



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 21 OF 2012

THOME DYNAMIC.....PLAINTIFF

VERSUS

JOSEPH WAMBUA NZIOKA.....DEFENDANT

RULING

1. This suit relates to Land Reference No. 209/11391 situated along Kangundo Road (the suit property). The Plaintiff commenced the suit by way of plaint on 18/1/2012 seeking *inter alia*, an order compelling the defendant and his agents to demolish/pull down/remove all developments undertaken on the suit property; an eviction order against the defendant, and his agents, and mesne profits.

2. On 13/9/2012, the plaintiff filed a request for default judgment. Attached to the request for default judgment was an affidavit of service sworn on 6/9/2012 by one Protus Litwaga Imbwaga. On 18/9/2012, the Deputy Registrar directed the plaintiff to set down the matter for hearing under Order 10 rule 9 of the Civil Procedure Rules. The matter was heard as an undefended cause on 18/11/2015 and on 3/10/2016, the court rendered an *ex parte* judgment in which it granted the following orders;

a) A permanent injunction restraining the defendants and/or their agents from carrying out further developments on all that parcel of land known as LR No. 209/11391 situated along Kangundo Road in the City of Nairobi.

b) An order compelling the defendants and/or their agents against to demolish/pull down/remove all the illegal developments that they have undertaken on all that parcel of land known as LR No. 209/11391 situated along Kangundo Road in the City of Nairobi.

c) On pray No. c the defendants is ordered to voluntarily move out or vacate the suit premises and remove any structure from therein within a period of 45 days from the date of this judgment failure to do so, the plaintiff to apply for eviction of the defendant.

d) The plaintiff is also entitled to costs of this suit and interest thereon from the date of filing the suit to the date of payment on courts rate.

3. On 24/5/2017, the defendant brought a Notice of Motion dated 23/5/2017 seeking to set aside the *ex parte* judgment. The application also sought leave to file a defence in the suit. That application is the subject of this ruling.

4. Besides the above application, a Notice of Motion dated 15/9/2017 was presented by the interested

parties on 22/9/2017, seeking to be enjoined in the proceedings on the ground that they are registered or lawful proprietors of various parcels of land which are resultant subdivisions of the original parcel of land LR. No. 209/11391. The application was allowed by consent of the parties on 5/10/2017 and by dint of that consent, the interested parties have henceforth participated in the proceedings and are supporting the motion to set aside the *ex parte* judgment.

5. The ground upon which the defendant's application is premised is that he was not served with the summons to enter appearance and all related papers. He accuses the process servers of swearing false affidavits. He contends that whereas in the first affidavit in the matter, sworn by Protus Litwaga Imbwaga, the process Server alleges that he served him with a court order, notice of motion and copy of the plaint on 20/1/2012 at Saika Estate, in the Second affidavit sworn on 6/9/2012 and attached to the request for judgment he contends that he served him with summons to enter appearance and copies of the plaint at Njiru where he allegedly resides. The defendant further contends that, in the subsequent affidavit sworn by Francis Ongati, the process Server alleges that he served him with the decree at his premises in Kayole. He has exhibited the three affidavits and he has deposed that he does not reside in any of the three alleged places, namely Saika, Njiru and Kayole. He asserts that the court was misled by the process server into allowing *ex parte* proceedings.

6. Supporting the application, the interested parties through an affidavit sworn by Joseph Wambua Nzioka and Patrick Magu Kamau assert that the City Council of Nairobi lawfully allocated the suit property to them and that the respondent failed to disclose to the court that the entire suit land is developed and occupied by them. They further contend that the plaintiff deliberately misled the court into granting eviction orders. Lastly they contend that it would be against the rules of natural justice if they were to be condemned unheard. They have exhibited photographs of alleged developments on the suit property.

7. The respondent opposes the application through a replying affidavit sworn by John Irungu Huma contending that it is incompetent and fatally and incurably defective. He reckons that Saika, Njiru are Kayole and in the same administrative location and refer to one and the same place. He has also deposed that he was always in the company of the process servers at the time of effecting service.

8. Parties made oral rival submissions in open court. Nzilani, Counsel for the applicant submitted that the defendant was not served with court papers because he does not reside in any of the three places where he is alleged to have been served. He added that the draft defence on record raises serious triable issues and that it is in the interest of justice that the defendant should be allowed to defend the suit.

9. Mr. Gatumuta, counsel for the interested parties submitted that the interested parties have developed and occupy the suit property and that the plaintiff knew this fact but conveniently avoided to enjoin them in the proceedings. He drew the attention of the court to the letters of allotment from the City Council of Nairobi. He added that the interested party would be shut out of the court of Justice and they would stand condemned unheard if the *ex parte* judgment is not set aside.

10. The plaintiff did not attend court. On 22/11/2017 when the application was heard, the hearing date having been fixed in the presence of all the parties.

Determination

11. The single issue for determination in the present application is whether the *ex parte* judgment delivered on 3/10/2016 and the consequential decree and orders should be set aside.

12. The legal framework on setting aside *ex parte* judgment is set out in Order 10 rule 11 of the Civil procedure Rules. The power to set aside *ex parte* judgment is a discretionary one, exercisable with the overarching objective of doing justice to the parties. The guiding criteria to be employed when excising this jurisdiction was spelt out in **Shanzu Investments Limited vs. Commissioner of Lands, Civil Appeal No. 100 of 1993**. When exercising this power, it is to be borne in mind that there are no limits nor restrictions on the discretion of the court except that if the judgment is set aside or varied it must be done on terms that are just taking into account the grounds upon which that decision is taken. Secondly,

the jurisdiction must be exercised judiciously depending on each particular case. Thirdly, the court is to look at the defence on record and satisfy itself that it raises a triable issue before granting the prayer. Lastly, if there is delay in bringing the application, the court should satisfy itself that a reasonable explanation has been tendered to account for the delay before allowing the application.

13. The gist of the defendant's application is that summons to enter appearance and all related court papers in the suit were never served upon him. The affidavits of service presented to the court indicate that summons and related court papers were served upon the plaintiff at his premises on three different occasions at Saika, Njiru and Kayole respectively. The applicant deposed that he lives in Umoja Estate and that is where he was at the time of the alleged service. In response, the defendant contends that Saika, Njiru and Kayole refer to one and the same place. I am not persuaded that Saika, Njiru and Kayole refer to one and the same place. Without saying much, the integrity of the three affidavits of service which informed the decision to allow *ex parte* proceedings at various points has been brought to question by the contention that Saika, Njiru and Kayole should be treated as one and the same place for the purpose of confirming service of court papers in the present proceedings. It is therefore highly doubtful that the defendant was served with summons to enter appearance.

14. I have perused the draft defence attached to the application. The defendant contends that the defunct City Council of Nairobi allocated a portion of the suit property and the defendant has been in possession of that portion since 1997. He has developed the said plot. On its part, the plaintiff claims to be the registered proprietor of the suit property pursuant to Grant No.76726 issued in 1998. What I understand the defendant to be saying is that he was a beneficial owner of a portion of the suit property prior to 1998. From this premise, I am satisfied that the draft defence does raise triable issues. In **Patel Vs. Cargo Handling Services Ltd**, the Court of Appeal observed that defence on merits does not mean a defence which must succeed.

15. Lastly, I am satisfied that there was no inordinate delay in bringing the present application. As soon as the applicant learnt about the existence of this suit, he brought the present motion.

16. In light of the foregoing, I will allow the defendant's Notice of Motion dated 23/5/2017 in the following terms.

a) The *ex parte* judgment delivered on 3/10/2016 is set aside

b) The defendant and the interested parties shall file and serve their pleadings within 15 days from today.

c) Parties shall file their duly bound, paginated and indexed bundles containing pleadings, witness statements evidentiary any documents within 60 days from today.

Dated, signed and delivered at Nairobi on this 9TH day of February 2018.

B M EBOSO

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance advocate for the Interested Parties

Halima Court clerk