



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO. 25 OF 2012

TULO HOLDINGS LIMITED.....PLAINTIFF

VERSUS

SATINDER SINGH KALSI.....1ST DEFENDANT

RAVINDER SINGH KALSI.....2ND DEFENDANT

RULING

Introduction

1. What is before me for determination is the Defendants application dated 3rd November, 2017. The said application is brought pursuant to Order 9 Rule 9 , Order 10 Rule 11, Order 50 Rule 11 and Order 40 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Applicants seek the following main prayers:

a) That the firm of Mbeche & Co. Advocates be allowed to come on record for the defendants in place of the firm of Aming'a, Opiyo and Masese & Co. Advocates.

b) That the proceedings done ex-parte and judgment entered on 25th November, 2016 be set aside and the Defendants be allowed to defend the case on merit.

That pending the hearing and determination of the application herein, this honourable court be pleased to issue an order of injunction restraining the plaintiff jointly and severally, his agents, servants, employees and or any other person or persons acting on their instructions from developing, entering, occupying and/or in any manner whatsoever, dealing with the suit parcel of land to the detriment of the Defendants' proprietary rights.

c) That pending the hearing and determination of the suit herein this honourable court be pleased to issue an order of injunction restraining the plaintiff jointly and severally, his agents, servants, employees and or any other person or persons acting on their instructions from developing, entering, occupying and/or in any manner whatsoever, dealing with the suit parcel of land to the detriment of the Defendants' proprietary rights.

e) That the costs of this application be provided for.

2. The application is predicated upon the grounds stated on the face of the Notice of Motion as well as the Affidavit of Satinder Singh Kalsi, the first defendant sworn on the 3rd November, 2017.

3. The application is opposed by the Plaintiff through the Replying Affidavit of Charles K. Maiyo sworn on the 16th November, 2017.

Defendants/ Applicants' Submissions

4. In his submissions counsel for the applicants' states that the reason why they have applied for leave to come on record in place of Aming'a Opiyo and Masese & Co Advocates is because judgment has been entered in favour of the plaintiff. In his submission, he reiterates the contents of the 1st defendant's supporting affidavit which explains the reason why they failed to attend court when the suit was listed for hearing which is that their former advocates neither informed them of the said date nor attended court. The case therefore proceeded ex-parte and they only came to learn the judgment had been entered against them when the plaintiffs' advocates sent auctioneers to proclaim their business.

5. The defendants submit that they have a good defence that raises triable issues. They submit that an advocates mistakes should not be visited on his client. They further submit that they are willing to deposit the taxed costs in in court and abide by any order of the court regarding thrown away costs.

Plaintiff/ Respondent's Submissions

6. The application is opposed by the Plaintiff/ Respondent. In his submissions, counsel for the Respondents has taken issue with the provisions under which the application has been brought stating that it ought to have been brought under Order 12 Rule 7 rather Order 10 Rule 11 of the Civil Procedure Rules.

7. They fault the supporting affidavit for offending the provisions of order 1 rule 8 of the Civil Procedure Rules in that the 1st defendant does not indicate that he is swearing the same on his behalf and on behalf of the 2nd respondent.

8. The Respondents fault the defendant's advocates for filing a Notice of Appointment of Advocates before obtaining leave of the court.

9. The respondent submits that the applicants lack *locus standi* for the reason that even though they hold a grant of Probate in respect of the purported registered owner of the suit land, the suit property is not mentioned in the Grant.

10. They also submit that the applicants have not demonstrated that they have met the threshold for the grant of an injunction in the case of **Giella V Cassman Brown 1973 E.A 358**.

Issues for Determination

11. The main issues for determination are as follows:

- i. Whether the application is fatally defective for having been brought under the wrong provisions of the law
- ii. Whether the defendants have *locus standi*
- iii. Whether the judgment entered against the defendants ought to be set aside
- iv. Whether the applicants are entitled to the reliefs sought?

Analysis of the law and Determination

12. On the first issue, the applicants have brought this application under Order 9 rule 9 and Order 10 rule 11 of the Civil Procedure Rules. Under Order 9 Rule 9 of the Civil Procedure Rules the defendant's advocates are required to seek leave of the court to come on record for the defendants since judgment has already been entered in the matter. The Respondents contention is that they should not have filed their Notice of Appointment of Advocates before first obtaining leave of the court.

13. This would have been possible if the defendants had filed two separate applications but in the current circumstances they combined their prayers in one application. I find that this objection though merited does not go the root of the matter.

14. The other ground on which the respondent faults the application is that it is seeking to set aside the ex- parte judgment in default of Appearance and Defence yet the defendants have a Defence on record. Instead they should have filed their application under Order 12 Rule 7 which talks about the consequences of non-appearance.

15. Clearly the applicants have mixed up the provisions of the Civil Procedure Rules as indeed they ought to have filed their application under Order 12 Rule 7 of the Civil Procedure Rules. However, the respondents have not demonstrated what prejudice they have suffered as a result of this procedural technicality.

16. Order 51 rule 10 (2) of the Civil Procedure Rules provides that no application shall be defeated solely because it has been brought under the wrong provisions of the law. Similarly, and more importantly, Article 159 (2) of the Constitution enjoins the court to administer substantive justice without undue regard to procedural technicalities. In view of the foregoing provisions and in the interest of justice it is my finding that the application is not fatally defective and it ought to be heard on its merits.

17. On the third issue Respondent contends that the applicants have no *locus standi* as their claim is based on the fact they hold a grant of Probate in respect of one Manjit Singh Kalsi - deceased who was the registered proprietor of the suit property. According to the Respondent, the Grant does not mention the suit property.

18. The issue of *locus standi* was not raised by the Plaintiff as a preliminary point and it is not clear why the Plaintiff is bringing it up at this stage after it has already obtained an ex parte judgment. In any event it is my view that if the Plaintiff wishes to rely on this ground then it would be embarking on a slippery slope as it could cut both ways since it would have no business suing a party or parties who have no *locus standi* to sue or be sued. For now, I think I have said enough on this point.

19. The fourth issue is the crux of this application. Have the applicants met the conditions for setting aside of the ex- parte judgement? In considering this issue I am guided by the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** Justice Havelock citing the

Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

“The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:

a) Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

*b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116 at 123B.***

*c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***

*d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***

*e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30”***

20. I further rely on the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P stated as follows:

“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 to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it “a triable issue”, that is, an issue which raises a prima facie defence and which should go to trial for adjudication”

21. Similarly, the case of **CMC Holdings Ltd V Nzioki 2004 KLR 173** in the court held as follows:

“The law is now well settled that in an application for setting aside an ex-parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date, but also whether the defendant has a reasonable defence... which raises triable issues.”

22. Regarding the issue of the advocates mistake, it is trite law that the mistake of an advocate should not be visited on his client. This was the position taken by the Court of Appeal in the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) KLR 272 Per Madan JA** as he then was, cited with approval in **CA 18/2013 Richard Ncharpi Leiyagu Vs IEBC and others** where the learned judges of appeal describing what constitutes a mistake stated as follows:

“A mistake is a mistake, it is no less a mistake because it is an unfortunate slip, it is no less pardonable because it is committed by senior counsel, Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door is not closed because the mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of the laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

23. Furthermore in the case of **Philip Chemweno & Another Vs Augustine Kubede (1982-1988) KAR 103 at page 1040, Apaloo J.A (as he then was)** stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit, I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, it is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline”

24. Going back to the issue as to whether the Defence raises triable issues, I have looked at the Plaintiff as well as the defence and Counterclaim. The Plaintiff states that the Plaintiff is the registered owner of land parcel number **KERICHO MUNICIPALITY BLOCK45/402** and that the applicants have unlawfully been threatening to occupy the same. On the other hand, the Defendants/ Applicants in their Defence and Counterclaim challenge the Plaintiff/ Respondent’s title to the suit land and allege that the respondents fraudulently had the said title registered in its name. I am therefore persuaded that the defence raises triable issues that should be canvassed at a full hearing.

25. In determining the last issue as to whether the defendants are entitled to the orders sought I am persuaded that the applicants have made out a case for the grant of a temporary injunction as laid out in the case of **Giella V Cassman Brown & Co. Limited** as they have established a *prima facie* case with a probability of success. In the 1st Respondent’s affidavit, he depones that the suit land has sentimental value as it has been passed on from his great, great grandfather. The courts have consistently held that in cases involving, given the value and special attachment to land in Kenya, damages would not be an adequate remedy if the land is alienated. Based on my findings above, I hold that the applicants are entitled to the reliefs sought.

Conclusion

26. I have considered the pleadings, Notice of Motion, Affidavits, annexures and ex-parte judgment entered herein as well as counsel's submissions and the authorities cited to me and come to the conclusion that the application is merited and I grant it. However, I must consider that justice cuts both ways and the interests of the plaintiff who has obtained a judgment in his favour must also be taken into account. It is not lost to me that the defendants only moved the court to set aside the judgment when auctioneers moved to their premises to proclaim against them. In **Kericho HCCC No. 6 of 2001 Eric Kimutai Mugun V Augustine Mageto Onkoba & 2 Others** Mumbi J held that it would be just if the applicant who sought to stay the Notice to Show Cause deposits the decretal sum in court within the stated period failing which the Notice to Show Cause would proceed. I therefore allow the defendants' application on condition that the defendants deposit the taxed costs in the sum of Kshs. 596,755.80/= in court and pay Kshs. 30,000 thrown away costs to the Plaintiff within fourteen days from the date hereof failing which these orders shall lapse.

27. In the final analysis I direct as follows:

- a) That the firm of Mbeche and Company Advocates be allowed to come on record for the Defendants in place of Aming'a Opiyo and Masese & Co Advocates.

- b) That pending the hearing and determination of this suit, an injunction do issue restraining the plaintiff by himself, his agents, employees, servants and anyone acting on his behalf be restrained from selling, mortgaging or alienating the property known as KERICHO/MUNICIPALITY BLOCK 5/402 but the status quo with regard to occupation thereof shall remain pending the hearing of the suit herein.

- c) The Respondents do deposit Kshs. 596,755.80 being the costs assessed herein in court and pay the Plaintiff/ Applicant Kshs. 30,000 being thrown away costs within the next 14 days failing which the above orders shall automatically lapse.

- d) The costs of this application shall be borne by the Defendants/Respondents.

Dated, signed and delivered at Kericho this 30th day of January, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

- 1. Mr. Langat for Masese for the Defendants/Applicants

- 2. No Appearance for the Plaintiffs/Respondents