REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA AT EMBU

E.L.C NO 151 OF 2014

FORMERLY KERUGOYA E.L.C 647 OF 2013

LAURENZIA WANJUKI ……..…….....……..1st PLANTIFF

FLORENCE WANJA MWANIKI……..…….…….…….....2nd PLAINTIFF

VIRGINIA RWAMBA NJOKA…….....…..……..…..3rd PLAINTIFF

VERSUS

SIMEON NJERU DIFATHA…….…....…….…..DEFENDANT

RULING

1. On or about 23rd February 2009, the Plaintiffs filed Embu HCCC No. 21 of 2009 against the Defendant one, Simeon Njeru Difatha alleging breach of trust against him with respect to Title No. KAGAARI/KANJA/397.

2. It would appear that the said Defendant did not enter an appearance or file a defence within time in consequence of which the Plaintiffs requested for interlocutory judgement in default of appearance and defence under the then Order IXA of the Civil Procedure Rules 1948. The said judgement was entered by the Deputy Registrar on 19th March 2009.

3. By a Chamber Summons application dated 20th November 2009, the said Defendant moved the court for setting aside of the default judgement on the basis that he was never served with summons to enter appearance; that he had a good defence on the merits; and that it would be in the interest of justice to set it aside.

4. The said application was supported by the Defendant's supporting affidavit sworn on 20th November 2009 in which he denied service of the summons. He attacked the affidavit of service of the summons on the basis that it alleged that he was served in Gichegeni village whereas he is, in fact, a resident of Iriari village. He also stated that he has a good defence on the merits of the case which he intended to ventilate if granted leave to defend.

5. The Plaintiffs filed a replying affidavit strongly opposing the said application. The said affidavit was sworn by Laurenzia Wanjuki who insisted that the Defendant was actually served and that his proposed defence did not raise any triable issues. The Plaintiffs therefore prayed for the said application to be dismissed for lack of merit.

6. The said application could not be heard for one reason or the other over the years. It was eventually

listed before Hon. Momanyi Bwonwonga on 23rd April 2015 for hearing when the parties agreed to file their written submissions to enable the court dispose of the said application.

7. The Plaintiffs were to file their written submissions by 28th April 2015 while the Defendant was to file by 13th May 2015. The court was to deliver a ruling on the matter on 18th May 2015. For some reason beyond the control of the parties, the ruling was never delivered on 18th May 2015 or at all.

8. The matter was finally listed for mention on 9th March 2017 before me when the said application was fixed for ruling on 15th March 2017. The parties' submissions are on record and I shall now proceed to consider the application.

9. The principles for setting aside a default judgement are now well settled in law. A party who has not been served or properly served is entitled to have such default judgement set aside as a matter of right. However, where proper service has been effected, the court still has discretion to set aside such default judgement if the Defendant has a good defence on the merits. See the cases of *Gandhi Brothers v H.K. Njage t/a H.K. Enterprises Nairobi HCCC No. 1330 of 2001; Shah v Mbogo & Another [1967] EA 116; Patel v E.A Cargo Handling Services Ltd [1974] EA 75; Pithon Waweru Maria v. Thuku Mugirai [1982 – 88] IKAR 171.*

10. It is clear from the record that the issue of service is disputed by the Defendant. The Plaintiff insists there was service. It is the word of the Plaintiffs against that of the Defendant. The Defendant did not apply for cross-examination of the process server but I note from the record that both parties consented to file written submissions on the application. Anyhow, there is no guarantee that the process server's cross-examination would have added value to this issue.

11. That being the state of affairs on the conflicting evidence of service, I would adopt the strategy adopted by Ringera J (as he then was) in the case of *Gandhi Brothers v. H.K. Njage t/a H.K enterprises* (supra) and invoke the provisions of section 3 of the Evidence Act which states a fact is not proved if it is neither proved nor disproved. On the basis of that, the default judgement entered on 19th March 2009 is liable to be set aside.

12. A consideration of the 2nd principle on having a good defence on the merits also seems to tilt in favour of the Defendant. The Defendant states that he is the registered proprietor of the suit property Title No. KAGAARI/KANJA/397 and that he had already filed Embu HCCC No 132 of 2009 seeking the eviction of the Plaintiffs from the said property. It is also on record that the Plaintiffs in this suit have since obtained an order for consolidation of the two suits, that is, Embu HCCC No. 132 of 2009 and the instant suit. The order for consolidation was made by the Hon. Justice Bwonwonga on 23rd April 2015 upon application of the Plaintiffs.

13. In those circumstances, it cannot be said that the Defendant's proposed defence is a sham. This ground would, therefore, still entitle the Defendant to a setting aside of the default judgement which was entered on 19th March 2009. It should always be remembered that shutting out a party or denying a party audience should be the last resort of the court unless, of course, such party is deliberately seek to delay or defeat the cause of justice.

14. Before I conclude this ruling, the court has noted that the interlocutory judgement entered against the Defendant was, in fact, irregular from the onset for the following reason. Under the provisions of *the Civil Procedure Rules, 1948* and even under the current *Civil Procedure Rules, 2010* there is no room for entry of interlocutory judgement where the reliefs sought by the Plaintiff do not include a claim for liquidated damages.

15. A perusal of the Plaint dated 23rd February 2009 reveals that the Plaintiffs were seeking the following orders against the Defendant.

a. A declaration that the Defendant holds parcels No. Kagaari/Kanja/397 in trust for the members of the family of the late Njaga Kagwi and specifically the 1st, 2nd and 3rd Plaintiffs.

b. An order that the trust held by the Defendant in respect of the said property be determined and that the same be transferred and registered in their names.

c. Costs of the suit.

16. It is, therefore, evident that there is no liquidated claim amongst the 3 prayers sought in the plaint which would have warranted the application of the provisions of Order IXA of the Civil Procedure Rules 1948 then in force. The only option the Plaintiffs had was to set down their suit for hearing. However, in view of my finding above, it is not necessary to base my ruling upon this ground since it was not canvassed by the parties in their written submissions.

17. The upshot of the foregoing is that the Defendant's Notice of Motion dated 20th November 2009 succeeds. Consequently, I make the following orders:

a. The default judgement entered against the Defendant on 19th March 2009 is hereby set aside with all consequential orders.

b. The Defendant shall file and serve his statement of defence within 14 days from the date hereof.

c. The Plaintiffs shall file and serve their reply to defence, if any, within 7 days of service of the Defence.

d. The costs of the application shall be in the cause.

Orders accordingly.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **15th day** of **MARCH 2017**

In the presence of Laurenzia Wanjuki the 1st Plaintiff and Mr Ireri holding brief for Mr Kathungu for the Defendant.

Court clerk Njue

Y. M. ANGIMA

JUDGE

15.03.17