



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 612 OF 2015

DAVID KIARIE NGUMI.....PLAINTIFF

VERSUS

STEPHEN KAHURANI NJUGUNA.....1ST DEFENDANT

JANE NJERI NJUGUNA.....2ND DEFENDANT

KANGERI WANJOHI T/A

KINDEST AUCTIONEERS.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

The plaintiff's brought this suit against the defendants on 30th June, 2015 seeking the following reliefs:

1. An injunction restraining the defendants from entering, taking possession, trespassing on or otherwise howsoever interfering with the plaintiff's possession, use and occupation of all that parcel of land known as Dagoretti/Riruta/T.83 (hereinafter referred to as "the suit property").
2. The cancellation of the title of the suit property in the name of the 2nd defendant and the restoration of the title in the name of Grace Wangari Kinyanjui.
3. General damages
4. Punitive/exemplary damages.
5. Costs of the suit

Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 29th June, 2015 seeking among others, a temporary injunction restraining the defendants' from entering, taking possession, alienating or otherwise howsoever interfering with the suit property pending the hearing and determination of the suit. The interlocutory application together with the plaint were served upon the 1st, 2nd and 4th defendants on 6th July, 2015 and upon the 3rd defendant on 9th July, 2015. Following that service, the 1st and 2nd defendants entered appearance through the firm of Paul and Anderson Advocates on 15th July, 2015 while the 3rd defendant appointed the firm of Ondabu & Co. Advocates to act for him which firm filed a Notice of Appointment of Advocates on or about 14th July, 2015. Summons to enter appearance were not issued until 13th November, 2015.

On 18th December, 2018, the plaintiff requested for interlocutory judgment against the defendants in the sum of Kshs.1,386,780/= in default of appearance and/or defence. The request for interlocutory judgment was supported by the affidavit of one, Kennedy Mugo a process server of this court sworn on 17th December, 2015 in which he stated that he served the summons to enter appearance upon the 4th Defendant and, the 1st, 2nd and 3rd defendants on 17th November, 2015 and 18th November, 2015 respectively. He stated that he served the 1st and 2nd defendants personally while the 3rd defendant was served through his advocates on record, Ondabu & Co. Advocates. On 22nd December, 2015 the Deputy Registrar entered interlocutory judgment in favour of the plaintiff against the defendants and directed the plaintiff to set down the suit for formal proof.

What is now before me is the 1st and 2nd defendant's Notice of Motion dated 25th January, 2016 seeking an order to set aside the said interlocutory judgment that was entered against them on 22nd December, 2015 (wrongly indicated as 11th December, 2015). The application which is supported by the affidavit of the 1st defendant is premised on the grounds that the 1st and 2nd defendants were not served with summons to enter appearance and that they have a defence against the plaintiff's claim which raises triable issues. The 1st and 2nd defendants annexed to their affidavit in support of the application a draft defence. The 1st and 2nd defendants filed a further affidavit on 27th January, 2016 also sworn by the 1st defendant in which the 1st defendant explained how he acquired the suit property and thereafter transferred it to the 2nd defendant.

The 1st and 2nd defendant's application was opposed by the plaintiff through a replying affidavit sworn on 9th February, 2016. In his affidavit, the plaintiff contended that the application was an abuse of the process of the court and was brought merely to delay the expeditious disposal of this suit. The plaintiff contended that all the defendants were properly served with summons to enter appearance and chose for reasons only known to them not to file statements of defence. The plaintiff contended further that the defence that has been put forward by the 1st and 2nd defendants raises no triable issues.

The 1st and 2nd defendants' application was argued by way of written submissions. The 1st and 2nd defendants filed their submissions on 19th July, 2016 while the plaintiff filed his submissions in reply on 22nd July, 2016. I have considered the application together with the affidavits filed in support thereof. I have also considered the plaintiff's affidavit in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The principles applied by the court in applications for setting aside default judgments are well settled. In the case of Patel v E. A. Cargo Handling Services Ltd. [1974] E.A 75, the Court stated as follows:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment, as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

In the case of CMC Holdings Ltd. v Nzioka [2004] KLR 173, the court stated that:

“In an application for setting aside ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law, the discretion that a court of law has in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.”

After taking all factors into account, I am inclined to exercise my discretion in favour of the 1st and 2nd defendants. As I mentioned earlier in this ruling, the plaintiff served the 1st and 2nd defendants with a plaint without summons to enter appearance. Although they were not obliged to enter appearance, the 1st and 2nd defendants proceeded to enter appearance through the firm of Paul & Anderson Company Advocates. The appearance that was entered by the 1st and 2nd defendants without being served with summons to enter appearance was irregular since under Order 7 rule 1 of the Civil Procedure Rules, a party can only enter appearance and file a defence after being served with summons to appear. I am of the view however that having entered unconditional appearance, the 1st and 2nd defendants had to file their statements of defence within 14 days of entering appearance as provided for under the said rule. The 1st and 2nd defendants failed to file their statements of defence after entering appearance. On whether the 1st and 2nd defendants were served with summons to enter appearance, I am satisfied from the affidavit of service that was filed in court together with the request for judgment that service of summons to enter appearance was effected upon the 1st and 2nd defendants. The 1st and 2nd defendants did not challenge the said affidavit of service in any material respect. In my view, the 1st and 2nd defendants having entered unconditional appearance, it was immaterial whether or not they were served with summons to enter appearance as that had no bearing on the time within which they were required to file their statements of defence. From the material before me, it is my finding that the 1st and 2nd defendants were served with the plaint and summons to enter appearance and that they entered appearance but failed to file statements of defence.

The 1st and 2nd defendants having failed to file statements of defence, the plaintiff was entitled to apply for interlocutory judgment. I have noted that the plaintiff in his request for judgment sought judgment for a liquated sum of Kshs.1,386,780/= together with costs and interest. I had at the begging of this ruling set out the reliefs claimed by the plaintiff. The plaintiff did not make any claim for a liquidated amount. I wonder where the sum of Kshs.1,386,780/= which the plaintiff sought in his request for judgment and was awarded by the Deputy Registrar came from. The plaintiff having not made a liquidated claim was not entitled to interlocutory judgment under Order 10 Rule 4 of the Civil Procedure Rules under which his request for judgment was made. It is therefore my finding that the interlocutory judgment in the sum of Kshs.1,386,780/= that was entered in the plaintiff's favour on 22nd December, 2015 was irregular.

In view of the foregoing, the 1st and 2nd defendants are entitled to have the said interlocutory judgment set aside. Even if the judgment was regular, I would still have set it aside. By entering appearance, the 1st and 2nd defendants expressed a desire to defend the suit. Even as at the time interlocutory judgment was being entered against them, the 1st and 2nd defendants were actively participating in the various interlocutory applications that were filed herein. I am of the view that the 1st and 2nd defendants' failure to file their statements of defence was a mistake or error which is excusable in the circumstances of this case. I am in agreement with the 1st and 2nd defendants that the draft statement of defence which they have annexed to their affidavit in support of the application raises triable issues. It would only be fair and just in the circumstances if the 1st and 2nd defendants are given an opportunity to defend the suit.

The upshot of the foregoing is that the 1st and 2nd defendant's Notice of Motion application dated 25th January, 2016 has merit. The interlocutory judgment that was entered herein by the Deputy Registrar on 22nd December, 2015 is set aside. The 1st and 2nd defendants are granted leave to file their statement of defence within 14 days from the date hereof. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 6th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Kotonya h/b for Ms. Kirimi for the Plaintiff

Mr. Njau for the 1st and 2nd Defendants

N/A for the 3rd Defendant

N/A for the 4th Defendant

Catherine-Court Assistant