



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 160 OF 2001

WILLY BUBBA.....PLAINTIFF

VERSUS

NAYIAN SAUNYILILA.....1ST DEFENDANT

SAMUEL NDUNGU KIHARA.....2ND DEFENDANT

RULING

1. The subject of this ruling is the 2nd defendant's notice of motion dated 26/9/2011 and filed on even date. It is over seven years old. Hearing of the application was concluded before me on 8/10/2018. The application seeks the following order:

- 1. That this application be certified as urgent and be heard exparte in the first instance.***
- 2. That there be a stay of execution of the exparte judgment entered against the 2nd defendant herein pending the hearing and determination of this application.***
- 3. That the exparte judgment entered against the 2nd defendant on 17th March 2004 together with the consequential orders herein be set aside and the suit herein be heard on merits***
- 4. That the 2nd defendant be granted unconditional leave to defend this suit***
- 5. That the costs of this application be in the cause.***

2. The application was supported by the affidavit of the second defendant sworn on 26/9/2011. The applicant contended that he was never served with summons to enter appearance. He learnt about the exparte judgment after he went to do a search at the Lands Registry after he went to the suit property and found it fenced. He further contended that he was never served with a notice of entry of judgment.

3. He further deposed that in 1988 he entered into a land purchase agreement with the 1st defendant pursuant to which he purchased 30 acres of land from the first defendant and the said 30 acres were conveyed to him through a formal transfer. The 30 acres were subsequently registered in the name of the plaintiff pursuant to the ex-parte judgment rendered against him in this suit by Ransley J on 17/3/2004. Aggrieved, he sought an order setting aside the said judgment.

4. The plaintiff opposed the application through his affidavit sworn on 18/6/2018. He contended that he purchased the suit property in 1988 from the 1st defendant, took possession thereof, fenced it and constructed a house thereon. Together with the 1st defendant, they applied for consent of the land control board. While aware that he had purchased the suit property from the 1st defendant, the plaintiff purported to purchase the same suit property from the 1st defendant in 1993 and subsequently colluded and obtained a consent court order in a preceding suit. They used the consent order to demolish his house without joining him as a party in the said proceedings.

5. The plaintiff further contended that the judgment in the present suit is a regular one because pursuant to leave granted by the court, he duly served summons upon the 2nd defendant through a notice in the Daily Nation Newspaper. He added that the suit herein was heard and determined way back in 2004 and the judgment was duly executed through transfer of the suit property into his name. He urged the court to disallow the application.

6. The application was canvassed through written submissions. In submissions dated 12/7/2017, the applicant contended that he did not see the newspaper advertisement through which the summons was served. He added that he learnt about the judgment when he went to the suit land and found it fenced. The applicant relied on the case of **Southern Credit Banking Corporation Ltd v Johah Stephen Nganga (2006)eKLR** and argued that this court has unfettered discretion to set aside the exparte judgment. The applicant further argued that he has a defence and counterclaim which raise substantial triable issues.

7. In written submissions dated 22/8/2018, the plaintiff urged the court not to allow the application because the impugned judgment was entered 14 years ago, and the decree has been executed. He contended that it would be prejudicial to the plaintiff to set aside the exparte judgment. He added that this being a regular judgment, there was no basis for setting it aside. Relying on **Orim East Africa v Mugema Farmers' Co-operative Union Limited & Another (2015) eKLR**, he urged the court to dismiss the application.

8. I have considered the grounds set out in the application and the depositions made in the rival affidavits. I have also considered the parties' rival submissions. Similarly, I have considered the relevant legal framework and jurisprudence on the key issue falling for determination in this application. The single issue in the application is whether the applicant has satisfied the criteria for setting aside a regular judgment.

9. The impugned judgment is a regular judgment entered after an exparte hearing which followed service of summons through a notice published in the Daily Nation Newspaper. The applicant did not respond to the notice. He brought the present application seven years after the exparte judgment was entered. His explanation for the inordinate delay is that he did not see the notice published in the Daily Nation and that no notice of entry of judgment was served on him.

10. The rival affidavits reveal that the 1st defendant owned a big chunk of land out of which he surveyed the suit property measuring approximately 30 Acres. He signed agreements with both the plaintiff and the 2nd defendant and sold to both of them the same parcel of land at different times. He received money from both the plaintiff and the 2nd defendant.

11. Under Kenya's legal system, the preferred mode of service of summons to enter appearance is personal service. In the present suit, the plaintiff contended that personal service was not possible because he was not able to trace the 2nd defendant. The court accordingly granted him leave to effect service through a notice in the newspaper. The applicant contends that the notice escaped his attention. Similarly, none of those who knew him alerted him about the notice. He was therefore not aware of the existence of this suit. Those depositions have not been controverted.

12. The approach to be adopted by the court when exercising jurisdiction to set aside a regular judgment was articulated by Apaloo JA in **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR** thus:

“I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties.....”

13. Both the plaintiff and the applicant lay claim to the same piece of land. Both of them claim to have paid the 1st defendant money as purchase price. Prior to the exparte judgment, the land was registered in the name of the applicant. It was registered in the name of the plaintiff consequent to the exparte judgment. The applicant exhibited a draft statement of defence and counterclaim which raises triable issues revolving around title to the suit property.

14. In my view, equity demands that parties to this suit be granted the opportunity to have their rival claims of title to the 30 acres of land determined on merits as opposed to locking out the 2nd defendant on the basis of the newspaper notice which he contends escaped his attention. The plaintiff will be indemnified through an award of costs.

15. The net result is that the exparte judgment herein is set aside and the 2nd defendant is granted leave to file and serve his statement of defence and counterclaim within 15 days from today. The suit property will, however, remain in the name of the plaintiff pending the hearing and determination of this suit but there shall be no dealings in the suit property until this suit is disposed. The 2nd defendant will pay the plaintiff throw-away costs of Kshs 50,000 within 60 days to cater for the costs incurred to date, including advertising costs. In default of filing and service of defence and counterclaim within 15 days, or in default of payment of the throw-away costs, the orders granted herein shall stand vacated and the present application shall stand dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Musili holding brief for Mr Mutua Advocate for the plaintiff

No appearance by the Defendants

June Nafula - Court Clerk