



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 135 OF 2016

STANLEY WAMUGUNDA WANJAU.....PLAINTIFF

-VERSUS-

JAMES NENE NDEGWA.....1ST DEFENDANT

REUBEN MITHAMO NDEGWA.....2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **23rd June, 2016** the plaintiff **Stanley Wamuguna Wanjau** brought the current suit seeking judgment against the defendants, **James Nene Ndegwa** and **Reuben Mithamo**, for eviction from **Nyeri/Waraza/2045** (hereinafter referred to as the suit property); a permanent injunction to restrain the defendants from entering or committing acts of waste upon the suit property; damages; costs and interest.

2. The plaintiff's case is that he is the registered owner of the suit property; that the defendants without any reasonable cause have entered and remained in the suit property without his permission.

3. As attested by an affidavit of service of the process server **Cyrus Ndirangu Kirunyu**, despite the defendants having been served with summons to enter appearance, they failed to enter appearance within the time stipulated in law and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against them. The said judgment was entered in favour of the plaintiff on 5th June, 2014 and the suit was set down for formal proof.

4. When the matter came for formal proof, the plaintiff testified that he bought the suit property from Simon Njiri Munene in two portions of 3/4 and 1/4 acres. The land was transferred to him in 2014 and he was issued with a title deed the same year. He informed the court that the defendants are cousins to the seller but he was not aware that they were in occupation of the suit property at the time of purchase. Upon learning that they were in occupation, he approached the chief of the area for help to have them evicted but the chief was unable to evict them. He approached them personally and pleaded with them to vacate the suit property. Initially they agreed, but later changed their minds prompting his counsel to write them a demand letter on 9th May, 2016. Despite issuance of the notice, the defendants failed and or refused to vacate the suit property.

5. To prove ownership of the suit property, the plaintiff produced the following documents :-

1. Agreement dated 6th September, 2013 between himself and Simon Njiiri Munene.
2. Agreement dated 18th August, 2014 between himself and Simon Njiiri Munene.
3. Copy of title deed for Nyeri/waraza/2045.
4. Official search for Nyeri/Waraza/2045 dated 7th June, 2016.
5. Demand letter to James Nene Ndegwa and Reuben Mithamo Ndegwa dated 9th May, 2016.

Analysis and determination

Entry of interlocutory Judgment:

6. As pointed out above, after the defendants were served with summons to enter appearance, they failed to enter appearance within the time stipulated in law and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against them. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment can only be entered in respect of a liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the Liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

7. In the circumstances of this case, the plaintiff's case being for eviction and permanent injunction to restrain the defendant from entering the suit property, does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **Order 10 Rule 2**.

8. The plaintiff should have straight away proceeded under **Order 10 Rule 9** to have the suit set down for formal proof which provides;

“Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

9. It is in the proceedings contemplated under **Order 10 Rule 9** where the plaintiff must prove service of summons and failure to enter appearance as contemplated in law. If the trial court is satisfied that service was effected as by law required, it will proceed and hear the plaintiff's case for purposes of determining whether the plaintiff has made up a case for being granted the orders sought.

10. In the affidavit of service sworn by Cyrus Ndirangu Kirunyū on **18th August 2016** to prove service on the defendants, the deponent, has *inter alia*, deposed:-

“2. That on 29th day of June, 2016 at 7.10 a.m in the morning at the defendant's homestead in Munyu Sub-location, Kieni East in Nyeri County I personally served a copy of summons to enter appearance attached with plaint, plaintiff's list of witnesses, witness statement by plaintiff and Simon Njiiri Munene and List of documents upon both defendants James Nene Ndegwa and Ruben Mithamo Ndegwa.

4. That the 1st defendant accepted to receive the said service and signed on my copy of summons to enter appearance returned herewith.

5. That the 2nd defendant accepted the service but refused to sign my copy.

6. That at the time of the said service both defendants were not known to me but they were pointed out to me by the plaintiff who had accompanied me”.

Law on Service of summons:

11. **Order 5 Rule 7** of the Civil Procedure Rules provides as follows about service:-

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

12. On the other hand **Rule 13** of the same order provides as follows:-

“Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:

Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.

13. I have read the affidavit of service and considered the testimony of the plaintiff. I have no reason to doubt that the defendants were served.

14. As there is evidence that the plaintiff is the registered owner of the suit property and there being no evidence to show that the defendants has any bona fide claim to the suit property, I find and hold that the plaintiff has established a case on a balance of probabilities for issuance of the orders sought.

15. Consequently, I enter judgment in favour of the plaintiff and against the defendant in terms of prayers (a) and (b) of the plaint dated 23rd June, 2016 and filed in court on 24th June, 2013. I also award him costs of the suit.

Dated, Signed and Delivered at Nyeri this 15th day of March, 2018.

L N WAITHAKA

JUDGE

Coram:

Stanley Wamugunda Wanjau

N/A for the defendants

Court assistant - Lydia