



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC CASE NO. 11 OF 2014

JOEL KIRAGU KARIGI.....1ST PLAINTIFF

BERNARD KARIMI GACHARIA.....2ND PLAINTIFF

JOSEPH NGACHA KARIGI.....3RD PLAINTIFF

VERSUS

ESTHER NJIRAINI.....1ST DEFENDANT

FELISTER WANJIKU.....2ND DEFENDANT

MURIA-IGIRI NDUIGA.....3RD DEFENDANT

MUNGUTI NJAU KARAGA.....4TH DEFENDANT

JOHN CHARIBU.....5TH DEFENDANT

JUDY KAGIO.....6TH DEFENDANT

LILIAN NYAGUTHII.....7TH DEFENDANT

MITHAMO GATERU.....8TH DEFENDANT

ANN WAMBUI.....9TH DEFENDANT

GICIMU KANJI.....10TH DEFENDANT

RULING

In the recent case of **JAMES KANYIITA NDERITU & ANOTHER VS MARIOS PHILOTAS GHIKAS & ANOTHER C.A CIVIL APPEAL No. 6 of 2015 (2016 e K.L.R)**, the Court of Appeal re-visited the principles that should guide a Court considering any application to set aside a default judgment. It said:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance but for one reason or another, he had failed to enter appearance or to file defence resulting in a default

judgment. Such a defendant is entitled under Order 10 Rule II of the Civil Procedure Rules to move the Court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others”.

In the case of ***SHAH VS MBOGO 1967 E.A 116, HARRIS J.*** made the following remarks which were confirmed on appeal (***MBOGO VS SHAH 1968 E.A 93***) about the Court’s discretion while considering an application to set aside a default judgment:

“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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.

It is clear therefore that a Court has unfettered discretion to set aside a default judgment. Such discretion, however, must be exercised judicially and on sound basis. It must not be exercised capriciously or whimsically. Being discretionary, it must not be exercised in favour of a party who does not approach the Court with clean hands. Those are the principles that will guide this Court in determining the defendant’s Notice of Motion dated 22nd December 2015 and which is the subject of this ruling.

On 27th October 2015, this Court delivered a judgment in favour of the plaintiffs having heard this case in the absence of the defendants who had been duly served but had not entered appearance nor filed any defence.

By their application dated 22nd December 2015, the defendants sought the setting aside of that judgment and leave to file their defence out of time on the basis that their fundamental rights were violated since they were condemned un-heard and were not aware about this suit. The application was supported by the affidavit of **FELISTER WANJIKU** the 2nd defendant and paragraphs 5, 6, 7 and 8 are important and I will reproduce them:

5: “That the Applicants/Defendants were not aware of the above suit and (sic) served with any Court papers in respect to the above suit”

6: “That the Applicants came to know of the existence of the above suit after having over-heard rumours and is when they decided to check from the Court and found that indeed there is a decree issued against them”

7: “That a quick look at the Court record would reveal that the Applicants (sic) stealthily obtained the orders against the Applicants irregularly and unlawfully hence the said orders ought to be set aside for justice to prevail”

8: “That the honourable Court was misled into believing that the Applicants were served with the proceedings in the suit which is not the case”.

The totality of those averments is that the defendants were never served with any pleadings in this case and the judgment dated 27th October 2015 and the subsequent decree were, to use their own words, obtained “***stealthily***”.

The plaintiffs on the other hand filed their own application dated 31st March 2017 seeking the dismissal of the defendants’ application for want of prosecution arguing that it was delaying the execution of the decree issued in their favour.

When the matter came before me, and in view of the serious allegations being raised by the defendants about service of the pleadings upon them, and further, pursuant to the powers bestowed upon me by the provisions of **Order 5 Rule 16 Civil Procedure Rules**, I found it prudent to summon the process server for examination.

The said process server **MR. FRANCIS KUNGA MUGI** duly appeared before this Court on 2nd October 2017 for cross-examination and he confirmed how on 14th February 2014, he had served all the defendants in this case with the plaint and summons to enter appearance after they had been identified by the 3rd plaintiff. The process server substantially confirmed what is contained in his six (6) paragraph affidavit of service dated 2nd March 2015 explaining how he had personally served all the ten (10) defendants in this case with the plaint and summons to enter appearance at **KIAMUTHAMBI** Village after they had been identified by the 3rd plaintiff. It is on record also that on 10th September 2015, all the defendants were again served with a notice informing them that the suit was set for formal proof on 7th October 2015. On both occasions, the defendants refused to sign both the plaint and summons and the notices and of course they neither entered appearance nor filed any defence and also failed to attend Court for hearing. It became clear beyond peradventure that the process server **MR. FRANCIS KUNGA MUGI** did infact serve the defendants with the plaint and summons as deponed in his affidavit of service dated 2nd March 2015. Indeed when he was cross-examined by the 1st and 2nd defendants, it became clear that he had previously served the 1st defendant on a previous occasion. There is no reason to doubt the averments of **MR. FRANCIS KUNGA MUGI** as contained in his affidavit of service dated 2nd March 2015 and also what he told the Court on oath on 2nd October 2017. It cannot therefore be true when the defendants allege that they were not served with any pleadings or that they only “**over-heard rumours**” or that the plaintiffs obtained judgment “**stealthily**” or that the Court was “**misled**” into believing that they were served. The totality of the evidence before me is that they were duly served not once but twice but deliberately ignored the summons and notices. The defendants have therefore sought, by evasion and deceit, to obstruct and delay this case. They have not approached this Court with clean hands and have, on the contrary, deliberately tried to mislead this Court that they were not served with the summons and plaint. While this Court has unfettered discretion in setting aside a default judgment, I can only exercise that discretion in favour of a deserving party. The defendants are clearly not deserving of the exercise of such discretion in their favour.

The up-shot of the above is that the defendants’ Notice of Motion dated 22nd December 2015 is devoid of merit. It is accordingly dismissed with costs.

The plaintiffs Notice of Motion dated 31st March 2015 seeking the dismissal of that application does not therefore need to be canvassed. They may proceed to execute the decree issued in their favour.

It is so ordered.

B.N. OLAO

JUDGE

3RD NOVEMBER, 2017

Ruling delivered, dated and signed at Kerugoya in open Court this 3rd day of November 2017

1st Plaintiff present

2nd Plaintiff present

1st Defendant present.

B.N. OLAO

JUDGE

3RD NOVEMBER, 2017