REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 45 OF 2014

RUKIYA ABDULRAHMAN HATIMY alias RUKIYA

NUREIN HATIMY & ANOTHER …….. PLAINTIFFS

VERSUS

MOHIDEEN ABDULRAHMAN MOHAMED

HATIMY & ANOTHER ……..… DEFENDANTS

RULING

(Application to set aside ex parte judgment; matter proceeding as a formal proof hearing when in fact there was a defence and counterclaim on record; matter proceeding in absence of counsel for the defendants who was however served with the hearing notice; not clear what directions the court would have given if it was aware that there was indeed a defence and counterclaim on record; benefit of doubt given to the defendants; defendants also having a defence and counterclaim which deserves to be ventilated; application allowed and judgment set aside)

1. Before me is an application dated 17 May 2021 filed by the defendants. The principal prayer in the application is for an order that the ex parte judgment delivered on 31 March 2019 (though the application erroneously states the year 2021) be set aside so that the matter may be listed for hearing inter partes. The application is opposed.

2. To put matters into context, the respondents commenced this suit through a plaint filed on 3 March 2014. The respondents and applicants are siblings. In the plaint, the respondents contended that they and the applicants jointly own the property Mombasa/Block IX/109 whereupon there are developed four flats. The respondents complained that the applicants have been interfering with the property and are out to dispossess them from it. In the suit, they asked for orders inter alia to have the applicants restrained from dealing with their share of the property. On 14 April 2014, the applicants entered appearance through the law firm of M/s Abdulrahman, Saad & Company Advocates and contemporaneously filed a joint statement of defence and counterclaim. They pleaded that the property was previously owned by their late father, and that the beneficiaries of his estate, including the respondents, entered into a property distribution agreement on 12 April 2002 vide which the suit property was distributed to the 1st defendant and one Sheikh Nurein Abdulrehman Mohamed Hatimy (not a party to this suit). In the counterclaim, they inter alia sought orders that the 1st defendant and the said Sheikh Nurein Abdulrehman Mohamed Hatimy, be declared owners of the suit property and for an order of injunction to restrain the respondents from the suit property.

3. On 16 July 2015, a notice of change of advocates was filed by the law firm of M/s Ojode Udoto & Onjoro, taking over the suit on behalf of the applicants. Interestingly, despite there having been a defence filed on 14 April 2014, the said law firm filed an application dated 6 July 2015 seeking to be allowed to file defence and counterclaim out of time on the basis that no defence was ever filed by the law firm of M/s Abdulrahman, Saad & Company Advocates. That application came up for hearing on 17 February 2016 when, curiously, it was allowed by consent and the defendants directed to file a defence within 14 days. On 4 May 2017, the respondents filed a request for judgment on the basis that the applicants have failed to file defence within the prescribed time. I have not seen any endorsement of interlocutory judgment having been entered as requested.

4. The matter was subsequently listed on 1 November 2018 for notice to show cause why it should not be dismissed for want of prosecution. On that day, Mr. Mutubia, learned counsel for the plaintiffs/respondents, was present but there was no appearance on the part of M/s Ojode Udoto & Onjoro Advocates for the defendants/applicants. The matter was placed before Waithaka J, who was not satisfied that the law firm of M/s Ojode Udoto & Onjoro Advocates had been served. She did not address herself on the notice to show cause but instead directed that the said law firm be served for a mention on 5 November 2018. There is evidence that the law firm of Ojode Udoto & Onjoro Advocates were served with a mention notice but there was no appearance on their part in court on the day. Mr. Mutubia asked for a date for formal proof hearing and the court fixed the matter for formal proof hearing on 4 December 2018. On 4 December 2018, Mr. Mutubia was present for the plaintiffs but there was no appearance on the part of the defendants. Mr. Mutubia addressed court and stated that the defendants had not filed their defence as directed despite being granted leave to do so. He stated that he was ready to proceed with formal proof hearing as

counsel for the defendants had been served with a hearing notice. The court acceded and the matter proceeded in the absence of counsel for the defendants. Judgment was fixed for 21 January 2019. It was subsequently delivered on 21 March 2019 in the presence of Mr. Mutubia but in the absence of counsel for the defendants. The judgment was in favour of the plaintiffs although the judge did express sentiment that the court was misled that no defence had been filed. A bill of costs was thereafter filed for taxation but it had not been taxed by the time this application was filed.

5. On 18 February 2021, the law firm of M/s Ahmednasir Abdikadir & Company Advocates, filed a notice of change of advocates coming in place of M/s Ojode Udoto & Onjoro Advocates. Another change of advocate was effected by consent on 13 April 2021 with the law firm of M/s Gikandi & Company now coming on record and the said law firm filed this application on behalf of the defendants.

6. In this application, the applicants aver that they were never informed by their erstwhile advocates, M/s Ojode Udoto & Onjoro, of the hearing date of 4 December 2018. They say that it is later that they learnt that the matter had proceeded for hearing ex parte, and being disappointed by the conduct of their advocates, they appointed M/s Ahmednasir Abdikadir & Company Advocates who could not take up the matter owing to a conflict of interest and they then settled on the firm of Gikandi & Company Advocates. They say that they have noted that counsel for the plaintiffs misled the court by stating that they had not filed any defence to the suit. They aver that they have a defence and counterclaim which raises triable issues and they thus deserve to be heard.

7. The application is opposed through the replying affidavit of the 1st plaintiff. She has justified their ownership of the suit property. She has mentioned that the applicants did enter appearance and file defence and counterclaim but their advocate failed to attend court for the hearing of the suit despite being served. She believes that the judgment is regular and valid and cannot be set aside as sought by the applicants. She has averred that the applicants are guilty of laches and inordinate delay in filing this application and their conduct cannot endear them to the discretion of the court.

8. The application was canvassed through written submissions and I have taken note of the submissions of Mr. Gikandi, learned counsel for the applicants and those of Mr. Mutubia, learned counsel for the respondents.

9. I have already set out in detail the genesis of the hearing of 4 December 2018. Although it was christened a “formal proof” hearing, it couldn’t have been, for there was on record a defence and counterclaim filed by the applicants. I do not know what action the court would have taken if it had knowledge, prior to fixing the matter for “formal proof” , that there was indeed a defence and counterclaim on record. Maybe the court would have directed that the matter be fixed for pretrial for I have not seen any record of a pretrial conference. I think in the circumstances of the suit herein, benefit of doubt needs to be given to the applicants.

10. The reason why counsel for the applicants did not appear in court for the “formal proof” hearing of the matter has not been explained. I of course cannot ascertain, without any evidence coming from the said law firm, that the applicants were not informed of the hearing date. But nothing suggests that it was due to any impropriety on the part of the applicants themselves. It is thus probable that the failure to attend court was a mistake of counsel and in the circumstances of this case, I wouldn’t wish to visit that on the applicants. It is also apparent to me that the applicants do have a defence and counterclaim that cannot be said to be frivolous and it is my view that they deserve to be heard on it. There is a case to be heard as to whether the suit property jointly belongs to the respondents or is property that wholly belongs to the 1st defendant and the said Sheikh Nurein Abdulrehman Mohamed Hatimy.

11. For the above reasons, I think it is justiciable that this application be allowed and the ex parte judgment be set aside.

12. The only issue left is costs. I would readily have awarded costs to the respondents, but as I have mentioned, part of the reason why the court proceeded for “formal proof” hearing was the submission by counsel for the respondents that no defence had been filed, which turned out not to be the position. I wouldn’t wish to profit that misdemeanor with an award of costs. I will thus order each party to bear his/her own costs of this application.

13. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA