



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASENO. 973 OF 2013

ESTHER NJERI KIBUE.....PLAINTIFF

VERSUS

MARY WAMBUI MUNYUI.....1ST DEFENDANT

JOSEPH NGUME MURAYA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR MURANG'A.....3RD DEFENDANT

RULING

The plaintiff brought this suit against the 1st defendant on 7th August 2013 seeking various reliefs which are set out in the plaint dated 5th August 2013. The plaint was amended on 4th July 2014 to join the 2nd defendant in the suit. It is not very clear from the record as to when the 3rd defendant was joined in the proceedings. On 11th July 2014, the plaintiff applied to court for leave to serve summons to enter appearance upon the 1st and 2nd defendants by way of substituted service which application was allowed on 22nd July 2014. Service was effected upon the 1st and 2nd defendants through advertisement in the Daily Nation Newspaper of 4th August 2014. On 20th August 2014, the plaintiff applied for interlocutory judgment against the 1st and 2nd defendants in default of appearance which judgment was entered by the Deputy Registrar on 25th August 2014. On 19th November 2014, the suit was fixed for formal proof on 2nd February 2015 when the same was stood over to 17th March 2015. On 4th March 2015, the 2nd defendant appointed the firm Kyalo & Associates to act for him in the matter. On 17th March 2015, the hearing of the matter proceeded before Mutungi J. in the absence of the defendants. After the close of the plaintiff's case, the court directed the plaintiff to make closing submissions in writing. The hearing of the case was conducted on behalf of the plaintiff by the firm of Gatheru Gathemia & Company Advocates which had taken over the conduct of the matter from the firm of Mwangi & Guandaru Advocates on 16th March 2016.

What is now before the court is the 2nd defendant's application which was brought on 3rd August 2015 by way of Notice of Motion dated 28th July 2015 seeking the setting aside of the interlocutory judgement entered against the 1st and 2nd defendants on 25th August 2014 and all subsequent proceedings which took place thereafter. The application was brought on the grounds that the impugned proceedings were conducted without the 2nd defendant's knowledge. The 2nd defendant contended that he was never accorded an opportunity to defend the suit.

The application was supported by the 2nd defendant's affidavit sworn on 28th July 2015 in which the 2nd

defendant averred that despite the plaintiff having been aware that Oonge & Company advocates were acting for him, the plaintiff sought and obtained leave to effect service upon him by way of substituted service. The 2nd defendant averred that he never saw the advertisement which appeared in the Daily Nation on 4th August 2014. He contended that he expected service through Oonge & Company Advocates.

The 2nd defendant contended that he was an innocent purchaser of the suit property for value without notice of any defect that may have existed in the 1st defendant's title. The 2nd defendant contended that it would serve the interest of justice if the interlocutory judgement is set aside to give him and the other defendants an opportunity to defend the suit.

The application was opposed by the plaintiff through grounds of opposition dated 26th August 2015 and a replying affidavit sworn by the plaintiff on the same date 2015. The plaintiff stated that she sought and obtained leave to serve the defendants with summons through substituted service after efforts to trace the defendants' physical location failed to bear fruit. The plaintiff stated that she was not aware that the defendant had instructed the firm of Oonge & Co. Advocates to accept service on his behalf. The plaintiff contended that the 2nd defendant had not exhibited any draft defence and was thus asking the court to speculate as to the grounds upon which he intended to contest the suit herein. The plaintiff contended that the orders sought would greatly prejudice her and delay the cause of justice since the suit is awaiting delivery of judgement. The plaintiff stated that if the court is persuaded to set aside the interlocutory judgement, the 2nd defendant should be ordered to deposit the original title deed for the suit property in court within 7 days to prevent any further dealings with the same.

The application was argued by way of written submissions. The 2nd defendant in his submissions dated 26th October 2015 reiterated that he was not served with the court process issued herein and that the interlocutory judgment entered against him herein amounted to a miscarriage of justice. The 2nd defendant submitted that the court has unfettered discretion to set aside the interlocutory judgment in contention. The court was referred to the provisions of Order 10 Rule 11 of the Civil Procedure Rules and the cases of Patel vs. East Africa Cargo handling Services Ltd.(1974)E.A. 75, Shah vs. Mbogo(1967)E.A. 116, Fredrick Chege Kamenwa vs. Aron K. Kandie(2001)eKLR and Winnie Wambui Kibinge & 2 others vs. Match Electricals Ltd.(2012)eKLR

The 2nd defendant submitted that he has a reasonable defence to the plaintiff's claim. The 2nd defendant submitted that he was an innocent purchaser for value without notice of any defects which may have existed in the 1st defendant's title. The 2nd defendant submitted that he stood the risk of losing the suit property and the purchase price he paid to the 1st defendant if the orders sought are not granted. The 2nd defendant cited section 26(1) of the Land Registration Act 2012 in support of his submission that being an innocent purchaser of the suit property, his title to the suit property was unimpeachable unless it was obtained fraudulently, illegally, unprocedurally or through a corrupt scheme which vices had not been demonstrated against him. The 2nd defendant argued that the tenets of natural justice require that all parties should be accorded a fair opportunity to be heard and given a chance to defend their claim and that it was in the interest of justice that the application was allowed to pave way for hearing of the suit on merits.

The plaintiff filed submissions dated 20th November 2015 in which she contended that the 2nd defendant was properly served through substituted service after the plaintiff failed to trace him for the purposes of personal service. The plaintiff submitted that although the setting aside of the judgment was at the court's discretion, the discretion should not be exercised in a manner that causes prejudice or injustice to a party in the proceedings. For this submission, the plaintiff cited the cases of Shah vs. Mbogo & another (1967)EA 470 and Yamko Yadpaz Industries Ltd vs. Kalka Flowers Ltd (2013) eKLR.

The plaintiff argued that service was effected through advertisement with leave of the court and as such, it was not open for the 2nd defendant to claim that he was not given an opportunity to defend the suit. The

plaintiff reiterated that the 2nd defendant had not attached a draft defence to his application to enable the court consider whether the defence he intended to put forward raised triable issues. The plaintiff submitted that she never transferred the suit property to the 1st defendant neither did she receive any purchase price for the property. He submitted that the transfer of the suit property from her name to that of the 1st defendant and subsequently to the 2nd defendant were fraudulent and cannot be allowed to stand.

The plaintiff cited the provisions of section 26(1)(a) and (b) of the Land Registration Act, 2012 and the case of Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & another (2013) eKLR and submitted that it was immaterial whether the 2nd defendant was a party to the illegal transaction or not and that the whole process that led to the transfer of the suit property to the 2nd defendant needed to be annulled for being unprocedural and illegal. The plaintiff submitted further that the court cannot allow a party to benefit from his own wrong. For this submission, the plaintiff referred to the case of Hemedi Sefu Abdalla vs. Nainesh Kantilal Shah & 4 others (2015) eKLR.

I have considered the 2nd defendant's application and the grounds of opposition and replying affidavit which were filed in opposition thereto. I have also considered submissions by the parties' respective advocates. The law on setting aside judgment entered in default of appearance or filing defence is well settled. The court has unlimited discretion to set aside a default judgment. In such applications, the main concern of the court is to do justice to the parties. See, Shah vs. Mbogo and Another (supra), Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd vs. Augustine Kubende [1982] KAR 1033 and Patel vs. EA Cargo Handling Services Ltd (1974) EA 75. The court's discretionary power to set aside a default judgment is unfettered. It must however be exercised judiciously. Where the judgment sought to be set aside was entered regularly, an applicant is normally required to explain the delay in entering appearance or filing a defence and show the merits of his/her defence. On the other hand, where the judgment is irregular, the defendant is entitled to have it set aside *ex debito justitiae*.

The 1st and 2nd defendants herein were served with summons to enter appearance by way of substituted service following an application for leave to effect such service by the plaintiff who had claimed that she was unable to locate the 1st and 2nd defendants' physical addresses. The 2nd defendant has contended that she did not see the advertisement through which service was effected upon him and that such service was unnecessary because the plaintiff was aware that the firm of Oonge & Co. Advocates was acting for him. I have noted from the material on record that there was another suit at the Chief Magistrate's Court at Murang'a namely, Murang'a CMCC No.115 of 2014 ("the Murang'a case") in which the plaintiff and the 2nd defendant were involved. The plaintiff was joined in the Murang'a case on 27th June 2014 on her own application. The dispute in that case concerned the suit property herein. In that case, the firm of Oonge & Co. Advocates were acting for the 2nd defendant. The plaintiff was also represented by an advocate. In the circumstances, the plaintiff had knowledge that Oonge & Co. Advocates were acting for the 2nd defendant. As at the time the plaintiff made an application herein on 11th July 2014 for substituted service, the plaintiff who was already a party to the Murang'a case knew the 2nd defendant's said advocates. In her affidavit sworn on 10th July 2014 in support of her application for leave to serve the 1st and 2nd defendants with summons through substituted service, the plaintiff stated that "*THAT on the other hand, I do not know the 2nd defendant herein as I have never dealt with him and therefore I have no information on his whereabouts*". Personal service is the best form of service. Substituted service is normally allowed only after all attempts to serve a party through personal service have failed. I am of the opinion that the plaintiff had a duty to disclose to the court the existence of the Murang'a case and the fact that the 2nd defendant was appearing in that case through an advocate. I am also of the opinion that the plaintiff should have made attempts to serve the 2nd defendant through Oonge & Co. Advocates before resorting to substituted service. Due to the foregoing, I am of the view that the plaintiff obtained leave of the court to effect substituted service upon the 2nd defendant through concealment of material facts. Since, I have not been called upon to set aside the service, I will leave the matter to rest there. The much I can say is that the 2nd defendant was denied the benefit of the most preferred mode of service.

As I have stated earlier in this ruling, the court has unfettered discretion to set aside a default judgment.

The 2nd defendant has stated that he had no notice of the advertisement through which he was served with the summons herein and that explains why he did not enter appearance. The 2nd defendant has contended that as soon as he came to know of the existence of this suit, he instructed an advocate to represent him in the matter. I have noted that as at 17th March 2015 when this suit was heard by Mutungi J., the 2nd defendant had already appointed his advocates on record to represent him in the matter. There is no suggestion on the part of the plaintiff that the 2nd defendant knew of the suit herein and chose not to appear and defend himself either with a view to delay the cause of justice or for some other ulterior motive. I am satisfied with the excuse that has been given by the 2nd defendant for not entering appearance within time. I am also satisfied that the 2nd defendant has an arguable defence to the plaintiff's claim and that he has demonstrated that he had an intention of defending the suit. I am of the view that the 2nd defendant should be given the opportunity to defend this suit.

The 2nd defendant is the registered proprietor of the suit property, LOC.14/KAIRO/1565. He acquired the property from the 1st defendant on 25th February 2014. The plaintiff's claim herein is that the 1st defendant fraudulently transferred the suit property to herself and thereafter to the 2nd defendant. The 2nd defendant has contended that he was an innocent purchaser for value without notice of the defect in the 1st defendant's title. The 2nd defendant stands to lose the suit property if the interlocutory judgment that was entered against him is not set aside. It is only fair in the circumstances that the 2nd defendant is given a chance to defend his interest in the suit property.

I am not persuaded that the plaintiff will suffer injustice or prejudice which cannot be compensated in costs if the orders sought by the 2nd defendant are granted. In the case of Philip Chemwolo & another vs. Augustine Kubede [1982] KAR 1033 at 1040 Apaloo JA. stated as follows:-

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

For the foregoing reasons, I will allow the Notice of Motion dated 28th July 2015 in terms of prayer 2 thereof as concerns the 2nd defendant only. The 2nd defendant shall file his statement of defence, witness statements and bundle of documents within 21 days from the date hereof. With a view to preserve the subject matter of the suit, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as LOC.14/KAIRO/1565 pending the hearing and determination of the suit herein. The plaintiff shall have the costs of the application assessed at Kshs. 15,000/= payable forthwith.

Delivered and Signed at Nairobi this 24th day of January, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Mr. Chengo for the 2nd Defendant

Kajuju Court Assistant