Mavuti v Mavuti & another (Environment & Land Case 64 of 2018)
[2024] KEELC 6186 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6186 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE 64 OF 2018

TW MURIGI, J

SEPTEMBER 18, 2024

BETWEEN

KALUNZU MAVUTI ..... PLAINTIFF

AND

MUNYOKI MAVUTI ..... 1ST DEFENDANT

MUTUKU MUTINDA ..... 2ND DEFENDANT

RULING

1. Before me for determination is the Notice Motion dated 6th October 2017 brought under Sections 3 and 3A of the *Civil Procedure Act*, Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, in which the Applicants seek the following orders:-

    i. Spent.

    ii. Spent.

    iii. Spent.

    iv. That the *ex parte* judgment entered herein on 22nd September 2017 against the Defendants/ Applicants herein be set aside and the Defendants/Applicants be granted a chance to ventilate their defence on merit.

    v. That the proposed defence attached hereto be deemed duly filed and served.

    vi. That the application be served on the Plaintiff/Respondent and heard inter parties on such date and time as this Honourable court may direct.

    vii. That the costs of this application be provided for.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Munyoki Mavuti sworn on his behalf and on behalf of the 2nd Defendant on even date.

The Applicant's Case

3. It is the Applicants case that they were not aware of the present suit as they were never served with summons to enter appearance and plaint. The Applicants contended that their defence raises triable issues which should be heard on merit. They further contended that they will suffer irreparable loss if the orders sought are not granted.

The Respondent's Case

4. The Respondent filed a replying affidavit sworn on 12th February 2018 in opposition to the application.

5. He deposed that the Defendants are his brothers and have all along been aware of this suit since they were served with the summons to enter appearance way back in the year 2006. He averred that he is the exclusive proprietor of the suit property. He contended that the application is devoid of merit, full of falsehoods and ought to be dismissed with costs.

6. The application was canvassed by way of written submissions.

The Defendants/applicants Submissions

7. The Defendants filed their submissions dated 25th March 2024.

8. On their behalf, Counsel outlined the following issues for the court's determination:-

    a. Whether the court has legal mandate to grant the prayers sought.

    b. Whether the circumstances of the case give justifiable cause for the court to exercise discretion to grant the prayers sought.

    c. Whether the Applicants are indolent and have abused the court by delaying this matter intentionally.

9. Counsel submitted that Sections 1A, 1B and 3A of the *Civil Procedure Act* confers powers upon the court to make orders that are necessary for the ends of justice. Counsel submitted that the Defendants will lose their liberty and property if the orders sought are not granted.

10. Counsel further submitted that the Applicants have given a reasonable explanation as to why they did not attend the court for the hearing of the case. Counsel argued that the Applicants failure to attend court was not deliberate or out of disinterest in pursuing the matter but was due to a breakdown in communication with their Advocate on record. It was submitted that the Applicants were not in contact with their Advocate prior to the hearing date.

11. It was further submitted that the Applicants risk losing their property and liberty if the orders sought are not granted.

12. Counsel further submitted that the Applicants have not been indolent nor abused the court process as they only became aware of the matter after they were served with an application citing them for contempt flowing from the judgment delivered on 22nd September 2017.

13. Concluding his submissions, Counsel urged the court to allow the application as prayed.

14. None of the authorities cited by Counsel were availed to the court for perusal.

The Respondent's Submissions

15. The Respondent filed his submissions on 8th July 2022.

16. On his behalf, Counsel identified the following issues for the court's determination:-

    a. Whether the application is merited?

    b. Whether the Applicants defence raises triable issues?

17. As regards the first issue, Counsel submitted that the impugned *ex parte* judgment was entered regularly as the Defendants were served with the summons to enter appearance together with the plaint.

18. Counsel further submitted that the Applicants have not demonstrated that they were not served with summons to enter appearance. Counsel argued that the Applicants did not seek to challenge or cross examine the process server who had served the summons to enter appearance. Counsel argued that it is incumbent upon the Applicants to show that it is fair and just to set aside the judgment.

19. To buttress this point Counsel relied on the case of *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd* (1996) eKLR where the court stated as follows:- "To our minds, the onus was on the Respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that service was proper, it is our view and so hold that the *ex parte* judgment was a regular judgment. It would only, if at all be properly vacated on grounds other than non service of summons".

20. Counsel further relied on the case of *Madison Insurance Co. v Samuel Ndemo Makori* (2004) eKLR to submit on the factors governing the exercise of judicial discretion to set aside an *ex parte* judgment.

21. On the second issue, Counsel submitted that the draft defence annexed to the application does not raise any triable issues as it contains mere denials and assertions. To buttress this point, Counsel relied on the case of *Landmark Freight Services Limited v Zakhem International Limited* (2021) eKLR where the court of appeal stated thus:-

> "Where a regular judgment has been entered, the court would not usually set aside the judgment unless it is satisfied that there is a triable issue."

22. Counsel further submitted that the Defendants did not adduce any documentary evidence to controvert the Plaintiff's claim that he is the absolute proprietor of the suit property. Counsel contended that the Defendants were out to deny the Plaintiff from enjoying the fruits of his judgment.

23. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

Analysis And Determination

24. Having considered the application in light of the pleadings and the rival submissions, the issue that arises for determination is whether the court should set aside the *ex parte* judgment delivered on 22nd September2017.

25. Order 10 Rule 11 of the *Civil Procedure Rules* provides that *ex parte* interlocutory judgments in default of appearance or defence may be set aside. It stipulates as follows: -

> "Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or upon such terms as are just."

26. Courts have the discretionary power to set aside *ex parte* judgment with a view of doing justice to the parties.

27. The well established principles of setting aside interlocutory judgment were set out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where the court held that:-

> " There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to feter the wide discretion given to it by the Rules".

28. In the case of *James Kanyita Nderitu & another v Marios Philotas Ghika & another* (2016) eKLR, the Court of Appeal set out the criteria to be adopted when exercising jurisdiction to set aside a regular and an irregular ex-parte judgment as follows:

> " In a regular default judgment, the defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default Judgment. Such a defendant is entitled under Order 10 Rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be, the length of time that has elapsed since the default Judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default judgment, among others.
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default judgment is set aside ex-debito justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on it's own motion. In addition, the court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations."

29. In *Shah v Mbogo & another* (1967) E.A 116, the Court of Appeal stated that the discretion to set aside an *ex parte* judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a party who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.

30. This court is called upon to determine whether the Defendants were served with the summons to enter appearance. The Respondents denied having been served with summons to enter appearance and plaint. The record shows that the Plaintiff instituted this suit against the Defendants vide a Plaint dated 28th February 2006 seeking the following orders:-

    a. A declaration that land title No.Kibauni/mutembuku/412 belongs to the Plaintiff and that the Defendants do move out of the said land or forcibly be removed.

b. An order of permanent injunction against the Defendants by themselves, their servants and/or agents from entering, cultivating, alienating, disposing of or in any way interfering with Plot No. Kibauni/mutembuku/412 situated at Kalawa Adjudication Section.

c. Costs and interest.

31. The affidavit of James Kamanda Advocate shows that he served the Defendants/Applicants with the summons to enter appearance and the Plaint on 02/03/2006 at 4pm.The Advocate was accompanied by Plaintiff who pointed out the Defendants for purposes of effecting service.

32. The Defendants having failed to enter appearance or file defence, the Plaintiff requested for interlocutory judgment on 16th January 2013. The matter proceeded for formal proof on 5th February 2015. In its judgment delivered on 22/09/2017, the court noted that the Defendants neither entered appearance nor filed a defence despite being duly served with the summons to enter appearance. The court in its judgment stated as follows in part:-

> " In view of the fact that the dispute between the Plaintiff and the Defendants was decided by the Minister pursuant to the provisions of the *Land Adjudication Act* and considering that the Defendants did not appeal against the said decision and a title was subsequently issued to the Plaintiff, I find and hold that the Plaintiff has proved his case on a balance of probabilities For those reasons, I allow the Plaintiff's Plaint dated 28th February 2006."

33. The Applicants averred that they became aware of the suit after they were served with an application dated 6th July 2021 citing them for contempt of the judgment dated 22/09/2017.

34. It is evident from the affidavit of service of James Kamanda Advocate that the Defendants/Applicants were served with the summons to enter appearance on 02/03/2006. The Applicants did not request or apply to cross examine the Advocate to challenge the veracity of his averments in the affidavit of service sworn on 3rd March 2006.

35. The Respondent annexed a bundle of affidavits of service (MM2) to his replying affidavit to demonstrate that the Defendants were aware of the existence of this suit. The affidavit of service sworn by Jacob M. Mutheya sworn on 15th February 2012 shows that the Defendants were served with a hearing notice on 13th August 2012. The Defendants were informed of the hearing date but chose not to attend the hearing. The Applicants chose to forego the opportunity to be heard by failing to enter appearance and file defence within the stipulated period. I therefore find that the Defendants were duly served with the summons to enter appearance and plaint. The judgment entered is therefore a regular judgment.

36. The court is also called upon to determine whether the Defendants have shown sufficient cause to enable the court to exercise its discretion in their favour. The Applicants alleged that there was a breakdown of communication with their Advocate on record prior to the hearing date.

37. I have carefully perused the court record and I find that the Applicants did not enter appearance nor file a defence. The Applicants instructed their Advocate after the judgment had been rendered. Their argument that there was a breakdown of communication therefore does not hold water.

38. The next issue for determination is whether the defence raises triable issues. I have looked at the draft defence annexed to the application and I find that it contains general denials of the Plaintiff's claim.

39. In the end, I find that the Applicants have not met the threshold for setting aside the *ex parte* judgment. Accordingly, the application dated 6/10/2017 is devoid of merit and the same is hereby dismissed. As the parties herein are closely related, I hereby order that each party bears its own costs.

…….

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.

In the presence of:

Arori holding brief for Opola for Defendant/Applicant.

Court assistant Stephen