



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 304 OF 2017

STANLEY MUTURI GATHERI.....PLAINTIFF/RESPONDENT

VS

NAOMI WANJIKU MUIRURI.....DEFENDANT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion on 1/3/18 seeking the following orders; -
 - a) Spent
 - b) Spent
 - c) That the Honourable Court be pleased to stay further execution of the interlocutory judgement and the final judgment delivered on 14/12/17 and all other subsequent orders pending the full hearing of the main suit interpartes.
 - d) That the applicant be granted leave to file her defence and the matter do proceed for hearing on merits.
 - e) That this suit be consolidated with Muranga ELC No 438 of 2017 which subject matter is the same i.e ownership of all that land known as LOC 1/Thuita/160.
 - f) That the order for the defendant/applicant to vacate the suit land be set aside.
 - g) That Tabitha Njeri Mbugua be cross examined on the contents of the affidavit of service sworn on the 11/4/17.
 - h) That costs of this application be in the cause.
2. The application is premised on the following grounds *inter alia*; -
 - a) That the applicant was never served with the pleadings hence denied a chance to enter appearance and defend the suit.
 - b) That the applicant should be allowed to file her defence which discloses triable issues with a high chance of success.
 - c) That this case be consolidated with ELC NO 438 of 2017 whose subject matter is the suit land LOC 1/THUITA/160.
 - d) That the interlocutory judgement and the ex parte judgment be set aside and any further execution stayed so that the defendant may defend the case and the matter be heard on its merits.
 - e) That no prejudice will be suffered by the Respondent which cannot be compensated by way of costs, in the event the said judgment is set aside.
3. The Application aforesaid is supported by the affidavit of the applicant who has rehashed the grounds as set out above. In brief she reiterates that she was not served with the summons to enter appearance. That she has annexed a draft defence which demonstrates triable issues that call for the matter being heard on its merits so that justice may be served. That her late husband acquired the suit land from the original owner Wanganga Wangombe who died before completing the transfer of the suit land to her late husband. That her son Isaac Murigi Muiruri filed a suit ELC No 438 of 2017 – Muranga involving the same suit land and the Plaintiff/Respondent. In that suit he is seeking *inter alia* ownership of the suit land. She urged the Court to order for consolidation of the two suits so that the issues may be heard on their merits. She averred that she lives on the suit land with her family and if the judgement is not set aside she stands to be evicted from the said

land.

4. In opposing the application, the respondent stated that the applicant had been sent demand letters on the 25/8/16, 14/9/16 to vacate the suit land. That both were responded to by the applicant who refused to vacate the suit land. That the applicant was duly served with summons to enter appearance on the 15/3/15 and 7/3/18 respectively and annexed returns of service to demonstrate service accordingly. That following failure by the applicant to enter appearance the respondent made a request for interlocutory judgement on 26/4/16 and ex parte judgement delivered on 14/12/17. He urged the court not to grant the applicants prayers as they are intended to deny him the fruits of his judgment.

5. On the 20/3/18 when the parties through their counsel on record appeared before the court, the elected to prosecute the application by way of written submissions. I have read and considered the written submissions on record.

6. Having considered the application, the affidavit evidence on record and the written submissions, the issues for determination are set out as follows;

A; whether the service of summons was effected

B; Whether the applicants defence has triable issues

C; whether the court should set aside the interlocutory judgement and the ex parte judgement

D; whether this suit should be consolidated with ELC 438 of 2017 -Muranga

E; Costs of the application.

7. Whether the summons were served? It is on record that the suit was filed on the 15/3/17 and there is on record an affidavit of service sworn by one Tabitha Mbugua on the 11/4/17 deponing that she served the summons to enter appearance and the plaint on 16/3/17 at her home at 4 pm. That she was in the company of the Respondent who showed her the home of the applicant and pointed out the applicant to her. On the 11/4/17 the Respondent filed a request for judgment against the defendant for failing to enter appearance. That on the 6/6/17 the said applicant was again served by the said process server with the mention notice for the case. She accepted service and declined to sign the return of service. On the 17/7/17 the court directed that the matter be set down for formal proof, it being an unliquidated claim. The hearing proceeded on the 26/9/17 ex parte where the Respondent called 2 witnesses to proof his claim. Thereafter judgment was delivered on the 14/12/17. It is this judgement that is subject of this application.

8. It is the applicant's case that she was not served with the summons to enter appearance. The record of the court shows that she was served. The applicant has failed to call the process server for cross examination to test the veracity of the affidavit of service on record. To that end the court finds and holds that the applicant was duly served.

9. The Civil Procedure Rules donate the power to the Court to set aside judgments. It has unfettered discretion to do so but under certain principles. Order 12 Rule 7 of the Civil Procedure Rules states that where judgement has been entered or the suit has been dismissed, the Court, may set aside or vary the judgement or order upon such terms as may be just. In the case of **Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd – v- Augustine Kubende (1982-1988)1 KAR 1036** the Court of Appeal dealing with an appeal in which interlocutory judgment had been entered in default of appearance considered whether judgment had rightly exercised his discretion in refusing to set aside the judgment under Order 9A Rule 5 held as follows: -

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.

Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue

In this instant case, it is a regular judgement being set aside and therefore the Court is invited to enquire on whether the applicant has a valid defence.

10. Does the Applicant's defence raise triable issues? **Patel – Vs – Cargo Handling Services Ltd [1974] EA 75** where the Court of Appeal considered the meaning of defence held that;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a ‘triable issue’.

11. As to whether the applicant has a good defence with triable issues, I have perused the draft defence where the applicant is claiming ownership through her late husband by way of a purchaser's right. She has alleged that the land was bought by her later husband from the original owner Wanganga Wangombe. This being a claim in land, the issues are best left for trial so that the merit of the case can be heard. Whether or not she will succeed on her defence is beside the issue. The Court finds and holds that there is a triable issue.

12. The Court of Appeal in the above-mentioned appeal on page 1039 of their judgment further stated:-

“The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal

exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

13. In the case of **Shah – v- Mbogo & Anor (1967) E.A 470** Court of Appeal for Eastern African held: -

“applying the principle that the court’s 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 not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

The discretion therefore is not designed to assist a party guilty of deliberate conduct intended to obstruct or delay the cause of justice and where the Court is persuaded of the intentions of such a party to so obstruct or delay justice, it should not hesitate to disallow such an application.

14. The Constitution of Kenya, 2010 provides that every person’s right to have any dispute determined be decided fairly. This means every person be afforded an opportunity to be heard and the case be decided on merits. Article 50(1) of the Constitution of Kenya, 2010 provides: -

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 159 (2) (a) and (b) of the Constitution of Kenya, 2010 on the other hand obliges court to do justice to all without undue regard to technicalities. Article 159(2)(a) and (d) provides:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) Justice shall be done to all, irrespective of status;
- (b)
- (c).....
- (d) to a public trial before a court established under this Constitution”.

Further the Civil Procedure Act under Section 1A and 1B of the Civil Procedure Act obliges this Court to do substantive justice.

15. I find the applicant has a valid defence and in the interest of justice it is this Court’s view that she should not be shut out from ventilating its case. I see no way that the respondent will be prejudiced as he will be accorded the opportunity to be heard and to prove his case on a balance of probability. In this case the Court has not heard the matter on merit and the justice of this case demands that the application to set aside judgment delivered on the 14/12/17 is granted.

16. On the issue of consolidation, it is common ground that the parties are the same and or claiming under the same persons, the suit land is the same and it is against public policy to have duplication of matters in our courts. I rely in the case of **R.M.G Vs N.G & Another HCCC NO. 29 of 2009 – Nairobi**, where the Court held that where there is a common question of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters be disposed of at the same time, consolidation should arise. I see no reason to disallow this prayer. It is allowed accordingly.

17. The Respondent did not respond to the issues raised by the Applicant. In his submissions he dwelt on the issues of ownership of land which issue, with respect cannot be canvassed in this application. Consequently, the issues of the applicant went unanswered to a greater extent.

18. The final orders are; -

- a). The application dated 1/3/18 be and is hereby allowed and the judgement delivered on the 14/12/17 and all the consequent orders thereto be and are hereby set aside.
- b). That Defendant is granted leave to file and serve her defence within the next 14 days from the date of this ruling.
- c). Corresponding leave is granted to the Plaintiff to file and serve his reply to the defence within 14 days upon service.
- d). ELC 304 of 2017 and ELC 438 of 2017 be and are hereby consolidated. The parties to fix a date for mention for directions before the Judge within 30 days from this ruling.

e). Costs of the application shall be met by the Applicant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF JULY 2018

J.G. KEMEI

JUDGE

Ruling read in open Court in the presence of;

Mr Ndegwa HB for Mr Gachau for the Plaintiff/Respondent

Defendant/Applicant – Absent

Mr. Wainaina, Ms. Irene and Ms Njeri, Court Assistants