



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 265 OF 2008

AMIRALI HASSANALI MOHAMMED & ANOTHER.....PLAINTIFFS

-VERSUS-

JOHN ODERO NYANGANGA.....DEFENDANT

RULING

1. This application is brought under Order 22 rule 25, Order 10 rule 11 and Order 9 of the Civil Procedure Rules. In it, the applicant/defendant sought

- a) Spent
- b) **An order staying the execution of the judgement pending determination of this application.**
- c) **An order setting aside judgement delivered on 22nd April 2010.**

2. The application is supported by the affidavit sworn by Joseph Obura Nyanganga and the grounds set forth on the face of the applicaton. One of the grounds states that the defendant is constructing on plot No MS/M.S/1/133 situate at Shelly beach area while the suit plot is at Mtongwe. The Applicant swore that he was never served with summons to enter appearance or any pleadings here and learnt of the case when he was arrested on 9th September 2013 in Nairobi.

3. The applicant denies the contents of the affidavit of service that he worked as soldier in the military and he annexed a job card to show he works with the ministry of education. He denied all the meetings alleged by the process server. The applicant deposes that he has a good defence which raises triable issues.

4. The application is opposed by the plaintiff through an affidavit sworn by David Tole advocate. The advocate deposed that the suit property is owned by the plaintiff as demonstrated by copies of title deeds attached. That the plaintiff has never leased or parted with possession of the suit property. That their investigations revealed constructions works on the suit plot was being undertaken by the Applicant. The deponent swore that summons to enter appearance were duly served as per the affidavit of service annexed. Lastly he deposed that the defendant does not have a reasonable defence. He annexed a copy of the joint survey report as D – 6.

5. The questions before this Court to determine is two fold. First ; whether service of summons to enter appearance was effected on the Respondent. Secondly whether the draft defence raises any triable issues.

An answer to either of the two questions would form a basis on whether the judgement entered on 22nd April 2010 should be set aside.

6. The principles for setting aside *ex parte* judgements was enunciated in the two renowned cases of **Patel vs Cargo Handling Services Ltd (1974) E A 75** and **Shah vs Mbogo (1968) E A 93**. In **Chemwolo & Another vs Kubende (1986) KLR 492**, the Court of Appeal held that Order IXA rule 10 confers upon the Court an unlimited discretion to set aside or vary judgement entered in default of appearance upon such terms as are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, or error but not exercised to assist a person who has deliberately sought to obstruct or delay the cause of justice.

7. The affidavit of service of summons to enter appearance is dated 15.10.2008. The process server John Ochieng Ouma deposed that he served Joseph Odero Nyaganga on 8th October 2008 with summons to enter appearance, Plaintiff and Chamber Summons Application. That he reached the said Mr Nyaganga through a phone No 0733572798 and met him at High Court gate No 5 on KICC side. The server deposes that the defendant informed him that he was supervising cleaning services

8. The process server in the affidavit of 12.3.2010 deposed that he served the hearing notice on 25.2.10 after their tele – conversation meeting at the high court gate 5 but the defendant declined to sign both sets of documents. The matter then proceeded to hearing on formal proof on 15.3.2010 and the Court rendered its judgement on 22nd April 2010.

9. The applicant has annexed a work ID showing his name is Joseph Obura Nyangaga and not Joseph Odero Nyangaga. He denied being a supervisor of cleaning services which is true as revealed by his work ID. He denied having an employee by the name of Omar Juma. I note in the affidavit of service that the applicant did not give the physical description of the person he met. The process server did not say in his affidavit how he confirmed the person who received the documents was indeed the defendant. Therefore on account of different in names and doubt created in veracity of the person served, I am convinced the Applicant deserves a chance to be heard and therefore merits orders of setting aside.

10. Has the defendant obstructed the course of justice or is using this Application to deny the Respondent from enjoying the fruits of his judgement ? There is no evidence that notice of entry of judgement was served upon the Applicant. As soon as the Applicant became aware of the judgement, he filed the present application. No evidence has been shown that his intention is to delay the matter.

11. Whether the defence raises any triable issue, the law provides that even if it is only one triable issue the defendant ought to get an opportunity to be heard. The defendant avers that the plot he is building on is different from the suit parcel. This is a triable issue for the Court to determine the two plots are physically different on the ground. The report of the survey being relied on by the Respondent cannot be taken in as evidence unless the interlocutory judgement has been set aside hence the necessity to grant the orders sought.

12. In conclusion, I find merit in the motion and allow prayer (b) and (c). The Court notes that the plaintiff has incurred some costs in serving the summons to enter appearance and executing the warrants of arrest. Although the defendant is not to blame the Court will direct that he pays the plaintiff thrown away costs. The thrown away costs is assessed by this Court at Kshs 25,000= to be paid within 45 days. In default execution to issue. The costs of this application abide the outcome of the main suit.

Ruling dated and delivered at Mombasa on this 11th day of March 2016

A. OMOLLO

JUDGE