



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 813 OF 2013

GEORGE GATHUKI NG'ANG'APLAINTIFF

VERSUS

GASKI INVESTMENT LIMITED..... 1ST DEFENDANT

THE REGISTRAR OF TITLES..... 2ND DEFENDANT

THE CHIEF LANDS REGISTRAR..... 3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th October 2013 in which the 1st Defendant/Applicant seeks for orders setting aside the Interlocutory Judgment entered against it on 16th September 2013 and that the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Gitonga Kithinji Muriuki, sworn on 28th October 2013 in which he averred that he is the Advocate acting for and on behalf of the 1st Defendant/Applicant. He further averred that he received instructions to act for the 1st Defendant/Applicant on 9th August 2013 after which he immediately proceeded to court to get all the pleadings herein. He further averred that he was directed by the court to write to the Registrar which he did and was given copies of the pleadings before court on 12th August 2013. He further averred that on the same day he filed his Notice of Appointment of Advocates which was served on the same day to the Plaintiff's Advocates. He further averred that at the time of filing the Notice of Appointment and at the time of serving by substituted service on 8th August 2013, there was no Summons issued by the court. He also stated that to his surprise and disappointment, the Plaintiff served his firm with a Notice of Entry of Judgment on 3rd October 2013 upon which he immediately wrote to the Registrar protesting the entry of judgment. He further stated that the Registrar directed for the 1st Defendant/Applicant to file a formal Application to set aside which is the present Application.

The Application is not opposed.

The guiding legal provision in this matter is **Order 10 Rule 11** which provides as follows:

“Where judgment has been entered under this Order the court may set aside or vary such

judgment and any consequential decree or order upon such terms as are just.”

What terms are just in this case? It would appear to me that this matter revolves around my determination as to whether or not there was proper service of court process, particularly the Summons to Enter Appearance, upon the 1st Defendant. It is the contention of the 1st Defendant/Applicant that the Notice of Appointment of its Advocates was filed and served on 12th August 2013 and the Summons to Enter Appearance issued 4 days later on 16th August 2013, was never served upon the Advocates acting for the 1st Defendant/Applicant. With this scenario, the 1st Defendant/Applicant argues that Interlocutory Judgment should therefore not have been entered against it.

Order 5 Rule 8(2) provides as follows:

“A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

After careful perusal of the court record, I have been able to ascertain that the 1st Defendant/Applicant’s Advocates, Gitonga Muriuki & Co., were never served with the Summons to Enter Appearance after the same were issued on 16th August 2013 yet they had filed their Notice of Appointment 4 days earlier on 12th August 2013. Accordingly, Interlocutory Judgment should not have been entered against the 1st Defendant/Applicant. In light of this background, I hereby set aside the Interlocutory Judgment entered on 16th September 2013. I therefore hereby allow this Application with costs to the 1st Defendant/Applicant.

SIGNED AND DELIVERED AT NAIROBI THIS 27TH

DAY OF JUNE, 2014.

MARY M. GITUMBI

JUDGE