



REPUBLIC OF KENYA



KENYA LAW
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Diani Square Limited v Lepele & 18 others (Operating under the banner of Kaskiza Jua Kali Traders) (Environment & Land Case 23 of 2020) [2023] KEELC 20103 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20103 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 23 OF 2020
NA MATHEKA, J
SEPTEMBER 26, 2023

BETWEEN

DIANI SQUARE LIMITED PLAINTIFF

AND

JACQUELINE LEPELE 1ST DEFENDANT
THOMAS AMIGO MARONDE 2ND DEFENDANT
JOSEPHAT MBITHITITO MUNYITHYA 3RD DEFENDANT
BENSON GITARI 4TH DEFENDANT
JANET SAMMY 5TH DEFENDANT
NJOROGE 6TH DEFENDANT
DANIEL NYANGA 7TH DEFENDANT
FRANCIS KIRINGA 8TH DEFENDANT
MARTIN MURUNGU 9TH DEFENDANT
MUTUA KYULI 10TH DEFENDANT
GIDEON KIILU 11TH DEFENDANT
KANGENDO MUSEE 12TH DEFENDANT
HUDSON OMWERI 13TH DEFENDANT
MAMA ROSE 14TH DEFENDANT
STEPHEN KINARA 15TH DEFENDANT
MWANGANGI NGONZI MULANDI 16TH DEFENDANT



CHARLES ONYONI 17TH DEFENDANT
LEAH MULWA 18TH DEFENDANT
MAMA HELLEN & OTHERS 19TH DEFENDANT
OPERATING UNDER THE BANNER OF KASKIZA JUA KALI TRADERS

RULING

1. The application is dated April 4, 2023 and is brought under the Provisions of, Sections IA, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya Order 10 Rule 11 and Order 22 Rule 22 of the *Civil Procedure Rules* seeking the following orders;
 1. That this application be certified as urgent and be heard ex-parte in the first instance and on priority basis.
 2. That there be a temporary order of stay of execution of the judgment dated September 14, 2021 and decree issued on November 25, 2021 and the Order to vacate issued on July 29, 2022 in this matter pending the hearing and determination of this application.
 3. That pending the hearing and determination of this application, this matter be transferred to the High Court (Environment & Land Court), Kwale for determination as it falls within the jurisdiction of the said court.
 4. That upon hearing and determination of this application, this Honourable Court to issue a temporary order of stay of execution of the judgment dated 1September 4, 2021 and decree issued on 2November 5, 2021 and the Order to vacate issued on July 29, 2022 in this matter.
 5. That Defendants/Applicants be granted leave to defend this suit by filing a defence within 14 days upon service of the Summons and pleadings.
 6. That costs of this application be provided for.
2. It is based on the following grounds that the Applicants are in possession and occupation of Kwale Diani Beach Block/155 hereinafter referred to as the suit property and have enjoyed peaceful occupation, possession and use thereof since the Year 1985. That sometime in March 2023, the Applicants were served with the Order to vacate the suit property issued on July 29, 2022. That the Applicants perused the court file in this matter and discovered that the Respondent filed the suit herein claiming ownership of the suit property and proceeded to obtain default judgment/decree against the Applicants. That the Applicants were never served with pleadings and summons to enter appearance. That as a result of non-service of the pleadings and Summons to Enter Appearance, the Applicants did not file their defence to the suit since they were unaware of the court proceedings against them. That the Respondent proceeded with the suit by way of formal proof and on September 14, 2021 this Honourable Court delivered judgment and issued a Decree on November 25, 2021 in the Respondent's favour. That the Applicants became aware of the suit sometime in March 2023 when the Respondent served them with an Order issued by this Court on July 29, 2022 to vacate the suit property. That the Applicants have been condemned without a legitimate opportunity to ventilate their undeniable constitutional and statutory right to defend themselves. The Applicants' failure to appear and defend this suit within time was inadvertent and not deliberate. The Applicants should be allowed to defend themselves in these proceedings and have a determination of the dispute herein on merits and in the interest of justice and equity. The application is brought without unreasonable



delay. It is in the interest of justice to grant the reliefs sought as of right so that this matter can proceed to hearing on merit.

3. This court has considered the applications and the submissions therein. The Applicants stated that sometime in March 2023, the Applicants were served with the order to vacate the suit property issued on July 29, 2022. That the Applicants perused the court file in this matter and discovered that the Respondent filed the suit herein claiming ownership of the suit property and proceeded to obtain default judgment/decree against the Applicants. That the Applicants were never served with pleadings and summons to enter appearance. That was neither served nor did he receive any summons or court papers in relation to this suit. In the case of *Mobamed & Another vs Shoka* (1990) KLR the appellants applied to court to set aside ex parte judgment claiming that service of summons was not properly done. On appeal the Court of Appeal held as follows;
 - (a) The test for the correct approach in an application to set aside default judgment are firstly whether the defence has merit, whether there will be prejudice and what the explanation for delay is.
 - (b) It was for the appellant to establish on a balance of probabilities that even with the irregular return of service, they were never served.
 - (c) Considering the lapse of time and taking into to account that the final judgment had been satisfied and in view of the absence of plausible explanation for the inordinate delay, the trial judge could not have exercised his discretion in favour of the appellant without prejudice to the respondent.
4. The principles for setting aside exparte judgements can also be found in the cases of *Patel vs Cargo Handling Services Ltd* (1974) E A 75 and *Shah vs Mbogo* (1968) E A 93. In *Chemwolo & Another vs Kubende* (1986) KLR 492, the Court of Appeal held that Order IXA Rule 10 confers upon the Court an unlimited discretion to set aside or vary judgement entered in default of appearance upon such terms as are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, or error but not exercised to assist a person who has deliberately sought to obstruct or delay the cause of justice. Be that as it may, I have perused the court file and find that from the record on the March 16, 2020 one Samuel Muthomi effected service upon the Defendants. This was done within the suit property with the help of the Area Chief who pointed out the Defendants. The matter did not proceed on the July 27, 2020 as scheduled and on the July 30, 2020 the Judge ordered the Plaintiff to serve the Defendants with a fresh hearing date of October 6, 2020. As per the affidavit of service sworn on September 15, 2020, the same process server served the Defendants on the 1 August 7, 2020 with the help of the Area Chief and at the same location. There was no appearance by the Defendants and the application was granted and the same fixed for pre trial directions on the November 11, 2020. The matter proceeded by way of formal proof and judgement was delivered on the September 23, 2021. I have further perused the supporting affidavit to this application sworn by Salim Abdalla Mwanyende and find that it does not raise any triable issues. I find that the Applicants were aware of the case all through but chose to ignore the same. I find that they are now deliberately trying to obstruct and/or delay the cause of justice. I find this application is not merited and I dismiss it with costs.
5. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

