



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 553 OF 2012

FORMERLY HCC 152 OF 2009

PHILIP KIBIRECH NG'ETICH.....PLANTIFF

VS

PETER OWICH MANGULA & OTHERS.....DEFENDANT

(Application seeking to set aside ex-parte judgment; parallel application seeking eviction of defendants from suit land; Defendants claiming not to have been served with summons or having been aware of the proceedings of the case; record shows the contrary; no good reason given to set aside judgment; judgment affirmed; plaintiff entitled to benefit of judgment; application for eviction allowed)

RULING

This ruling is in respect to two applications. One is dated 27 November 2013 filed by the defendants and the other is dated 7 January 2014 filed by the plaintiff. In the application dated 27 November 2013, the defendants want the judgment herein set aside and they be allowed to file their defence to this suit and the suit to be heard afresh. In the application dated 7 January 2014, the plaintiff wants an order of eviction.

A little background will shed light to why these two applications have been filed.

This suit was instituted through a plaint filed on 4 September 2009 against the 17 defendants. In his pleadings the plaintiff asserted that he is the sole owner of the land parcel L.R No. 12161/17 situated North of Muhoroni Township, Nandi District measuring 19.99 hectares. It was pleaded that sometimes in the month of July 2009, the plaintiff found the defendants in his land and despite asking them to vacate, they refused to do so. In the suit, the plaintiff sought orders of eviction, a permanent injunction to restrain the defendants from any further interference with the suit land, mesne profits and costs. The defendants entered appearance on 13 October 2009 through the law firm of M/s Ken Omollo & Company Advocates. No defence was however filed. On 24 November 2010, a Notice of Change of Advocates was filed and the firm of M/s Z.K. Yego Law Offices, came on record in place of the law firm of M/s Ken Omollo & Company Advocates. They did not file any defence. On 28 March 2011, the law firm of M/s Z.K. Yego Law Offices filed an application to have them declared as having ceased acting for the defendants. That application was allowed on 29 June 2011 and the suit was stood over generally. Later, a date for 26 October 2011 was taken, but the matter did not proceed as it could not be reached. There is no record whether the defendants were present in court. The matter then came up again on 21 March 2011 for hearing. The record is also not clear whether all defendants were present in court, but one John Mursi was present and he stated that it is the first time the matter was coming up before court. The court then recorded as follows :-

"This matter cannot be reached. It is fixed for hearing on 6/6/12. The defendant who has attended is

informed that if he does not file a defence the matter will proceed to hearing on formal proof."

On 6 June 2012, the 3rd and 4th defendants were present in court. They asked for time to engage an advocate. The matter was then stood over to 3 October 2012. It seems as if the matter never came up on the 3 October 2012. It came up before me on 10 April 2013 when I gave 8 October 2013 for hearing. I directed that all defendants be served. On 8 October 2013, only the plaintiff appeared. None of the defendants was present. There was an affidavit of service on record showing that all defendants had been served and being satisfied as to service, I allowed the plaintiff to proceed. The plaintiff gave evidence that he was the sole proprietor of the suit land and tendered his certificate of lease as an exhibit. I delivered judgment on 12 November 2013 and held for the plaintiff. I made an order that the defendants vacate the suit land within 14 days or else the plaintiff be at liberty to apply for eviction. That is why in the application dated 7 January 2014, the plaintiff wants an order that he be allowed to evict the defendants.

In the application dated 27 November 2013, filed through the law firm of M/s Singoei & Murkomen, the defendants want the judgement set aside inter alia on the grounds that they had instructed M/s Z.K. Yego Advocates but the said firm ceased acting without giving information or notice to the defendants. It is also stated that the said firm failed to file a Statement of Defence on their behalf which made the matter proceed undefended. It is averred that mistakes of counsel should not be visited upon the litigants. The supporting affidavit is sworn by Mrs. Niuster J. Bor counsel for the defendants. In addition to the grounds that I have alluded to above, Mrs. Bor has deponed that the defendants were not served in person until judgement was entered. She has also deponed that the defendants and their ancestors have lived on the suit land since time immemorial. She has further averred that the defendants have a merited defence. The defendant filed a replying affidavit in which he opposed the application to set aside the judgment. I allowed the defendants leave to file a supplementary affidavit and 7 affidavits were filed by seven of the defendants. They have all deponed that the suit land was formerly owned by the Agriculture Development Corporation (ADC) and that their parents used to work for ADC and reside on the suit land. The land they now occupy was that that their parents occupied while employees of ADC. They have averred that their possession has never been challenged until this suit was filed. They have averred that they have a case for adverse possession.

Mrs. Bor for the defendants urged me to set aside the judgement whereas Mr. Miyienda holding brief for Mr. Orina for the plaintiff, urged me to dismiss the application seeking to set aside the judgment and instead allow the application of 7 January 2014, seeking orders of eviction. Mrs. Bor argued that the applicants never received summons save for the judgement and that is the time they became aware of the suit. Mrs. Bor also argued that the defendants were never served with hearing notices. She contended that when the firm of Z.K Yego Advocates ceased acting, only one defendant John Mursoi was aware. She stated that the said John Mursoi purported to have had authority from the other defendants yet he never did. She also submitted that of the 17 defendants only 7 are on the suit land and that the others are strangers to this suit. Interestingly, despite filing a Notice of Appointment for all defendants, she also submitted that she only acts for these 7 occupants, being the 2nd, 3rd, 4th , 7th, 10th, 14th and 17th defendants. She stated that they have a good defence based on adverse possession.

Mr. Miyienda in his submissions averred that the plaintiff is the registered proprietor of the suit land. He submitted that the defendants have not filed any document to show that they have a right to own the land. He also submitted that the defendants were duly served since the inception of the suit but kept changing counsel. He also averred that no draft defence has been filed. He contended that the defendants cannot be availed of any claim for adverse possession as the suit has been in court since 2009.

I have considered the material in support and in opposition to the application and the submissions of counsel. The defendants want to set aside the judgment inter alia on grounds that they were never served with summons and hearing notices. Further it is contended that the firm of Z.K Yego Advocates never informed them that the said firm had ceased acting for them and that the said firm neglected filing a defence. It is further their case that they have a good defence based on adverse possession.

First, it cannot be true that the defendants were never served with summons. If they were never served with summons, how then could the firm of M/s Ken Omollo & Co Advocates file a Memorandum of

Appearance on their behalf ? Moreover, if they never knew of the existence of this suit, how could the firm of M/s Z.K Yego Advocates come on record in place of M/s Ken Omollo & Co Advocates ? The two firms of advocates must have received instructions before coming on record for the defendants. I am also not convinced about the claims that the law firm of M/s Z.K Yego Advocates failed to inform the defendants that they had ceased acting and that the said firm neglected to file a Statement of Defence. The record shows that some of the defendants, particularly the 4th and 5th defendants, were present in court after the firm of M/s Z.K Yego Advocates had ceased acting for the defendants. I have already set out the record of 21 March 2012, which record shows that the defendants were advised by the judge, that they had not filed any defense, and were duly warned that the matter would proceed if they do not act. At that time, the firm of M/s Z. K Yego Advocates had ceased acting for the defendants. The record does not support the contention that the defendants were never served with summons, or hearing notices, and neither does it support the contention, that the defendants were not aware that the law firm of M/s Z.K Yego Advocates had ceased acting on their behalf. On the contrary, the record does show that the defendants, or at least some of them, used to attend court even after the law firm of M/s Z.K Yego Advocates had ceased acting. There are also affidavits of service on record, which are very detailed, showing that the defendants were served with hearing notices. In my view, the defendants only want to have the firm of Z.K. Yego Advocates used as a scapegoat for their indolence. They were aware of this suit from its inception, and they were also aware that the law firm of M/s Z.K Yego Advocates had ceased acting for them. The judgement herein cannot therefore be set aside *ex debito justitiae*.

I could use my discretion to set aside the judgement if I am convinced that the defendants have a good defence that needs to be ventilated and that it would be in the interests of justice to allow them defend this suit. But no draft defence was ever filed by the defendants so that I can have the opportunity of assessing whether the defendants actually have a good defence. On that score alone, I am entitled to dismiss the application. I can however assume, from the supporting affidavits and the submissions of Mrs. Bor, that the claim of the defendants, is that they are entitled to be on the suit land by dint of the doctrine of adverse possession. They claim that they have been on the suit land for long either by virtue of having been employees of ADC, the previous owners of the suit land, or by virtue of being born on the suit land while their parents were working for ADC. It is trite law that one cannot claim land by way of adverse possession if his relationship is that of employer/employee, for that kind of possession is with the permission of the land owner, and is not adverse to the title of the land owner. ADC transferred the suit land to the plaintiff on 12 January 2000. This suit was filed in the year 2009. Assuming that the possession of the defendants from the year 2000 was adverse to that of the plaintiff, 12 years had not lapsed to the year 2009, when this suit was filed. I do not see how, from the material before me, the defendants can claim to have a good case based on adverse possession.

For the above reasons, I see no merit in the application seeking to set aside the judgment on record. I therefore dismiss the application dated 27 November 2013 with costs to the plaintiff.

The other application seeks an order of eviction. In my judgment of 12 November 2013, I gave the defendants 14 days to vacate the suit land. 14 days have lapsed and yet the defendants have failed to move out of the suit land. I see no reason why I should decline to order them evicted from the suit land. I see merit in the application dated 7 January 2014, and allow it. I permit the plaintiff to seek the services of a court bailiff and proceed to evict the defendants forthwith. I further order the County Police Commissioner, Tinderet, or any police officer working under his/her authority to offer security and any other necessary assistance to the plaintiff so as to ensure that the defendants are evicted from the suit land. In the event that the eviction order is executed, the defendants shall also bear the costs of the eviction exercise. I also grant the plaintiff costs of the application.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:-

Mr. E.O. Miyianda holding brief for Mr. Orina of M/s E.M. Orina for the plaintiff

Mr. B.K. Langat holding brief for Mrs Bor of Ms Singoei & Murkomen for the defendants