



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 81 OF 2013

ELIAKIM JAOKO AWITI..... PLAINTIFF

VERSUS

BENARD ISABOKE MBAKA 1ST DEFENDANT

GREGORY AGWATA NDUBI 2ND DEFENDANT

R U L I N G

1. The court in the instant matter on 24th June 2016 heard the plaintiff ex parte by way of formal proof after the defendants who apparently had been served with summons failed to appear and/or file a defence. Notice of hearing of the case on the date had also apparently been served on the defendants. On 23rd June 2016 the court delivered judgment in favour of the plaintiff on the following terms:-

a. That the defendants do unconditionally vacate the plaintiff's land parcel Suna East/Wasweta I/15695 forthwith failing which an order of eviction to issue.

b. A permanent injunction be and is hereby issued restraining the defendants their servants, agents and/or representatives from in any way, however interfering with the plaintiff's occupation and/or ownership of land parcel Suna East/Wasweta I/15695.

c. The costs of the suit are awarded to the plaintiff.

2. The 1st defendant has vide a Notice of Motion dated 16th November 2016 brought under Order 10 Rule 11 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act moved the court for orders that:-

1. That there be stay of execution/intended execution pending the hearing of this application.

2. That the ex parte judgment entered herein on 23rd June 2016 be set aside.

3. That this matter be heard de novo.

4. That the respondent herein do bear the costs of this motion.

3. The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support by the 1st defendant. In support of the application the 1st defendant avers that he was never served with any summons to enter appearance or any hearing notices. The applicant states that the

various affidavits of service alleging service upon him have been falsified. The applicant further avers he has a good defence which raises triable issues. He further avers he owns his own parcel of land being **LR No. Suna East/Wasweta I/14408** and denies any knowledge of land parcel **LR No. Suna East/Wasweta I/15695** claimed by the plaintiff/respondent.

4. The plaintiff/respondent swore a replying affidavit dated 7th December 2016 in opposition to the 1st defendant's application. In the replying affidavit the plaintiff reiterates that the defendants were severally served by the process servers initially with the summons and subsequently with hearing notices. The plaintiff refers to the various filed affidavits of service by the process servers which he avers are sufficiently detailed and explain how the defendants were served.

5. The defendants intended statement of defence merely pleads that the 1st defendant owns **LR No. Suna East/Wasweta I/14408** and his brother Cyrus Orora Mbaka owns **LR No. Suna East/Wasweta I/14409** and states that these are the plots where he carries on his activities. He denies having trespassed on parcel **LR No. Suna East/Wasweta I/15695**. From the copies of certificates of official search parcels **14408** and **14409** measure 0.08ha each while the plaintiff's parcel measures 1.781hectares. The 1st defendant does not dispute the plaintiff is the registered owner of parcel **15695**. The plaintiff's claim as per the plaint was that the defendants had encroached into and constructed structures onto parcel **Suna East/Wasweta I/15695**. The 1st defendant denies this and states his activities are restricted to parcels **Suna East/Wasweta I/14408** and **14409**. There is hence an issue of who between the parties has encroached onto the others parcel of land. That is indeed an issue that cannot be determined and/or resolved without the aid of technical evidence in the nature of a surveyor's report.

6. Without making a finding as to whether or not the defendants were validly served with summons to enter appearance, I am satisfied that the 1st defendant's application raises a triable issue and that it would only be fair and just to allow the defendants to plead their case so that all the issues can be fully ventilated and determined on their merits. The court's discretion to set aside an ex parte judgment is wide and unlimited and the only caveat is that the discretion has to be exercised judiciously. Where as in the instant case an applicant demonstrates a reasonable defence which raises a triable issue the court will exercise the discretion in favour of the applicant. The court has a duty to do justice in all matters that are presented before it and in that regard will set aside even a validly obtained judgment albeit on terms.

7. In the case of **Pithon Waweru Maina –vs- Thugu Mugiri [1982-99] 1KAR** the Court of Appeal laid down the principles upon which a court ought to exercise its discretion. Potter J. A cited with approval the holding in **Patel –vs- E. A Cargo Handling Services Ltd [1974] E.A 75** at pg 76 where the judge stated:-

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... 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 to it by the rules.”

The judge further cited the holding by Harris, J. in **Shah –vs- Mbogo [1967] E.A 116** at pg 123 where Harris J. stated:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

8. In the instant case, as I have observed it is not possible to state with certainty whether the defendants activities are on the plaintiff's parcel of land and/or on the land parcel owned by the 1st defendant and his brother. An injustice would be occasioned if the ex parte judgment was executed and it eventually turned out that the defendants were infact not carrying on their activities on the plaintiff's land as claimed by the plaintiff.

9. In the circumstances, I exercise my discretion in favour of the 1st defendant and I accordingly allow the application dated 16th November 2016 and set aside the judgment delivered on 23rd June 2016. I award the plaintiff **“thrown away”** costs of kshs. 15,000/= which are to be paid to the plaintiff within a period of 30 days from the date of this ruling failing which the judgment dated 23rd June 2016 will stand reinstated and the plaintiff to be at liberty to execute the same.

10. Finally, as the land the subject matter is situate within the territorial jurisdiction of Migori Environment and Land Court it is hereby ordered that this file be transferred to Migori Environment and Land Court for hearing and final determination or any other directions and/or actions as may need to be done to finally dispose of the matter.

11. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of April, 2017.

J. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the 1st and 2nd defendant

Milcent court assistant

J. MUTUNGI

JUDGE