



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT KERICHO

CIVIL SUIT NO. 4 OF 2015

PAULINA KIKWAI LANGAT.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BOMET.....1ST DEFENDANT

KEBINICO CONTRACTORS LTD.....2ND DEFENDANT

RULING

(Application to set aside judgment; defendant claiming that person served had left employment at time of service; evidence showing that the person was actually in employment; no complaint that the person served had no instructions to receive summons; mention notices and hearing notices later served; no reaction to these by defendants; matter proceeding for hearing and judgment entered for plaintiff; reasons given for setting aside judgment being dishonest; no excusable mistake or inadvertence demonstrated; no good defence; application dismissed with costs; judgment to stand)

The application before me is that **dated 8 April 2016** filed by the defendants. It is an application seeking to set aside the judgment herein and for leave to file defence out of time.

The suit itself was commenced by way of plaint filed on **22 January 2015**. In the plaint, the plaintiff pleaded to be the owner of the **land parcel Kericho/East Sotik S.S/ 159**. It was her case that in the year 2014, the defendants did trespass into her land and constructed a bridge and road through her land for use by the public. In this suit, she sought to be compensated for the value of the land taken and the costs of her trees and fence that were destroyed in the process. No defence was filed despite service being effected.

The matter thereafter proceeded for hearing on **27 October 2015** with the plaintiff giving evidence to support her claim and calling two witnesses. I reserved judgment for **29 January 2016** and did deliver the same as appointed. I was of the view that the plaintiff has proved her case on a balance of probabilities and entered judgment for her in the sum of Kshs. 811, 492.50/= being the loss that she incurred together with costs and interest.

On **9 March 2016**, the plaintiff's counsel filed a bill of costs for taxation. The taxation was scheduled for **29 March 2016**. On that day, Mr. Cosmus Koech, counsel for the defendants, appeared in court and the court record does show that Mr. Koech and Mr. J.K Rono, learned counsel for the plaintiff, did agree to stand over the taxation to **12 April 2016**. However, on **8 April 2016**, this application was filed.

The application is said to be brought pursuant to the provisions of **Order 10 Rules 8 and 11** of the **Civil Procedure Rules** and **Sections 3 and 3A** of the **Civil Procedure Act** and all other enabling provisions of the law. As drawn, it seeks the following orders :-

- a. That the ex-parte judgment and all other consequential orders on record be set aside and the matter be set for hearing inter parties on priority basis as the Honourable Court may direct.*
- b. That the taxation of costs scheduled for 12th April 2016 be stayed pending the hearing and determination of this application inter parties.*
- c. That the defendants be granted leave to file the attached defence out of time.*
- d. That there be such other or further orders as the Court may deem fit and just to grant.*

The application is based on the following grounds :-

- 1. The defendants did not willfully cause the delay in entering appearance and filing the Statement of Defence.*
- 2. The disputed land is a road reserve which has been used since 1977 to date and it is in public interest that the defendants be allowed to put up a defence and parties heard.*
- 3. That the plaintiff did not seek leave of Court before the ex parte judgment was entered against the County Government of Bomet contrary to ... (no law specified).*
- 4. That the general public stands to be greatly prejudiced if this application to set aside judgment is not granted.*
- 5. The plaintiff will not be prejudiced since the land is already in use by the Public since 1977 and in any event she can be adequately compensated by the County Government of Bomet if the matter is determined in her favour.*

The application is supported by the affidavit of one Erick Kirui who is the Director of Administration at the County Government of Bomet. He has deposed inter alia that the defendants did not in any way intentionally cause delay in entering appearance and filing defence. He has averred that the cause of the delay was that service of summons to enter appearance were served on an employee "*who had just left the employment of the defendant County Government.*" He has annexed a letter from the Human Resources Department. He has further averred that there are triable issues in the matter and the defendants should be afforded a chance to be heard. He has further deposed that the disputed land is a road reserve.

The plaintiff has filed a replying affidavit to oppose the application. She has inter alia deposed that summons were served upon one Mercy Cherotich who worked at the Bomet County Government Legal Department. It is her view that proper service was effected. She has further deposed that on **30 April 2015**, the same Mercy Cherotich was served with a mention notice. She has averred that by the time she was served, Mercy was an employee of the County Government of Bomet. She has averred that it cannot be true when the defendant states that Mercy was not in employment at the time of service. She has further deposed that the defendants have no good defence. She has deposed that Mr. Erick Kirui, the deponent of the supporting affidavit, was aware that surveyors including those from the County Government had assessed her land and recommended compensation for the reason that the bridge and road were developed on her land.

I took in the submissions of Mr. Koech and Mr. Rono for the applicants and respondent. Mr. Koech submitted that Mercy Cherotich did not serve the notices to the in house lawyer of the County Government thus occasioning the default judgment. He also submitted that leave was not sought before entering default judgment against the County Government pursuant to **Order 10 Rule 8**. Mr. Rono on the other hand was of the view that the ex-parte judgment was properly entered. He submitted that it cannot

be claimed that Mercy was served after she left employment and the claim that she did not hand over the documents is not in the affidavit.

I have considered the matter. First, I wish to clarify that there was no entry of interlocutory judgment in this matter, and **Order 10 rule 8**, which requires an application to be made before interlocutory judgment may be entered against the Government, does not therefore apply. The matter proceeded for hearing on the merits and I do note that the defendants were served with the hearing notice. The hearing notice on behalf of the County Government of Bomet was received on **13 July 2015**, by one Mr. Ngeno, said to be the Secretary Bomet County Law Office. I observe that there is no mention of this in the supporting affidavit to this application.

The main reason given, for not filing defence, is that service was effected upon one Mercy Cherotich whom it is deposed that she had just left employment and a letter is annexed. In the letter, it is said that Mercy Cherotich resigned from service on **12 May 2015**. Assuming that this is the position, I do observe that Mercy Cherotich did receive the summons to enter appearance on **24 February 2015**. She also received a mention notice served on **30 April 2015**. Clearly, at this point in time, she was still in employment. It is not therefore correct that at the time she was served, she had left employment as claimed by Mr. Erick Kirui. Mr. Koech submitted from the bar that Mercy did not hand over these documents to the in house lawyer. I think this is an afterthought as it is nowhere in the supporting affidavit of Mr. Kirui. It has not also been explained why no defence was filed despite a hearing notice being served upon the defendants and being received by one Mr. Ngeno. The defendants have not claimed that these persons had no instructions to receive summons or notices for this case.

This court of course has discretion to either allow or decline the application. In the case of **Shah v Mbogo(1967) EA 116**, Harris J, stated as follows, at page 123, in respect of an application to set aside judgment obtained ex parte.

"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."

I am in agreement with the said dictum, and applying the principles to the facts of this case, I think the defendants have been deliberately dishonest and have aimed to mislead this court by stating that service was effected upon a person who had left employment. I am unable to exercise my discretion in favour of a person who has chosen to be economical with the truth. There was no inadvertence or excusable error, or mistake, that has been furnished to me by the defendants. If there was indeed any, the defendants would have acted promptly once they became aware of the judgment. But what happened ? Mr. Koech himself on the date of taxation convinced Mr. Rono to defer the taxation. He did not mention that he intended to set aside the judgment, which at that point in time he and his clients were very much aware of. I can think of no other reason for seeking to defer the taxation other than wanting to steal a march on Mr. Rono and his client.

It is in my view unfair for a party to be properly served, do absolutely nothing about it; be informed of the matter proceeding, and do absolutely nothing about it; be informed of the judgment and do nothing, then later come to try and return the plaintiff to the starting blocks. An applicant in such instance must really demonstrate special circumstances before successfully setting aside the judgment. In as much as the court must endeavour to hear parties on merits, it must be understood that the sword of justice cuts both ways.

I also doubt whether the defendants have any good defence. The plaintiff did demonstrate that there had been joint surveys done with the defendants and consensus reached that the bridge and road encroached on part of the plaintiff's land. Mr. Kirui in his supporting affidavit has made no mention of these surveys. He has only stated that the land is a road reserve, and even then, no evidence whatsoever has been tendered to demonstrate this. I am of the opinion that without any supporting material, the proposed defence of the defendant is a red herring. Neither have I seen any loss that the public would suffer as the public is using the bridge and road. What the plaintiff has asked for is to be compensated because part of her land was taken away to build the said bridge and road, and she actually does deserve to be

compensated.

The upshot of the above is that I am not persuaded that I should allow this application. It is hereby dismissed with costs. The effect is that the judgment stands and the taxation of the plaintiff's costs may proceed.

It is so ordered.

Dated, Signed and delivered on this 29th day of April, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT:

Mr. Joshua Mutai holding brief for Mr. J.K. Rono for the plaintiff/respondent

No appearance on the part of Mr. Cosmus Koech for the defendants

Court assistant: Mr. Kenei