



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**

**ELC. SUIT NO. 192 OF 2012**

**PIUS KINOI MAINGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**WILSON KIVUVO MBITHI.....DEFENDANT/RESPONDENT**

**RULING**

1. In his Application dated 15<sup>th</sup> December, 2014, the Defendant is seeking for the following reliefs:
  - a. That this Honourable Court be pleased to set aside the interlocutory judgment and all the consequential orders entered against the Defendant/Applicant herein on 13<sup>th</sup> July, 2012.*
  - b. That upon grant of orders (c) above the court be pleased to give the defendant unconditional leave to file a statement of defence and the annexed draft defence be deemed as duly filed and served.*
2. In his Supporting Affidavit, the Defendant/Applicant deponed that in the year 2016, he sold four (4) acres of a parcel of land known as Mavoko Town Block 3/2087 to the Plaintiff; that two (2) of the four (4) acres were to be exchanged with the Plaintiff's land being Mavoko Town Block 3/2889 and that the said exchange has never taken place.
3. According to the Defendant, the Plaintiff filed this suit seeking to transfer the land in his name; that he was never served with summons and that he only became aware of the suit after he was served with the Notice to Show Cause why execution should not proceed.
4. The Defendant finally deponed that he has a constitutional right of being heard; that he has a draft defence which raises triable issues and that unless the Application is allowed, he will be deprived of his property.
5. In response, the Plaintiff deponed that the Defendant was served with summons to Enter Appearance; that the agreement in respect to the two acres was done separately and that he has complied with that second agreement.
6. Both the Plaintiff's and the Defendant's advocates filed their respective submissions and authorities which I have considered.
7. The Defendant is seeking to set aside the judgment of this court which was entered on 13<sup>th</sup> July, 2012.

8. The record shows that this suit was filed on 5<sup>th</sup> June, 2012. On 13<sup>th</sup> July, 2012, the Plaintiff's advocate, vide a "*request for judgment*" dated 11<sup>th</sup> July, 2012 requested for judgment to be entered against the Defendant pursuant to the provisions of the then order 1XA Rules 3 and 9 of the Civil Procedure Rules. The request was for "*interlocutory judgment and cost*".
9. On the same day the request to enter interlocutory judgment was made, the Deputy Registrar entered judgment "*subject to formal proof*". That is the judgment that the Defendant is seeking to set aside.
10. Before I consider if indeed the Defendant was served with the summons to Enter Appearance or not, I need to deal with the issue of whether the Deputy Registrar could enter the said interlocutory judgment in the first place.
11. It is not in dispute that the suit before the court is for recovery of land and not money.
12. Order 10 of the civil Procedure rules, 2010, provides for "*consequences of non-appearance, default of defence and failure to serve*".
13. Order 10 Rule 4 (1) provides that where the Plaintiff makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons, the court shall, on request, enter judgment against the Defendant for any sum not exceeding the liquidated demand.
14. Order 10 Rule 6 on the hand provides that in a claim for pecuniary damages or for detention of goods, the court shall, on request, enter interlocutory judgment against a Defendant who shall fail to appear.
15. Order 10 Rule 9 of the Civil Procedure provides that in all suits not otherwise specifically provided for by the order, where a party served does not appear, the Plaintiff may set down the suit for hearing.
16. Other than a suit in which the Plaintiff makes a liquidated demand, or the claim is for pecuniary damages or for detention of goods, "*interlocutory judgment*" or any form of judgment cannot be entered until the matter has been set down for hearing by the Plaintiff, evidence taken and a final judgment delivered by the court.
17. The practice by the Deputy Registrars to enter "*interlocutory judgments*" in matters pertaining to recovery of land is not supported by any law.
18. Indeed, all matters which do not fall within the ambit of Order 10 Rules 4 and 7 of the Civil Procedure Rules should be set down for hearing without any form of "*judgment*" being entered as provided for by the provisions of Order 10 rule 9 of the Civil Procedure Rules.
19. The entry of judgment by the Deputy Registrar in this matter on 13<sup>th</sup> July, 2012 was therefore unlawful.
20. In the circumstances, it does not matter whether the Defendant was served with the summons to Enter Appearance or not. Having entered an unlawful "*judgment*" on 13<sup>th</sup> July, 2012, the said judgment is set aside *ex debito justitiae*.
21. Having set aside the said judgment, the Defendant is at liberty to file his Defence. Of course, the Plaintiff is at liberty, if he so wishes, to apply for the striking out of such a Defence for having been filed out of time.
22. If the Plaintiff files an application to strike out the Defence for having been filed out of time, the court will consider the reasons, if any, for the filing of the Defence out of time.
23. It is for the above reason that this court shall not venture into the issue of whether the Defendant was served with the summons to Enter Appearance or not, or if the draft Defence raises triable issues or not.

24. In the circumstances, I allow the Defendant's Application dated 15<sup>th</sup> December, 2014 in respect to prayer number (9) only.

**DATED, DELIVERED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF JUNE, 2017.**

**O. A. ANGOTE**

**JUDGE**