



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 682 OF 2016

JAMES KAMAU KIMANI.....1ST PLAINTIFF

=VERSUS=

AMOS GODFREY ONYANGO NYAORO.....1ST DEFENDANT

RAY O. ABOGE T/A ANNE A. WEDAH &

COMPANY ADVOCATES.....2ND DEFENDANT

RULING

1. On 22/6/2016, the plaintiff brought this suit seeking the following verbatim orders:

a) A declaration against the Defendants that the Plaintiff herein is the legal owner of all that piece and parcel of land known as Title Number KJD/OLEKASASI/1067;

b) A declaration that the sale and transfer of Title Number KJD/OLEKASASI/1067 to the 1st defendant is unlawful and fraudulent and order the cancellation of the 1st defendant's title deed

c) An order of eviction be issued against the 1st Defendant

d) Rectification of the Register to reflect the Plaintiff as the bona fide owner of the suit premises being Title Number KJD/OLEKASASI/1067.

e) A permanent injunction restraining the Defendant, his agents, servants, assignees or any other persons authorized or claiming through him from interfering in any way with the plaintiff's ownership and quiet possession of the suit premises:

f) The sum of Kshs 164,720/- being special damages for payment of legal fees.

g) Cost of this suit and interest thereon until payment in full.

2. The defendants, through M/s Anne A Wedah & Company Advocates entered appearance on 18/7/2016. They did not however file a statement of defence within 14 days thereafter as required under Order 7 rule 1 of the Civil Procedure Rules. Consequently, on 20/2/2017, the plaintiff filed a request for judgment, expressed to have been made under Order 10 rules 4, 5, 6 and 10 of the Civil Procedure Rules. On 27/2/2017, the Deputy Registrar of this Court entered what she described as “interlocutory judgment” against the defendant for Kshs 164,720/-. Subsequently, Gitumbi J set down this matter for formal proof on 23/1/2018.

3. On 19/1/2018, the defendants brought a notice of motion dated 19/1/2018 seeking to set aside the interlocutory judgment. They also sought an order enlarging the time within which to file defence. That application is the subject of this ruling. The application is supported by an affidavit sworn on 19/1/2018 by Mr Ray Aboge in which he contends that the interlocutory judgment entered herein is *ultra vires*. He adds that the 1st defendant was never served with summons to enter appearance.

4. The plaintiff opposes the application through a replying affidavit sworn on 22/1/2018. The plaintiff contends that the defendants were duly served with summons and they duly entered appearance. He further contends that the defendants’ draft statement of defence contains mere denials of facts and does not amount to a defence. He urges the court to dismiss the application.

5. I have considered the application together with the plaintiff’s replying affidavit. I have also considered the parties’ submissions, the relevant legal framework and the applicable jurisprudence.

6. From the court record, the defendants entered appearance on 18/7/2016. They were legally obligated to file their defences within 14 days from 18/7/2016. The contention that they were not served with summons to enter appearance is, in my view, a red herring; an argument devoid of seriousness. I say so because the act of entering appearance without any protestation was a confirmation that they had been served. I therefore reject that argument.

7. Secondly, the applicants have not endeavoured to give any explanation as to why they failed to file and serve defence subsequent to entering appearance. Indeed, they have presented the present application from the premise that there was no entry of appearance. This is therefore one application that ordinarily would fail were the court required to solely exercise its discretionary jurisdiction under the Civil Procedure Rules.

8. I will however allow the application on account of the fact that the Deputy Registrar had no powers to enter interlocutory judgment in a claim of this nature. Under Order 10 rule 6 of the Civil Procedure Rules, interlocutory judgment would be available only if the claim is for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. The claim in the present suit is set out in paragraph 1 of this ruling. Clearly, it is not a claim amenable to interlocutory judgment as contemplated under Order 10 rule 6 of the Civil Procedure Rules.

9. For the above reason, the interlocutory judgment entered herein by the Deputy Registrar of this court is hereby set aside and the defendants are granted conditional leave to file and serve their defence(s) within Ten (10) days from today. The defendants will jointly and severally pay the plaintiff throw-away costs of Kshs 10,000 within Ten (10) days from today. In default, the leave granted herein shall stand vacated and any defence(s) filed shall stand struck out and the suit will proceed as an undefended cause.

10. Upon expiry of the Ten (10) days stipulated hereinabove, this suit shall be transferred to Kajiado Environment and Land Court for hearing and determination.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Odongo Advocate for the plaintiff

Ms Rashid holding brief or Mr Abogo for the defendants

June Nafula - Court Clerk

