



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 24 OF 2015

RAPHAEL MURE YAA.....PLAINTIFF

VERSUS

NYEVU NYANJE.....DEFENDANT

RULING

1. The Application filed by the Defendant and dated 24th March, 2016 is seeking for the following reliefs:
 - a. That after hearing of this Application inter-parties, the Defendant/Applicant be granted leave to defend this suit.*
 - b. That the costs of this Application be provided for.*
2. According to the grounds on the face of the Application, the Defendant has a good defence to the Plaintiff's claim; that the matter proceeded Ex-parte and a Judgment was entered into and that although the Court indicated that is no Defence on record, they filed a Defence on 25th June, 2015.
3. The Defendant deponed that he has been living on the suit land for a very long time and that he has a good defence to the Plaintiff's claim.
4. In a short Replying Affidavit, the Plaintiff deponed that execution has already been done and there is nothing to be stayed; that the Defence does not raise any triable issue and that the Application should be dismissed.
5. The Defendant's advocate submitted that a party should not be condemned unheard; that to deny a subject a hearing should be the last resort of a court and that they were never served with a hearing notice.
6. The parties filed their respective submissions which I have considered.
7. The record shows that on 12th August, 2015, the Plaintiff's advocate appeared before the Deputy Registrar with a view of fixing the matter for "formal proof", meaning that there was no Defence on record.
8. When the matter came up for hearing on 7th October, 2015, the Plaintiff's advocate proceeded with the hearing ex-parte, and on the basis of an Affidavit of Service that was filed in court on 7th October, 2015.
9. Although the Affidavit of Service states that the Defendant's advocates were served with a hearing notice, I have not seen the copy of the notice that was received by the Defendant's advocate.

10. That notwithstanding, the entire court file does not have the Defence that was filed by the Defendant on 23rd July, 2015.

11. The Defendant has annexed a copy of the Defence on his Affidavit. The said copy shows that the Plaintiff's advocate was served with the Defence on 7th October, 2015.

12. Considering that the Defendant has also exhibited the receipts showing that indeed he paid for the filing of the Defence on 26th June, 2015, it would appear that someone pulled the filed Defence out of the court record.

13. My observations above are further justified by the fact that the Defendant filed his list of documents on 23rd July, 2015. Those documents were on record as at the time the matter proceeded for hearing on 7th October, 2015.

14. In view of my observations, I find and hold that the Plaintiff's counsel misled the Deputy Registrar when he told her that the matter was undefended. That is the only reason that this matter could have proceeded for hearing ex-parte considering that the Plaintiff did not exhibit a duly stamped hearing notice.

15. Indeed, in the Judgment of 20th November, 2015, the court observed that the Defendant never filed a Defence, which was not true.

16. For the reasons I have stated above, I allow the Application dated 24th March, 2016 in the following terms;

a. The Judgment of this court of 20th November, 2015 be and is hereby set aside.

b. The matter to be fixed for pre-trial directions and hearing.

c. The Plaintiff to pay the costs of the Application.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE