



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 82 OF 2011

FREDRICK MBURU NDEGWA.....PLAINTIFF

VERSUS

GEOFFREY KINYA WARUHIU.....DEFENDANT

RULING

The Defendant filed an application dated **6th August 2013** and sought orders that the Court be pleased to set aside the judgment dated **7th March 2013** and the consequent orders made therein. Secondly that he be granted leave to enter appearance and file defence out of time. The application is premised on grounds that an interlocutory judgment was entered and in favour of the Plaintiff and the matter was set down for formal proof. However, the Plaintiff failed to notify neither him nor his advocates of when the matter came up for formal proof contrary to the provisions of the law. The Defendant avers that he stands to suffer prejudice as the Plaintiff is in the process of executing the court orders.

The application was supported by an affidavit by the Defendant wherein he deposed that on **23rd April 2013**, he received a copy of a decree and penal notice which he presented to his advocates on record. Upon being served he learnt that an interlocutory judgment was entered against him, formal proof conducted in his absence on **24th January 2013** and final judgment entered on **7th March 2013**. It was his deposition that he was not served with the hearing notice for formal proof contrary to the laid down procedure. The Defendant deposed that the Plaintiff's application dated **28th February 2011** seeking injunction orders was dismissed with costs on **26th May 2012**. Subsequently, that he was advised by his advocates that they would keep him informed of the developments.

The Defendant admits to having been served with summons to enter appearance but deposed that he did not dwell on it since he had instructed his advocates to act on his behalf and that since his advocates had filed a Notice of Appointment, they were the ones who ought to have been served. Further that he neither received a notice of entry of judgment nor the hearing notice for the formal proof. Additionally, that the summons was issued on **11th September 2012** whereas the hearing notice issued on **19th September 2012**, before the expiry of the time within which to exchange pleadings. The Defendant referred to the draft statement of defence annexed to the affidavit and deposed that he has a good defence which raises triable issues. It was his deposition that the Plaintiff will not suffer prejudice if the orders sought are granted.

The application was opposed by the Plaintiff who swore a Replying Affidavit on **8th October 2013**. He deposed that the application was an afterthought thus an abuse of the court process for reasons that the Defendant was personally served with the decree on **24th April 2013**. Further, that indeed

summons was issued on **11th September 2012** and served upon the Defendant on **15th September 2012** but that the interlocutory judgment was requested on **9th October 2012**, after the expiry of **21 days** from the date of service. The Plaintiff deposed that the Defendant's advocates were invited for fixing of the hearing date on **23rd May 2012**, but failed to attend and thus a hearing notice was served upon them on **31st May 2012**, before the entry of judgment. The Plaintiff referred the Court to the affidavits of service annexed to his affidavit reiterating that the Defendant was personally notified of the entry of judgment.

The application was canvassed by way of written submissions. On behalf of the Defendant, counsel submitted that the interlocutory judgment and formal proof hearing was conducted in the absence of the Defendant thus denying him a fair hearing. Counsel further submitted that service was not properly effected and therefore a ground for setting aside ex-parte judgment. It was submitted that the affidavit of service on which the interlocutory judgment was entered is casual and contradictory thus depicting a fundamental lapse in respect to the law and parameters of proper service of court process. On setting aside ex-parte judgments, counsel relied on the case of **Gandhi Brothers v H.K. Njage t/a H.K Enterprises HCCC No. 1330 of 2001** where Ringera J. (as he then was) held that:

If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is irregular one which the court must set aside ex-debito justitiae (as a matter of right) on the application by the Defendant and 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.

If the interlocutory judgment and final judgment herein are regular the court has unfettered discretion to set aside such judgment and any consequential decree or order.

It was also submitted that the Defendant has a meritorious defence which should be canvassed on merit. Additionally, that the court need not be satisfied that the Defendant's defence would succeed but that the defence has an arguable case which carries some degree of conviction.

Submissions were filed on behalf of the Plaintiff on **10th October 2014**. Counsel gave a chronology of events submitting that the Defendant's application was intended to stall the contempt of court proceedings against the Defendant. Further that there is an inexcusable delay in bringing this application with no plausible reason offered as to failure for filing a defence on time. In respect to the issue of service, counsel submitted that there being no defence, service of the hearing notice for formal proof was not mandatory but that service of the final judgment was effected. Counsel also submitted on the issue of a meritorious defence that the same was equally belated, the Defendant having had time to file his defence.

The Defendant seeks to have the Judgment entered by this Court on **7th March 2013** following a hearing on formal proof set aside and that he be granted leave to file his defence out of time. The Defendant's sole ground for the application is that he was not served with the hearing notice for formal proof and therefore was not aware of that the same has been set down for hearing. On perusal of the court record, it is evident that the Defendant was served with a summons to enter appearance alongside the Plaintiff and Notice of Motion application. The Defendant entered appearance and filed a Replying Affidavit to the application. The Plaintiff's application seeking temporary orders of injunction was heard and dismissed by the Court on **16th May 2012** and it appears that the Defendant went to sleep as he failed to file a Defence.

In his supporting affidavit, the Defendant admits having been served with summons to enter appearance but that he did not think much of it as he had advocates on record whom he had instructed. This deposition, in my view displays lack of seriousness on court processes by the Defendant. Courts have held that a suit belongs to a litigant and not his or her advocate and such litigant has the duty to pursue the prosecution of his or her case. See the case of **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397/2002.**

There is no explanation offered by the Defendant as to why a Defence was not filed at all. The record also shows that the Defendant's advocates were invited to the registry for purposes of taking a

convenient hearing date which they failed to honor, and were subsequently served with a hearing notice before the interlocutory judgment was entered. The said notices have a receiving stamp of the Defendant's firm of advocates which therefore demonstrates service on these occasions was properly effected. No action by the Defendant despite service of the notices further denotes disinterest on the part of the Defendant.

Undisputedly, however the Defendant was not served with the hearing notice for formal proof. The **Civil Procedure Rules 2010** unlike the repealed rules does not expressly state that service of a hearing notice for formal proof shall be served upon a Defendant. **Order 10 Rule 6** of the Civil Procedure Rules empowers the Plaintiff to set down the suit for assessment by the court of the damages or value of the goods and damages as the case may be where an interlocutory judgment is entered against the Defendants. There being no express provision, in respect to service, it is my finding that the entry of the final judgment was not irregular and therefore setting aside of the Judgment will be as a matter of discretion. **Order 10 Rule 11 of the Civil Procedure Rules** gives this court discretion to set aside or vary such judgment and any consequential decree or order upon such terms as are just.

I have duly considered the draft defence annexed to the Defendant's supporting affidavit and find that it does raise triable issues. The Court will therefore be inclined to set aside the Judgment entered on 7th March 2013 and grant the Defendant leave of 14 days within which to file a Defence. However, due to the laxity on the part of the Defendant, it is my finding that the Plaintiff deserves thrown away costs for this application and consequently exercise my discretion in assessing the same at **Kshs. 20,000/-**. Therefore, the Court directs that the Defendant do pay these costs within 14 days of the date of this ruling or the Judgment of this court delivered on 7th March 2013 shall stand.

Consequently, the Court allows the Defendants Notice of Motion dated 6th August 2013 subject to payment of thrown-away costs as directed.

Dated, Signed and Delivered this **21st** day of **May** 2015

It is so ordered.

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff

Mr Murage for the Defendants

Hilda: Court Clerk

Court:

Ruling read in open Court in the presence of the above counsel and absence of the Plaintiff/Respondent.

L.GACHERU

JUDGE