



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 159 OF 2014

ANDREW KAREMI KINGORI.....PLAINTIFF

VERSUS

JOSEPH WAWERU NJOROGE.....DEFENDANT

RULING

This ruling is in respect of an application dated 28th June 2018 by the defendant/applicant for the following orders:

Spent.

- a) THAT an order of stay of execution restraining that the Plaintiff from executing the decree in this suit subdividing or in any manner dealing with the proprietary interest in L.R No.NGERIA/KABONGO BLOCK 1 (KIAMBAA)/138 pending hearing and determination of this application inter partes and thereafter the main suit and/or further orders of this Honourable Court:
- b) That the Honourable court be pleased to set aside the ex-Parte judgment obtained by the Plaintiff due to lack of service upon the Defendant pending hearing and determination of this application inter partes and thereafter the main suit and/or further orders of this Honourable Court.
- c) That the Honourable Court do allow the Defendant unconditional leave to defend the Suit as per the annexed draft defence herein annexed.
- d) Further and/or in the alternative without prejudice to (c) above the court do allow the Defendant to seek the consent of the Land Control Board for subdivision than the Plaintiff executing the Defendant's L.R No.NGERIA/KABONGO BLOCK
- e) THAT the cost of this application be provided.

The defendant applicant appeared before Justice Ombwayo who certified the matter as urgent and ordered that the application be served within 5 days. The parties were to file written submissions but only the plaintiff/respondent filed the submissions. The court will therefore rely on the supporting affidavit and the submissions by the plaintiff/respondent.

The applicant's case is that he was never served with the summons to enter appearance and the entry of judgment. The applicant in the same breath states that he is ready to apply for the land Control Board consent and that he did not refuse to transfer the suit land to the plaintiff.

The respondent opposed the application and stated that the defendant was served with summons and copy of plaint together with witness statements and documents as per the Affidavit of service filed by the process server. He stated that the defendant's application is meant to delay the execution of the decree. He also confirmed that he was present when the process was served. He annexed all the hearing and mention notices together with the entry of judgment which were served on the defendant.

The respondent took issue with the fact that the defendant has admitted that he is ready and willing to apply for the Land Control Board consent and that he has never refused to transfer the land to the plaintiff respondent. He specifically cited the defendant/applicant's alternative prayer that the court do allow the defendant to seek the consent of the Land Control Board for subdivision than the Plaintiff executing the Defendant's L.R No.NGERIA/KABONGO BLOCK 1(KIAMBAA) 138.

The respondent therefore urged the court to dismiss the defendant's application as he was properly served.

Analysis and determination

The issues for determination in an application for setting aside ex parte judgment is as to whether there exists sufficient cause to do so. What constitutes sufficient cause has been stated in many cases. It should be noted that setting aside ex parte judgment is a matter of discretion of the court which must be exercised judiciously.

In the case of *Esther Wamaita Njihia & Two others vs. Safaricom Ltd* the court citing relevant cases on the issue held *inter alia*:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. the 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 a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.)It also goes without saying that the reason for failure to attend should be considered."

The court must also look at whether the defendant was properly served with the suit papers and whether sufficient cause has been shown by the defendant as to why he or she did not appear in court for the hearing of the suit. The court's duty is to administer justice to both parties to the suit.

When a party is served with summons to enter appearance and does not do so within the prescribed period the Civil Procedure Rules prescribe what steps are to be taken in such scenarios. You cannot force a party who has been properly served to file their papers if they do want to do so. From the evidence on record it is clear that the plaintiff did his best as required by law and procedure to notify the defendant every time that the matter was coming up for mention and for hearing. The affidavits of service filed by the process server are elaborate and self-explanatory.

The defendant filed a supporting affidavit to his application which is contradictory. He states that he stays in Nyandarua but gives an address in Eldoret. He averred that he had moved from Eldoret in 2007 after the post-election violence, does he still retain the same

address or he has since acquired another one in Nyandarua? The defendant further wants to be given an opportunity to apply for the Land Control Board Consent and execute the documents in respect of the transfer to the plaintiff. What the defendant is saying in other words is that he is admitting the plaintiff's claim. If he is admitting the plaintiff's claim then why would he want the judgment to be set aside and yet he has admitted the claim.

Further the defendant's annexed draft defence is contradictory of what he has averred in the supporting affidavit. The defendant has further not explained to the court how he finally got the decree and not the other hearing notices. It seems he only saw the seriousness of the case when a decree was finally extracted. He has not shown sufficient cause why he failed to appear in court after being served with a hearing notice for the formal proof and the other documents. Setting aside ex parte judgment is discretionary and the court can either be persuaded to do so or decline to set aside when it is of the view that the defendant has not shown sufficient cause to warrant the court to give an order in his favour.

I have considered the defendant/applicant's application together with the response by the plaintiff/respondent and I have come to the conclusion that this is case where the court will not exercise its discretion in favour of the defendant for the reason that the defendant has not shown sufficient cause to benefit from this. The defendant admits the claim and just wants the execution to be done his way. The application is therefore dismissed with costs to the plaintiff/respondent.

Dated and delivered at Eldoret this 15th day of November, 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of the Plaintiff and in the absence of the defendant.

Mr. Koech: Court Assistant.