



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 896 OF 2012

STEPHEN WANYOIKE KINUTHIA..... PLAINTIFF

VERSUS

CECILIA WAMBUI KARIUKI.....1ST DEFENDANT

VIRGINIA WANGUI KARIUKI.....2ND DEFENDANT

FREDRICK MBURU KARIUKI.....3RD DEFENDANT

RULING

The Plaintiff brought this suit against the Defendants on 27th November, 2012 seeking among others; special damages, mesne profits and vacant possession of all that parcel of land known as L.R No. Gitamaiyu/Kamburu/1314 (hereinafter referred to as “the suit property”). The Defendants filed a joint Memorandum of Appearance on 20th December 2012 but failed to file a statement of defence within the prescribed time. On 22nd January, 2013, the Plaintiff requested for interlocutory judgment in default of defence and was directed by the Deputy Registrar on 25th January, 2013 to set the matter down for hearing. No interlocutory judgment was entered pursuant to that request. After the Plaintiff was directed to set down the matter for hearing as aforesaid, the Plaintiff fixed the suit for hearing on several occasions but the hearing of the matter did not take off because the suit was not being listed in the cause list.

What is now before me is the Defendants’ application by way of Notice of Motion dated 14th June 2013 seeking to set aside a purported interlocutory judgment which was entered herein in favour of the Plaintiff in default of defence and unconditional leave to defend the suit. The application was brought on the grounds that the defendants were prevented from filing their statement of defence due to unavailability of the court file and that the Defendants have a valid defence against the Plaintiff’s claim which they should be given opportunity to ventilate. The Defendants annexed to their affidavit in support of the application a draft statement of defence.

The application was opposed by the Plaintiff through a replying affidavit sworn on 17th September 2013. The Plaintiff contended that the Defendants had not given good reason why they failed to file their statement of defence within the prescribed time. The Plaintiff contended that there was no evidence placed before the court showing that the court file had disappeared. The Plaintiff contended further that the defendants application was brought after unreasonable delay. Finally, the Plaintiff contended that the defendants did not have a defence on merit to the Plaintiff’s claim.

When the application came up for hearing on 11th October, 2016, the parties relied on their affidavits on

record in support of and in opposition to the application. I have considered the defendant's application and the affidavit which was filed by the Plaintiff in opposition thereto. As I have mentioned earlier in this ruling the Defendants have sought two prayers namely, the setting aside of interlocutory judgment said to have been entered herein in favour of the Plaintiff and unconditional leave to defend the suit. It is not disputed that the Defendants did not file a statement of defence after entering appearance. It is also on record that as a result of this default, the Plaintiff requested for interlocutory judgment on 22nd January 2013. The court record shows that the request for judgment was placed before the Deputy registrar on 25th January 2013 who declined to enter judgment and directed the Plaintiff to set down the suit for hearing under order 10 Rule 9 of the Civil Procedure Rules. It follows therefore that no interlocutory judgment was entered herein in favour of the Plaintiff which this court can be called upon to set aside. The limb of the defendants' application which seeks the setting aside of the purported judgment is in the circumstances misconceived. That leaves the prayer for unconditional leave to defend the suit.

Under Order 7 Rule 1 of the Civil Procedure Rules, a defendant who has entered appearance is required to file a statement of defence within 14 days from the date of appearance. The Defendants did not enter appearance within this prescribed time. Order 50 Rule 6 of the Civil Procedure Rules gives the court power to extend time for the Defendants within which to file and serve their statement of defence. The power is discretionary and is exercised as the justice of the case may require. The onus was upon the Defendants to persuade the court that they are deserving of the exercise of the courts discretion. I am in agreement with the Plaintiff's contention that the excuses given by the Defendants for not filing defence have no basis. The discretion of this court is nevertheless not fettered. I am satisfied from the draft defence attached to the affidavit in support of the Defendants' application that they have an arguable defence to the Plaintiff's claim. I have also noted from the plaint filed by the Plaintiff that the reliefs sought against the Defendants would have far reaching consequences upon their livelihood and as such they should be given opportunity to put forward whatever defence they have to the claim before the orders sought are granted. Finally, there is no evidence that the Plaintiff would suffer any prejudice which cannot be compensated in costs if the Defendants are allowed to defend the suit.

For the foregoing reasons, I would allow the Defendants' application dated 14th June, 2013 on the following terms;

1. The Defendants are granted leave to file and serve a statement of defence, bundle of documents and witness statements within 21 days from the date hereof.
2. The Defendants shall pay the Plaintiff's costs of the application.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

Ms. Mambiri for the Plaintiff

N/A for the Defendants

Kajuju Court Assistant