



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 145 OF 2015

YERINE H. MAGHERE.....1ST PLAINTIFF/RESPONDENT

ROBERT BONAYA.....2ND PLAINTIFF/RESPONDENT

FUNANA D. MAGHERE.....3RD PLAINTIFF/RESPONDENT

VERSUS

SAMUEL JOSHUA HAMENA.....DEFENDANT/APPLICANT

RULING

1. Before me is a Notice of Motion dated 20th March 2017. The Defendant/Applicant -Samuel Joshua Hamena prays for Orders:-

1.

2.

3. That this Honourable Court be pleased to set aside the ex-parte Judgment entered in default of appearance and defence, and all other consequential orders issued therefrom, reinstate the suit for hearing and final determination on merit and grant leave to the Defendant to file and service (sic) his Statement of Defence out of time.

4. That the Plaintiff's (sic) Statement of Defence annexed hereto be deemed as duly filed upon payment of the requisite Court fees.

5. That the costs of this application be in the cause.

6. Any other order that this Honourable Court deems fit.

2. The application is based on a number of grounds stated on the body thereof, which are, inter alia:-

(a) That there is an ex-parte Judgment against the Defendant.

(b) That failure by the Defendant to enter appearance and file a Statement of Defence was not intentional as the Plaintiff's documents were not served upon the Defendant.

(c) That the Defendant has wrongly been sued as Samuel Hamena Mtetemo whereas his real name is Samuel Joshua Hamena.

(d) That the Defendant has a good and meritorious defence.

(e) That the Plaintiff's will not be subjected to any damages as the sum can be compensated by way of costs; and

(f) That the Defendant stands to suffer irreparable loss unless he is granted the opportunity to defend himself.

3. In a Replying Affidavit sworn on behalf of the 3 Plaintiffs by Yerine H Maghere, the 1st Plaintiff/Respondent on 18th April 2017, the

Plaintiffs aver that the unsurveyed plot at Tana Delta Ngao (the subject property) is their ancestral land, having inherited the same from their father the late Elisha Maghere Dullu.

4. The Plaintiffs state that after instituting this suit against the Defendant, they served him with Summons, pleadings and a Court Order restraining him from using the land but the Defendant failed, refused and/or neglected to enter appearance and or file any defence. It is therefore the Plaintiffs' position that the defendant's claim of non-service is a mere afterthought intended to delay the Plaintiffs from enjoying the fruits of their Judgment.

5. I have considered both the application and the response thereto. I have equally considered the submissions filed by the Learned Advocates acting for the parties herein as well as the authorities they referred me to.

6. Order 10 Rule 11 of the Civil Procedure Rules provides that:-

“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.”

7. In *Patel –vs- E.A. Cargo Handling Services Ltd(1974) EA at 75*, it was held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. 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 it by the rules...”

8. However, considering the exercise of that discretion in *Shah –vs- Mbogo(1967)EA 166*, the Court observed that:-

“ This discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

9. In the matter before me, the Defendant contends that he was not granted an opportunity to defend himself as the Plaintiffs did not serve him with any Court documents. At the same time, he avers that he was wrongly sued as SAMUEL HAMENA MTETEMO instead of his real name which is SAMUEL JOSHUA HAMENA. It is his case that he has resided over the land since 1991 and therefore has a good and arguable defence.

10. On their part, the Plaintiffs contend that the Defendant was duly served with the summons and pleadings herein and that he deliberately failed and/or refused to enter appearance and/or to file a defence.

11. From the record, it is evident that an attempt was made to serve the Defendant with Court papers on or about 11th September 2015. From an Affidavit of Service sworn by one David Mwangi Muiruri and filed in Court on 16th September 2015 the Process Server states:-

“3. That on 11th September(2015) while accompanied by my colleague Miss Selina together with the 1st and 3rd Plaintiffs herein, I proceeded to the said Defendant’s place of work at the suit premise as directed and upon arrival at the suit premise we found all the doors and windows sealed. A neighbour who declined to disclose his name for security reasons informed me that the Defendant was around but had hidden to avoid service of Court documents because the area Chief that I had introduced myself to had called him and informed him that some people were looking for him to serve him with the Court documents.

4. That after noticing the frustration, I attached the Court documents on the premise wall and assumed service done and took some photos respectively.”

12. A perusal of the photos taken by the Process Server show someone holding a copy of what is presumably the Summons against the wall of a certain building. It is not shown in the Affidavit by what method the Summons were attached to the concrete wall nor is it claimed by the Plaintiff that the serving officer had at the time made any other attempt to serve the defendant but had failed to find him as required under Order 5 Rule 12 of the Civil Procedure Rules. As it were, affixing of summons on the outer door or some other conspicuous part of the house is only allowed under Order 5 Rule 14 when the defendant refuses to accept service or cannot be found after use of all due and reasonable diligence. I am not satisfied that this was the case herein.

13. In any event it is evident that so far only an interlocutory Judgment was entered for the Plaintiff and the Plaintiff is yet to testify in support of his case.

14. From both the Plaintiff and the draft Statement of Defence, it is apparent that the Defendant has been in occupation of a portion of the disputed parcel of land since 1991. I think in the circumstances, it would be fair and in the interest of justice that the Defendant is allowed to file his defence and to state his case at the hearing hereof.

15. Accordingly, I find merit in and do hereby allow the application dated 20th March 2017. The Defendant is hereby granted 14 days from the date hereof within which to file his Statement of Defence, Witness Statement as well as a List of Documents to be relied upon, if any.

16. The cost of this Application shall be in the cause.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE