



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 125 OF 2015

CHANGAWA SHOMI MWANGANYA PLAINTIFF

VERSUS

MARY KENGO MWELEKA

SIDI KATANA KAMBI

GEOTHAM NGUI KUMI MUTHURI

KAHINDI KATANA KAMBI DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion application dated 17th July 2017. The four Defendants herein pray for orders :-

1.

2. That there be a temporary stay of execution of the Judgment and Decree of this Court dated 4th November 2016 pending the hearing and determination of this application inter partes;

3. That pending the hearing and determination of this application an order of inhibition do issue inhibiting the registration of any against Title No. Malindi/Singwaya/448, Title No. Malindi/Singwaya/626

4. That at the hearing of this application inter-partes proceedings of 22nd September 2016 and the Judgment and Decree of this Court dated 4th November 2016 be set aside and the Defendants be granted leave to enter appearance and file a Defence in this case.

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

2. The said application is supported by an affidavit sworn by Mary Kengo Mweleka the 1st Defendant herein and is premised on the grounds;

i) That the Defendants were not served with summons to enter appearance in this case and were unaware of the pendency of this case;

ii) That the 1st and 4th Defendants were not served with the Notice of Motion application dated 27th July 2015;

iii) That the Defendants were not served with any temporary order of injunction in this case;

iv) That the Defendants were not served with a letter of invitation to attend the Court registry to fix the case for hearing;

v) That the Defendants were not served with the Hearing Notice for the hearing held on 22nd September 2016;

vi) That the Defendants only came to learn that this case had been heard on 14th June 2017;

vii) That the Defendants have a good defence to the Plaintiff's claim;

viii) That the Defendants were condemned unheard and the Titles of the parcels of land the subject matter of this case are about to be cancelled;

ix) That the execution and implementation of the Court Decree is imminent and may be effected by the Land Registrar at any moment;

x) That the execution and implementation of the said Decree will occasion immense injustice to the Defendants;

xi) That the Defendant shall suffer irreparable loss and damage.

3. In a Replying Affidavit filed herein on 11th September 2017, the Plaintiff/Respondent –Changawa Shomi Mwanganya avers that it is not true that the Defendants were not served with summons to Enter Appearance, Plaint and other documents in relation to this case. He asserts that the Defendants were served with the said documents on 22nd August 2015 by an authorized Court Process Server.

4. The Plaintiff further avers that the matter proceeded for formal proof after the Defendants failed to enter appearance and/or file a defence after being served with summons.

5. The Plaintiff further states that the decree whose execution is sought to be stayed has already been executed and the titles in the Defendant's names have already been cancelled and fresh titles have already issued in the Plaintiff's name.

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

7. The general principles governing the exercise of judicial discretion to set aside an ex-parte Judgment obtained in default of either party to file a defence or attend the hearing were clearly set out in *Shah –vs- Mbogo & Another (1967) 1 EA 116* as follows:-

“.....Firstly, there are no limits or restrictions on the Judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, this discretion 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 course of justice...”

8. In the matter before me, the Defendants deny that they were served with summons to Enter Appearance as well as copies of the Plaint. They however admit that sometimes in the month of August 2015 they were served with a Notice of Motion application dated 27th July 2015 and that the person who served the same told them it was coming up for hearing on 10th September 2015.

9. From the material placed before me, it is apparent that despite their denial the Defendants were served with the Summons and the Plaint as well as the application they admit receiving on 22nd August 2015 by one Samson B Kimbeja a duly authorized Process Server of this Court. In an Affidavit of Service filed herein on 9th September 2015, it is apparent that the Process Server received various documents including an order issued ex-parte when the matter came up for hearing under Certificate of Urgency on 28th July 2015. The said documents were served with the assistance of a village elder on the Defendants on the said 22nd August 2015.

10. A perusal of the said Order and Notice of Motion application shows that the matter was scheduled for inter-partes hearing on 10th September 2015. According to the Defendants, they did attend Court on the said date but their names were not called out and upon enquiry, they were informed by the Court Registry staff to go home and wait to be served with another hearing date.

11. The Court record for the said 10th September 2015 however paints a different picture. A perusal thereof reveals that the matter was called in Court but the Defendants were not only absent but had not filed any appearance and/or defence. Accordingly and on the basis of the Affidavit of Service of Samson Kimbeja aforesaid, the Honourable Justice Angote then seized of the matter proceeded to allow the Motion dated 27th July 2015 as prayed.

12. Having secured the orders of injunction against the Defendants pending the hearing of the suit, the Plaintiff proceeded to fix this matter for hearing on 22nd September 2016. From the Court record, that date was obtained from the Registry by the Plaintiffs on 27th May 2016 and in the absence of the Defendants. Subsequently, on the said 22nd September 2016, the matter proceeded for formal proof leading to the Judgment and decree sought to be set aside herein.

13. As it were, it is apparent that no hearing notice was served upon the Defendants for the hearing on 22nd September 2016. I have indeed perused the Court file and could not find any Affidavit of Service indicating that the Defendants were notified to attend Court on the said date. In my view, the mere fact that the Defendants did not enter appearance or file defence in this case did not entitle the Plaintiff to proceed with the hearing without first giving notice thereof to the Defendants.

14. The Plaintiffs claim was for the cancellation of the Defendant's title and a declaration that the Plaintiff is the rightful owner of the suit properties. The claim as pleaded in the Plaint was therefore not for the recovery of a liquidated demand or for recovery of pecuniary damages which would entitle the Plaintiff to proceed as such under the provisions of Order 10 Rules 4(2) and 6 of the Civil Procedure Rules. Accordingly as at the time this suit proceeded for formal proof, the Plaintiff had not obtained any interlocutory Judgment in respect of the

claim against the Defendants to warrant such ex-parte proceedings.

15. In the result, I agree with Mr. Shujaa, Learned Counsel for the Defendants that in the absence of an interlocutory Judgment against the Defendants, they were entitled to be served with a hearing notice for 22nd September 2016, their failure to enter appearance and/or file a defence notwithstanding.

16. Accordingly it is my respectful view that the proceedings that took place before this Court on 22nd September 2016 were irregular and ought to be set aside. In the circumstances, I find and hold that the application dated 17th July 2017 has merit. The same is allowed.

17. Each party shall bear their own costs.

18. Orders accordingly.

19. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10th May 2017. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE