



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 114 OF 2015

MURIITHI GACHEWA.....1ST PLAINTIFF

JOSEPH KIRAGU MUTHURA.....2ND PLAINTIFF

VERSUS

FRANCIS MWANGI.....)

MURIITHI NGARI.....) DEFENDANTS

SAMUEL MUCHIRI.....)

RULING

This is in respect to the defendants Notice of Motion dated 28th January 2016 seeking the following orders:-

1. *That the interlocutory judgment entered by this Honourable Court on 25th November 2015 be set aside and/or vacated and the defendants be granted leave to enter appearance and file their defence out of time.*
2. *That further proceedings in this matter be stayed pending the hearing and determination of this application.*

The application is grounded on the reasons set out therein and supported by the affidavit of the 1st defendant **FRANCIS MWANGI** and the only issues raised therein is that the defendants were never served with summons to enter appearance and plaint in this matter and that the suit property is very emotive and of sentimental value to the defendants.

The application is opposed by the plaintiffs who, in a replying affidavit sworn by **MURIITHI GACHEWA** the 1st plaintiff herein, it is deponed, inter alia, that the defendants were duly served with summons herein but there is no explanation why they failed to enter appearance. That infact the defendants were seen burning the summons and therefore their failure to enter appearance is deliberate and out of spite. Further, the draft defence filed herein is a mere denial that raises no triable issues.

The plaintiff had filed this suit on 6th October 2015 seeking for the eviction of the defendants from land parcel No. MUTIRA/KIRUNDA/1902 and MUTIRA/KIRUNDA/1903 and for the Officer Commanding Kerugoya Police Station to provide security during the exercise.

According to the affidavit of service filed by **JACK MURIITHI STANLEY** a Process server of this Court, the three defendants were all served with the plaint and summons to enter appearance on 2nd

October 2015. That affidavit of service is annexed to the replying affidavit of the 1st plaintiff (annexture **KG 1**).

When counsel appeared before me on 14th March 2016 for purposes of arguing the application, it was agreed that the Court relies on the rival affidavits of the parties herein.

I have considered the application and the rival affidavits filed by the parties.

This is an application to set aside an interlocutory judgment entered against the defendants on 25th November 2015. I have looked at the Court record and although there was an application made on 25th November 2015 by counsel for the plaintiff to have judgment entered against the defendants for failing to enter appearance or file defence within the prescribed time and although the Court file bears a stamp for the entry of such judgment, the same is not signed by the Deputy Registrar and therefore, no interlocutory judgment was infact entered against the defendants. There is therefore no interlocutory judgment to set aside.

Having said so, it is clear from the plaint herein that the plaintiffs claim was for eviction of the defendants from parcels of land No. MUTIRA/KIRUNDA/1902 and MUTIRA/KIRUNDA/1903. That is not a liquidated claim. **Order 10 of the Civil Procedure Rules** which empowers Deputy Registrars to enter interlocutory judgments in cases where the defendant fails to enter appearance or file defence only applies where the plaintiff has made a liquidated demand or a liquidated demand together with some other claim or where the claim is for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. There is a practice that has almost acquired the force of law whereby parties and counsel apply for interlocutory judgment even in cases that do not strictly come within the ambit of **Order 10 of the Civil Procedure Rules**. While that practice obviously causes no prejudice to the defendants, it is a practice that strictly has no juridical basis. What counsel and parties should do in such cases where a claim does not fall within the provisions of **Order 10 of the Civil Procedure Rules** should be to simply apply for the case to be listed for formal proof before the Judge or magistrate.

What I have found rather strange in this case is that although the plaint herein was filed on 6th October 2015, the defendants were served with the plaint and summons to enter appearance on 2nd October 2015 (some four days before the plaint was actually filed in Court). In paragraph two of his affidavit of service dated 9th November 2015 and which is annexed to the replying affidavit of the 1st plaintiff, the process server **JACK MURIITHI STANLEY** has deponed as follows:-

“That on 2nd October 2015 having been instructed by ANN THUNGU & CO. Advocates at MUGA Village in Kirinyaga County at around 2.30 p.m., I served copies of summons to enter appearance and plaint dated 5th October 2015 upon FRANCIS MWANGI MURIITHI NGARI, SAMUEL MUCHIRI by tendering a copy of the documents earlier mentioned to each of them”

Order 5 of the Civil Procedure Rules which deals with issuance and service of summons provides under **Sub-rule 1(1)** as follows:-

“Where a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein” emphasis added

And **Order 3 Rule 1(1) of the Civil Procedure Rules** provides how a suit shall be commenced. It states:-

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed” emphasis added

While this Court is satisfied that the defendants were infact served with summons in this case, those summons could not have been properly issued and served on 2nd October 2015 when the suit was only filed on 6th October 2015. If there was any typographical error on the affidavit of service, it has not been explained. The long and short of the above is that whatever summons were served on the defendants on

2nd October 2015 could not have been summons as known in law and the same could not be the basis upon which any interlocutory judgment could be entered against the defendants in this case.

This Court's power to set aside an ex-parte judgment is wide with the main concern being to do justice to the parties. Even where the judgment is regular, the Court will still set it aside if satisfied that there is a defence on the merits which raises triable issues – **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 74** and also **PHILIP CHEMWOLO AND MUMIAS SUGAR CO. VS AUGUSTINE KUBENDE 1982 – 1988 K.A.R.**

In a situation such as this where the summons were served even before the plaint was filed in Court, then the judgment becomes an irregular one which this Court must set aside as a matter of right – ***EX-DEBITO JUSTITIAE.***

In the circumstances, the defendants' application dated 28th January 2016 is allowed with the result that the interlocutory judgment allegedly entered by this Honourable Court on 25th November 2015 is set aside. Each party to bear their own costs.

B.N. OLAO

JUDGE

27TH APRIL, 2016

Ruling delivered in open Court this 27th day of April, 2016

Mr. Macharia for Mr. Kagio for Defendants present

Mr. Ngangah for Ms Thungu for Plaintiffs present.

B.N. OLAO

JUDGE

27TH APRIL, 2016