



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL CASE NO. 77 OF 2010

CHARLES K. MAIYO.....1ST PLAINTIFF

FREDRICK K. SAWE.....2ND PLAINTIFF

VERSUS

JOHN MBURU..... DEFENDANT

RULING

(Application to set aside judgment; defendant being absent on hearing date despite hearing being taken by consent; suit for vacant possession and mesne profits; vacant possession given after judgment but mesne profits contested; application allowed on condition that defendant deposits the mesne profits which is not denied; judgment to stand if condition will not be satisfied)

The application before me is that dated 2nd July 2015. It is an application filed by the defendant. Principally, the application is one to set aside the judgment entered on 26th June 2015. The said judgment was read after an *ex-parte* hearing as the defendants did not attend court. The grounds upon which the application is based are as follows :-

- (a) Due to an oversight on the part of the defendant/applicant's counsel, the matter proceeded for hearing ex-parte.*
- (b) A party should not be condemned for the mistakes of his counsel.*
- (c) There is an apparent error on the face of the judgment.*
- (d) the defendant/applicant has a good defence with high chances of success.*
- (e) That the defence raises triable issues that need to be decided on merit.*

The application is opposed and before I go to the issues raised by the respondent, I think it is necessary that I provide a little background to this suit.

This case was commenced by way of plaint filed on 9th November 2010. The plaintiffs' case is that they purchased the land parcel Kericho Municipality Block 5/399 which was transferred to them on 7th May 2010. At the time of purchase, the defendant was a tenant in the premises. Prior to the transfer, the plaintiffs sued the defendant at the Business Premises Rent Tribunal (BPRT) but the case was dismissed because at that time they were not the registered proprietors of the premises. Upon becoming registered as

proprietors, the plaintiffs sued the defendant, through this suit, for vacant possession, mesne profits and interest on the same at commercial rates.

The defendant filed defence. He denied that the plaintiffs are registered proprietors of the suit premises and invited strict proof. He pleaded that he is a protected tenant of the known owner of the premises one Kipkoech arap Langat (deceased) as from the early 1970s. He pleaded that if the plaintiffs are registered proprietors then they obtained registration by fraud or mistake. It was further pleaded that the rent in respect of the premises was tendered to the agent of the known landlord who declined to accept it and that the same was paid into the BPRT to the credit of the known landlord. He pleaded that the plaintiffs have issued an illegal notice to terminate or alter terms of tenancy. He reiterated that he is a protected tenant who is subject to the jurisdiction of the BPRT. He also had a counterclaim through which he sought the title of the plaintiffs to be cancelled.

The matter proceeded for hearing partly before my predecessor Waithaka J, and I took it over as a part heard matter. On 26th March 2015, Mr. Miruka was present for the plaintiffs and Mr. Motanya was present for the defendant. By consent the matter was fixed for further hearing on 22nd June 2015. On the day, only Mr. Miruka attended with his witnesses and I allowed him to proceed since the date was taken by consent. Mr. Miruka called two more witnesses and closed his case. He made brief submissions and I allocated 26th June 2015 as the date for judgment.

On 26th June 2015, only Mr. Miruka attended and I read the judgment. I held that the plaintiffs are the registered proprietors of the land and entitled to vacant possession. I further assessed mesne profits at Kshs. 35,000/= per month from the date of filing suit till payment in full with interest, which was the sum claimed by the plaintiffs. I awarded the plaintiffs costs of the suit and of the counterclaim.

It is then that this application was filed seeking to have the above judgment set aside. While this application was pending *inter partes* hearing, the defendant vacated the premises. The question therefore is whether the judgment should be set aside so that the defendant can contest the award on mesne profits.

The supporting affidavit to the application is sworn by Mr. Motanya. He has deposed inter alia that the defendant was paying rent of Kshs. 10,000/= per month and not Kshs. 35,000/= per month. He deposed that this rent of Kshs. 10,000/= was fixed by the BPRT. He has explained that on the day of hearing, he was completely unaware and was seized with a case before the Magistrates Court which was a highly contested burial dispute. It is only on 1st July 2015 that he became aware that this matter proceeded and judgment delivered when a son of the defendant came to his office with a copy of the judgment. He deposed that he forgot to diarise the matter in his office diary.

The replying affidavit is sworn by Charles Kimaiyo the 1st plaintiff. He has deposed inter alia that the defendant has been engaging in delaying tactics in this matter. It is denied that the rent was Kshs. 10,000/= and asserted to be Kshs. 35,000/=.

I have considered the matter. It is an application to set aside a judgment after an *ex-parte* hearing. The only remaining issue that is contested is the mesne profits payable since the defendant has already vacated the premises.

I am not too persuaded by the reasons given for the absence of counsel for the defendant and the defendants on the date that the matter proceeded for hearing. The date was taken by consent. Even if counsel forgot to place the matter in his diary, the Cause List was published and counsel should have taken note of the same. Counsel has admitted to being within the court precincts on the day and I believe that a little due diligence would have attracted him to this suit.

Be as it may, I am prepared to accommodate and hear the defendant on whether mesne profits should be Kshs. 35,000/= or Kshs. 10,000/=. I give him this indulgence for the sole reason that the court should go to its lengths to give each party a hearing. However, this is on condition that the defendant deposits the equivalent of rent in the sum of Kshs. 10,000/= per month from November 2010 to February 2016 which is a period of 64 months. The total is Kshs. 640,000/=. This sum must be deposited with the plaintiff's

counsel within 30 days of this ruling. If the same is not deposited, then the judgment of 26 June 2015 will stand and the plaintiffs will be at liberty to execute on the same. If it is deposited, time being of essence, then I will re-open the case and hear the defendant on the mesne profits payable.

In any event, the defendant will bear the costs of this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of;

1. Mr. J.M.Motanya for defendant/applicant.
2. Mr. Miruka for plaintiffs/respondent.
3. Mr. Kenei – court assistant.