



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ELC SUIT NO. 277 OF 2012
NYANGERI OBIYE THOMAS.....PLAINTIFF
VERSUS
YUNUKE SAKAGWA..... 1ST DEFENDANT
LAMECK NYOKA SAKAGWA.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants on 16th July 2012 seeking general damages and a permanent injunction to restrain the defendants from trespassing on land parcel known as Central Kitutu/Mwabundusi/1052(hereinafter referred to as “the suit property”). The defendants were served with summons to enter appearance but failed to enter appearance within the prescribed time. Interlocutory judgment in default of appearance was entered against defendants on 13th February 2013. The suit was thereafter set down for formal proof on 3rd June 2013 when the plaintiff gave evidence and closed his case. Judgment was subsequently entered in the plaintiff's favour on 29th November 2013.

The defendants have now moved the court by way of Notice of Motion application dated 19th December 2014 seeking to set aside the interlocutory and ex parte judgements that were entered against the defendants on 13th February, 2013 and 29th November 2013 respectively and all consequential orders. The defendants have also sought leave to enter appearance and file a statement of defence.

The defendants' application is premised on grounds set out on the face thereof and on the affidavit sworn by the 1st defendant on 19th December 2014. In the said affidavit, the 1st defendant contended that she was never served with summons to enter appearance, plead and verify affidavit and that she became aware of this suit on 20th November 2014 when she was arrested through orders issued by this court.

The 1st defendant stated that the affidavits of service that had been presented to court by the plaintiff alleging that service had been effected upon her were full of falsehoods. She denied that her name is Yunuke Sakagwa as alleged in the pleadings. The 1st defendant stated that her name is Yunuke Nyakobo Daniel as evidenced by a copy of her identity card annexed to her affidavit. The 1st defendant stated that she stands to suffer loss and damage if her application is denied since she would have been condemned unheard. She averred that she has a defence to the plaintiff's claim which raises triable issues and that she should be given an opportunity to put the same forward.

The plaintiff opposed the application through replying affidavit sworn on 21st January 2014 in which he contended that the defendants were duly served with summons as evidenced by the affidavits of service

filed in court. The plaintiff contended that he visited the defendants in December 2012 for the purposes of establishing their position with regard to this suit and the defendants claimed that the suit property did not belong to him but to one, Jones Matara Nyankune (deceased).

The plaintiff exhibited an affidavit allegedly sworn on 21st January 2015 by Daniel Sakagwa Simion, the 1st defendant's husband, in which he stated that the suit property rightfully belonged to the plaintiff who had purchased the same from Jones Matara Nyankune to whom he had earlier on sold the property. The plaintiff contended that the defendants were also served with a notice of entry of judgment and that their application herein is intended solely to delay the course of justice since they have no defence at all to the plaintiff's claim.

When the application came up for hearing on 2nd June 2015, parties agreed to argue the same by way of written submissions. The defendants filed their submissions on 3rd July 2015. The defendants submitted that they had been in occupation of the suit property since 1975 and that it is not clear to them how the plaintiff who is a stranger to the family of Daniel Sakagwa Manyara acquired the suit property without the consent of the 1st defendant and her husband Daniel Sakagwa Manyara who was the registered owner thereof.

The defendants submitted that Daniel Sakagwa Manyara who was the registered owner of the suit property did not sell the same to the plaintiff and that in any event, if there was such sale the same lacked consent from the 1st defendant as required by law. The defendants cited the provisions of Article 159(2) (a) of the Constitution and submitted that they should be given their day in court before being condemned. The defendants submitted further that the 1st defendant was not served with summons since the affidavits of service on record indicates that service was effected upon one, Yunuke Sakagwa who is a different person from the 1st defendant whose name is Yunuke Nyakobo Daniel.

In response, the plaintiff filed his submissions on 7th July 2015. The plaintiff reiterated that the defendants were raising the issue of service with an intention of delaying the course of justice in this suit. The plaintiff submitted that the defendants were served with the summons and copies of the plaint as required. The plaintiff contended that the constitutional imperative requiring one to be heard before being condemned should not be abused. The plaintiff submitted that the defendants are out to waste precious judicial time and expose him to expenses which they will never afford to compensate. The plaintiff submitted that should the court be inclined to allow the application, the defendants should be ordered to deposit a sum of Kshs 150,000/- as security for costs within 15 days and also to keep off the suit property until the hearing and determination of this suit. The plaintiff also urged the court to award him thrown away costs in the sum of Kshs 15,000/- payable within 15 days of the court ruling.

I have considered the defendants' application and the opposition to it mounted by the plaintiff. The law is settled that the court has unfettered discretion when considering an application seeking to set aside an ex parte judgement. In exercising its discretion, the court's main concern is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not to assist a person who has deliberately sought either by evasion or otherwise to obstruct or delay the course of justice. See, **Shah vs. Mbogo (1967) EA 116** and **Patel vs. E. A. Cargo Handling Services (1974) EA 75.**

As I have stated above, this suit was filed on 16th July 2012. According to an affidavit of service sworn by James Moracha Ntabo on 21st January 2013, the 1st and 2nd defendants were served with summons, plaint and verifying affidavit on 23rd and 24th August 2012 respectively. The 1st defendant has disputed the said service and has contended that the if any service was effected, the same was effected upon a different person by the name Yunuke Sakagwa and not upon her since her name is Yunuke Nyakobo Daniel. It has not been disputed that the 1st defendant's name is Yunuke Nyakobo Daniel and not Yunuke Sakagwa. Service upon Yunuke Sakagwa cannot be deemed as service upon Yunuke Nyakobo Daniel.

In light of the 1st defendant's forgoing contentions regarding service, I am of the view that there was no

proper service of the summons and plaint upon the 1st defendant. The law is settled that where there is no proper service of summons to enter appearance, the court has no discretion in setting aside ex parte judgment entered in default of appearance. In the case of **Remco Ltd V Mistry Jadva Parbay & Co. & 2 Others, (2002)1EA 233**, the court stated as follows in this regard:-

" I begin by stating the applicable law as I understand it. First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside ex debito justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules."

The defendants had also contended that they have a defence to the plaintiff's claim which raises triable issues. The 1st defendant contended that she is the wife of Daniel Sakagwa Simion who is said to have sold the suit property to one, Jones Matara Nyankune(deceased) who in turn is said to have sold the same to the plaintiff. The 1st defendant contended that her consent was not sought and obtained for the said transaction contrary to the requirements of the law. As I have stated above, I am not satisfied that the 1st defendant was properly served with summons to enter appearance. I am also persuaded that the 1st defendant has an arguable defence to the plaintiff's claim. In her affidavit in support of the application herein, the 1st defendant stated that she swore the said affidavit on her own behalf and on behalf of the 2nd defendant. The 1st defendant however did not state whether the 2nd defendant was served with the summons to enter appearance or not. I have however noted from the plaint that the plaintiff's claim against the 1st defendant is closely intertwined with his claim against the 2nd defendant and that judgment sought to be set aside was entered against the 1st and 2nd defendants jointly and severally.

Having come to the conclusion that the 1st defendant was not properly served with summons to enter appearance and that she has a reasonable defence to the plaintiff's claim, I have no discretion in the matter but to set aside the interlocutory and final judgments that were entered herein on 13th February, 2013 and 29th November, 2013 respectively as against the 1st defendant. With regard to the 2nd defendant, I see no useful purpose that would be served by not setting aside the foregoing judgments also as against him having regard to the nature of the plaintiff's claim. I am inclined to exercise my discretion in his favour. The plaintiff has not indicated that he will suffer prejudice which cannot be compensated by costs if the application herein is allowed also with respect to the 2nd defendant.

The upshot of the foregoing is that, I find the application dated 19th December 2014 well merited. The same is allowed in terms of prayers 4 and 5 thereof. The defendants shall file and serve their statement of defence within 14 days from the date hereof. The plaintiff shall have the costs of the application assessed at Ksh. 10,000/= to be paid by the 2nd defendant within 14 days from the date hereof failure to which the plaintiff shall be at liberty to execute for the recovery thereof.

Signed at Nairobi this.....day of.....2016.

S.OKONG'O

JUDGE

Delivered and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**