



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 267 OF 2012

Formerly HCC 90/2006

JOSEPHINE CHEPKURGAT RUTO & ANOTHER.....PLAINTIFFS

VS

WILLIAM K. MELI.....DEFENDANT

(Application seeking to set aside ex-parte judgment; defendant alleging that he was not served with court papers; facts showing otherwise; no defense demonstrated by applicant; application dismissed with costs; judgment affirmed).

RULING

This is an application by the defendant, filed pursuant to the provisions of Order 9 rule 7, Order 45 Rule 1, and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, CAP 21. The main prayer is for an order that the judgment delivered on 25 November 2013 be reviewed. The grounds upon which the application is based are as follows :-

- (a) That the defendant was not served with the suit papers.
- (b) That the defendant was not served with the court order on 1/2/2013 well after lapse of the time indicated in the court order.
- (c) That there is a suit regarding the same parcel of land being Eldoret HCCC No. 49 of 2003.
- (d) That the defendant will suffer irreparable damage if the application is not allowed.

The application is supported by the affidavit of the defendant and is opposed by the plaintiff.

Probably a little background will shed light to this application.

This suit was filed on 31 July 2006. The plaintiffs are administrators of the estate of Fredrick Kibet Ruto (deceased). The case of the plaintiffs was that the deceased is the owner of the land parcel Pioneer/Ngeria Block 1 (EATEC)/106 having purchased it in April 2003 from Lonrho Agribusiness (E.A) Limited for a consideration of Kshs. 748,149/=. The plaintiffs averred that after the demise of the deceased, the defendant entered the land and occupied it. They asked that he be evicted from the land.

There is an affidavit of service showing that on 4 November 2006, the defendant was served with summons to enter appearance. However, no appearance and no defence was filed by the defendant.

The matter was fixed for hearing on 11 November 2011 but there is no record that the file was attended to on that day. It was later fixed for 15 February 2012 but the matter did not proceed and the court gave a date for 2 May 2012 and ordered that the defendant be served with a hearing notice. The matter did not proceed on 2 May 2012 and was deferred to 11 July 2012 again with an order that the defendant be served. On 11 July 2012, the matter could not be reached and was fixed for hearing on 21 November 2012. On 14 May 2013, another date for 7 November 2013 was given again with an order that the defendant be served. On 7 November 2013, only the plaintiff attended and the gave evidence. Before allowing the plaintiff to proceed, I verified that the defendant had been duly served. I gave judgment on 21 November 2013 and held for the plaintiff. I ordered the defendant to vacate the land within 7 days of the judgment and further issued an order of permanent injunction against him. I also awarded the plaintiff general damages for trespass in the sum of Kshs. 200,000/=.

In this application, the defendant in his supporting affidavit and further affidavit averred that he was never served with any court papers. He also contended that he was not properly served with the judgment as it was dropped in his compound on 1 December 2013. He further deponed that the suit Eldoret HCCC No. 49 still subsists.

The plaintiff opposed the application through the supporting affidavit of the second plaintiff. It was contended inter alia that the application is defective as it is not alleged that there is an error apparent on the face of the record. It was also averred that the defendant has not claimed ownership of the suit land and that process was properly effected.

I have considered the application and the submissions of Mr. Aseso for the applicant and Mrs. Khayo for the respondents. The applicant has brought this application inter alia under the provisions of Order 45 Rule 1 which deals with review. Order 45 provides as follows:

REVIEW

Rule 1. (1) any person considering himself grieved-

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
or*

(b) by a decree or order from which no appeal is hereby allowed,

and from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay

In my view, this cannot be said to be an application for review for the issues raised do not fall within the purview of order 45 Rule 1.

What the defendant wants is to set aside the judgment and to probably have the matter heard afresh inter partes. I will deal with the application as such. It is contended that the defendant was never served with court papers. I am not convinced. I have seen the affidavit sworn by Justus Orondo on 7 November 2006 showing that the defendant was served with summons. I have also seen several affidavits on record showing that the defendant was served with hearing notices. These affidavits are very elaborate on how the defendant was served and I have no reason to doubt them. I am of the view that the defendant was duly served with summons and hearing notices but chose not to appear. This judgment cannot therefore be set aside ex-debito justitiae.

I have discretion to set aside the judgment if I am convinced that it would be in the interests of justice to do so. I would probably have been inclined to exercise my discretion in favour of the defendant if the defendant had demonstrated that he has a good defence. But there is no draft defence annexed to the

application and I am unable to tell whether the defendant has any good defence that deserves to be heard on merits. The evidence adduced clearly showed that the deceased, of whom the plaintiffs are administrators, had title to the suit land. All requisite procedures leading up to the title were followed. The title of the plaintiffs is therefore a good title. The defendant has alluded to another suit, being Eldoret HCCC No. 49 of 2003. The pleadings to that suit were not annexed, but I took the trouble to look up at the file in that suit. It is a case where Lonrho Agribusiness Ltd has sued the defendant. The case of Lonrho in that suit is that the defendant failed to pay for land (presumably the suit land herein), but moved in without any colour of right. Lonrho wanted the defendant declared a trespasser and that he be evicted from the land. That matter last came before court on 14 February 2007 when counsel for Lonrho, stated that a title deed has been issued to the deceased herein and they asked that the matter be adjourned. Nothing has happened to the suit since. It cannot be said that the presence of that suit in any way affects this suit. In fact, it will be seen that the former suit has been overtaken by events. Probably Lonrho did not see the point of pursuing the matter, since they no longer had an interest in the same, and left it for the new owner (the deceased), to pursue the defendant. The plaintiff's herein, as administrators of the deceased, have done exactly that, through this suit. Given these facts, I do not see what kind of defence the defendant has. I am not therefore convinced that it will be in the interests of justice to set aside this judgment.

On the whole, I am not persuaded that the defendant is desirous of the orders sought. I therefore dismiss this application with costs. For the record, the judgement of 21 November 2013 stands in full. Inter alia, the defendant must vacate the suit land forthwith or else the plaintiffs are at liberty to apply for his forceful eviction at the defendant's own cost.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. Aseso present for the defendant/applicant

Mr. Yego holding for M/s Nyairo for plaintiff/respondents