follows: -

“where judgement has been entered under this order, the court may set aside or vary such judgement or any consequential decree or order upon such terms as are just.”

10. The Counsel went on to cite the case of **Shah vs. Mbogo & Another [1067] EA 116 at 123B** where Harris, J set out the principles for setting aside ex parte judgement as follows: -

“... applying the principle that the court’s discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

The Counsel further cited the case of **Kenya Commercial Bank Limited vs. Nyatenge & Another (1990) KLR 443** where Bosire, J (as he then was) held that;

“Order IXA Rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person of deliberate conduct intended to obstruct or delay the course of justice.”

Arising from the above, the Counsel submitted that the Defendant/Applicant was not aware of the suit and that he only came to know of its existence when he was served with a proclamation by the auctioneer. The Counsel pointed out that the Defendant/Applicant was denied the chance to be heard by a court of law and cited the case of **Tree Shade Motors Ltd. vs. D.T Dobie & Another (1995-1998) 1 EA 324** where it was held that: -

“Even if service of summons is valid, the judgment will be set aside if the defence raises triable issue. Where a draft defence was tendered with an application to set aside a default judgement, the court hearing the application was obliged to consider if it raised a reasonable defence to the Plaintiff’s claim. Where a Defendant showed a reasonable defence on merits, the court could set the ex parte judgement aside.”

The Counsel was of the view that the defence herein raises triable issues which can only be determined when the suit begins de novo. The Counsel cited the case of **Emily Koech vs. Ziporah Nyamoita Mwangi & Uasin Gishu County Land Registrar [2018]** where M. A. Odeny, J held:

“I have considered the pleadings, submissions of Counsel and find that this application has merit and therefore exercise my discretion to set aside the judgment entered on 18th October, 2017 with all consequential orders. I order that the 1st Defendant to pay thrown away costs of Kshs.15,000/= within 15 days failure to which the order lases.”

The Counsel further cited the case of **Abdullah Ali Nassir vs. Sophia Mwanghunda [2019] eKLR** where Omollo A., J while allowing an application to set aside ex parte judgement made the following remarks: -

“It was the first time the Defendant was being served with the S.T.E.A, she would be aware of this matter from what background. The process server does not explain to this court. As soon as execution process commenced, the Defendant moved the court. Therefore for the missing link on how the demand letter was served and how the Defendant was previously made aware of the matter, I find her request to be given hearing is not intended to obstruct the cause of justice.”

The Counsel concluded by submitting that the application is merited and the orders sought should be granted.

11. Arising from the above, I do note that the Defendant/Applicant herein has denied service of summons even though the affidavit of service sworn by Benjamin Manyenyi Kosom, a process server, at Kilungu on 18th September, 2017 shows that the Defendant/Applicant was served on 14th September, 2017 at 1:00 pm. Be that as it may, the Defendant/Applicant denies having ever purchased land parcel number Makueni/Kalongo/2833 and according to him, what he bought was land parcel Makueni/Kalongo/5205. The Plaintiff/Respondent has deposed in replying affidavit that there was no written sale agreement between him and the Defendant/Applicant in respect of land parcel number Makueni/Kalongo/2833.

12. Under the provisions of **Section 3(3) of the Law of Contract Act chapter 23 of the Laws of Kenya**, it is provided as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract upon which the suit is founded –

(i) Is in writing

(ii) Is signed by all the parties thereto, and

(b) The signature of each party signing has been attested by a witness who is present when the contract is signed by such party.”

13. I do note that the averments in paragraphs 4, 5, 6 and 7 of the plaint regarding how the purchase price of what he describes as land parcel number Makueni/Kalongo/5205 was to be paid have been denied in paragraphs 4 of the draft defence annexed to paragraph 7 of the Defendant's/Applicant's supporting affidavit. Bearing in mind that according to the Plaintiff/Respondent the sale agreement was oral, the draft defence herein raises triable issues since what will be issue during the trial will be among others whether or not the sale agreement conforms to Section 3(3) of the Law of Contract Act. The interest of justice herein demands that the Defendant/Applicant be granted a chance to defend the suit against him filed by the Plaintiff/Respondent.

14. The upshot of the foregoing is that the application has merits and I hereby proceed to grant the following orders: -

2. The Plaintiff's/Respondent's exparte judgment dated 21st June, 2018 and the decree issued on 05th July, 2018 are hereby set aside and the Defendant/Applicant is granted leave to file a memorandum of appearance and defence out of time.

4. The costs of the application are provided for.

Signed, Dated and Delivered at Makueni this 11th day of December, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Masaku for the Defendant/Applicant

No appearance for the Plaintiff/Respondent though served with ruling notice on 10/12/19 as can be seen from the affidavit of service dated 11/12/19

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

11/12/2019.