



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 276 OF 2017

(formerly Machakos ELC 145 of 2012)

JAMES OBARA KEYA.....1ST PLAINTIFF

LAWRENCE OMANGA OTWERE....2ND PLAINTIFF

CHARLES MOGAKA OTWERE.....3RD PLAINTIFF

(Suing on behalf of the members of

Magenche Progressive Society)

VERSUS

STEPHEN RAKITA KURENDE.....DEFENDANT

RULING

The application for determination is the Defendant's Notice of Motion dated the 22nd August, 2013 brought pursuant to Order 10 rule 10 and 11 of the Civil Procedure Rules, Section 3 of the Civil Procedure Act, Article 159 of the Constitution of Kenya and the inherent jurisdiction of the Court. It is based on the following grounds which in summary is that the Notice of Motion dated the 4th May, 2012 was dropped at the Applicant's homestead on 2nd July, 2012. The Applicant immediately instructed the advocates who promptly prepared a replying affidavit but when they attempted to file the same on 3rd July, 2012, the file could not be traced. From the order dated the 2nd July, 2013, it turns out the application came up for interpartes hearing on 2nd July, 2012 as opposed to the 7th July, 2012 which had been erroneously indicated as the hearing date. The Summons to Enter Appearance were never served upon the Defendant and there is no affidavit of service to confirm this. The ex parte orders and the default judgement are irregular and should be set aside in the interest of justice.

The application is supported by the affidavit of STEPHEN RAKITA KURENDE the Plaintiff herein where he deposes that his advocates went to court on the 6th July, 2012 but the court file could not be traced and he attempted severally to trace it, which led to his filing the Notice of Appointment and Replying Affidavit dated the 3rd July, 2012 on 18th July, 2013. He claims on 24th June, 2013, he was served with a letter dated the 17th June, 2013 with an order dated 2nd July, 2012 as well as the Plaintiffs' list of documents. According to the letter, the matter was coming up for the hearing of the main suit on 26th June, 2013 yet as per the Court Order dated 2nd July, 2012, the said application came up for hearing on 2nd July, 2012. He avers that the default judgement was entered on 11th July, 2012, but he has a good Defence and urges the court to set aside the default judgement as well as the orders issued on 2nd July, 2012. He reiterates that the Plaintiffs will not suffer any prejudice if the orders sought are granted.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by JAMES OBARA KEYA, the 1st Plaintiff herein where he deposes that the Defendant has admitted he received the Plaintiffs' Notice of Motion dated the 4th May, 2012 including the accompanying documents as well as the Plaintiff. He avers that Peter Muendo did actually serve the Defendant with the Plaintiff and other documents on 16th April, 2012 at the Kiserian Shopping Centre and the affidavit of service on record dated the 28th June, 2012 is self explanatory. He contends that the Defendant did not take any step to defend the suit and subsequently default judgement was entered on 11th July, 2012. Further that the Defendant's Advocates were appointed sometimes after 16th April, 2012 but filed their Notice of Appointment on 18th July, 2012 albeit the same is dated the 3rd July, 2012. He insists the default judgement entered is meritorious and the draft statement of Defence constitutes mere unsubstantiated denials, not sufficiently answering to the suit so as to raise triable issues. He reiterates that the Defendant agreed to sell a portion of 10 acres of land to be excised from Kajiado/Olchoro – Onyore/ 5946 to Magenche Progressive Society (Development) Group that the Plaintiffs represent, which land was subdivided into three parcels including Kajiado/Olchoro Onyore/11558; Kajiado/Olchoro

Onyore/11557 and Kajiado/Olchoro Onyore/11559 respectively. He claims that the Defendant then sold Kajiado/Olchoro Onyore/11558 but has refused to transfer to the Plaintiffs' nor to give them possession of the remaining piece. He insists no documents have been annexed by the Defendant to discount why the default judgement is irregular.

The Plaintiffs' filed their written submission but the Defendant did not. I have considered the Plaintiffs' written submissions.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 22nd August, 2013 including the supporting affidavit as well as the replying affidavit, the only issue for determination is whether the interlocutory judgement entered on the 11th July, 2012 should be set aside.

The Defendant contends that they were unable to retrieve the court file to enable them file their Notice of Appointment and Replying Affidavit on time. He insists his Defence raises triable issues. He denies being served with Summons to Enter Appearance and challenges the mode of service. The Plaintiffs reiterate that the Defendant was duly served as evidenced by the affidavit of service dated the 28th June, 2012, sworn by Peter Muendo which indicated the Defendant was served with the Plaintiff and other documents on 16th April, 2012 at the Kiserian Shopping Centre.

Order 10 rule 9, 10 and 11 of the Civil Procedure Rules provide that: ' **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. 10. The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.**

11. Where judgment has been entered under this Order the court may set aside or vary such

judgment and any consequential decree or order upon such terms as are just.'

In the case of **James Wanyoike & 2 others v C M C Motors Group Limited & 4 others [2015] eKLR** Justice C K Kariuki summarized the principles and tests for setting aside ex parte judgement as follows: '

'That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgement. That the tests for setting aside an ex-parte judgement are:-

- a) Whether there is a defence on the merits.**
- b) Whether there would be any prejudice to the plaintiff.**
- c) What is the explanation for any delay.'**

In the current scenario, I note the Defendant accepts he was duly served with some documents but denies receiving the summons to enter appearance. He insists his advocate was unable to locate the court file and that is the reason for the delay. I note the advocate took over one year to file his Memorandum of Appearance and Replying Affidavit. Further, on perusal of the affidavit of service dated the 28th June, 2012 by Peter Muendo Keli, it is clear the Defendant was duly served with all the documents on the 16th April, 2012, which on one breath he admits and denies on the same breath. Further that Judgement in default was entered against him on 3rd July, 2012 which was more than two months later.

I note from the draft Defence, the Defendant admits contracting to sell to the Plaintiffs ten (10) acres of the suit land. I note he is very evasive in the Defence and does not respond to the allegations in the Plaintiff relating to the purchase price of Kshs. 3.35 million that he received from the Plaintiffs and the issue of subdivisions he has done. I note the Plaintiffs had entered into an Agreement with the Defendant from 2009 and later executed a Sale Agreement dated the 26th June, 2011 where the Defendant agreed to sell them ten (10) acres of the suit land. Further, by the time they instituted this suit on 7th May, 2012, the Defendant had not allocated to them, the said ten (10) acres which was to be excised from the suit land, that they had purchased, and they continue to suffer prejudice. Further I find that the draft Defence contains mere denial and the reasons for the delay to file it are not adequately explained nor convincing. There is no demonstration that the Defendant's counsel even wrote letters to the Deputy Registrar, Machakos High Court, to produce the file to enable them file the requisite documents. From the court records I note the Defendant has failed to come to court twice to argue the instant application despite being duly served. He even failed to file his written submissions in respect to the application despite being directed by the court.

In the circumstances, I find the Notice of Motion Application dated the 22nd August, 2013 is not merited and dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 8th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Parties absent