



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 85 OF 2013**

**JOSEPH NJUGUNA THAIRU ::::::::::::::::::::::::::::::: PLAINTIFF**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI ::::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

**The Application**

1. The Application before this Court is the Notice of Motion dated **21<sup>st</sup> July 2014** and filed in Court on **22<sup>nd</sup> July 2014**. It is expressed to be brought under **Section 3A** of the **Civil Procedure Act** and **Order 10 Rule 11, Order 22 Rule 22 (1) (2) and (3)** of the **Civil Procedure Rules**. The Defendant, who is the Applicant, seeks for orders to set aside the interlocutory judgment dated **25<sup>th</sup> April 2013** as made by the Court in default of defence. Subsequently, the Defendant seeks the leave of this Court to defend the suit.

2. The Application is based on the grounds stated in the application and is supported by the Affidavit of ERICK ABWAO, described as the Defendant's Assistant Director of Legal Affairs, and sworn on **21<sup>st</sup> July 2014**.

**Background**

3. The Plaintiff filed the current suit claiming against the Defendant the sum of **Kshs. 3,141,965/=** together with interest. The facts as per the Plaintiff are that the Plaintiff had been granted a Lease by the Defendant for a house in Woodley. The houses were owned by the then Nairobi City Commission. The Plaintiff had paid the purchase price and entered into an agreement for sale of the said house with the Defendant. However, it is the Plaintiff's contention that the Defendant in breach of the said agreement failed to deliver possession of the house hence the current suit.

4. The Plaintiff filed the suit on **11<sup>th</sup> March 2013**. The Defendant only entered appearance on **14<sup>th</sup> November 2013** way after the stipulated time. As is expected, the Plaintiff filed for Request for Judgment and the Court entered a Judgment in default of defence, which the Defendant now seeks to set aside.

**The Defendant's case**

5. It is the Defendant's case that when the Plaintiff moved to Court and served them with the suit

papers, the matter was assigned to one of the Nairobi City County Lawyers, Evans Mogire, to enter appearance and tender a defence. However, the said lawyer transferred his services from the defunct City Council of Nairobi to Nairobi County Assembly.

6. The deponent avers that due to the turn of events, the files which were allocated to the lawyer in question could not be traced and several letters were written to him requesting him to handover the files. The deponent further avers that by the time the lawyer handed over the files, the Plaintiff had already obtained Judgment against the Defendant and got a decree. The Defendant instructed the firm of Advocates currently on record to defend the suit.

7. It is also the Defendant's case that they have an arguable defence with high chances of success. The Defendant admits entering into an agreement for sale with the Plaintiff with regard to the suit property. It is however the Defendant's position that when the management of the City of Nairobi changed hands from Nairobi City Commission to the defunct City Council of Nairobi, it turned out that the houses along Woodley estate, among them the suit property, had been allocated to individuals without following proper procedures.

8. According to the Defendant the anti-corruption commission established that the allocation of the said houses was irregular and fraudulent. The Commission recommended that the houses be returned to the City Council of Nairobi. It is on this basis that the Defendant contends that it has already paid the Plaintiff **Kshs. 1,100,000/=** paid by him during the allocation of the house. The Defendant therefore disputes the sum of **Kshs. 3,141,965/=** as pleaded by the Plaintiff.

### **The Plaintiff's case**

9. The Plaintiff opposed the application by filing a Replying affidavit on **14<sup>th</sup> August 2014** and sworn on the same day.

10. It is the Plaintiff's case that the Defendant has not made out a case for setting aside the Judgment herein. The Plaintiff laid down the events leading to the default Judgment. He avers that the Plaintiff and Summons were served upon the Defendant on 25<sup>th</sup> March 2013. The Defendant acknowledged service by duly stamping copies of the same. The Defendant did not file a Defence following which the Plaintiff applied for Judgment in default on 25<sup>th</sup> April 2013. Subsequently a Decree was issued on 28<sup>th</sup> May 2013.

11. The Plaintiff avers that upon the issuance of the Decree, he proceeded to tax the Party and Party costs. He served the Defendant with the Notice of Taxation on 12<sup>th</sup> June 2013 and the Defendant duly acknowledged service of the same. However, the Defendant neglected to attend the taxation. The Plaintiff further avers that on 18<sup>th</sup> July 2013, he served the Defendant with a Notice for ruling on the Taxation which they duly received by stamping. The Defendant again neglected to attend the ruling.

12. It is the Plaintiff's assertion that the Defendant entered appearance on 13<sup>th</sup> November 2013 when the Decree and Certificate of Taxation had already issued. The Plaintiff points out that the Defendant filed the current application more than eight months after they entered appearance. It is therefore the Plaintiff's contention that from the foregoing events, it is clear that the Defendant was well aware of this suit. However, the Defendant failed to defend the same only to frustrate him from enjoying the fruits of his decree.

13. The Plaintiff further avers that he visited the offices of the Defendant to pursue payment on several occasions. He avers that he held several meetings with an official of the Defendant who never disputed his claim or the decree. The said official promised to settle the same.

14. It is the Plaintiff's case that the draft defence produced by the Defendant does not raise any triable issues. According to the Plaintiff, before he filed the suit, the Defendant admitted owing the money. It is further the Plaintiff's case that he legally acquired the suit property. The Defendant allocated

it to him and he paid the contractual premium. The Plaintiff avers that to date he continues to hold a duly registered lease in his favour as issued by the Defendant.

15. The application was prosecuted by way of written submissions. The Plaintiff filed his submissions on **5<sup>th</sup> November 2014** while the Defendant filed theirs on **16<sup>th</sup> January 2015**.

### Analysis

16. I have carefully considered the pleadings, the submissions filed by the parties as well as the authorities cited. The principles for setting aside default judgment are now well settled. In **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

*(i) if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.*

*(ii) if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.*

17. The decision of whether or not to set aside *ex parte* judgement is discretionary. The discretion is to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116**.

18. The Defendant has not disputed the issue of service of the suit papers. It is therefore not in doubt that the default Judgment herein is a regular one. The Defendant submits that at the time of service the City Council of Nairobi was undergoing transformation to the Nairobi City County Government. The Defendant further submits that this caused some delay in offering certain functions and the Legal affairs department was equally affected with the changes.

19. It is my view that the Defendant has itself to blame for failing to put its house in order during the restructuring of the defunct City Council of Nairobi. The delay in this matter is simply inexcusable and it is evident that the Defendant is guilty of laches. This is evident from the account given by the Plaintiff leading to the Judgment in default of defence and the subsequent taxation. The Defendant did not make any efforts to act despite being notified of the events of the suit by the Plaintiff. The matter was handled with little, if any due diligence.

20. The time that lapsed between the entry of the interlocutory judgment, the subsequent decree, the filing of the memorandum of appearance which was way beyond the stipulated time and the current application has not been sufficiently explained. It goes to show that the Defendant did not handle the matter with the seriousness it deserved. Equity does not aid the indolent.

21. The issue of corrupt allocation of the houses is a matter between the Defendant and the Anti-Corruption Commission. In the annexed Defence, the Defendant has not pleaded any allegation of fraud or corruption on the part of the Plaintiff. Therefore, the Defendant's argument that it has an arguable Defence which raises triable issues is moot.

22. In view of the foregoing, the Defendant has not made out a case for setting aside of the Interlocutory Judgment dated **25<sup>th</sup> April 2013**. Subsequently, there is no basis for this Court to stay the execution of the decree dated **28<sup>th</sup> May 2013**. The Judgment was regular and the Plaintiff is at liberty to

enjoy the fruits of the same.

23. In the upshot, the Defendant's Notice of Motion dated **21<sup>st</sup> July 2014** and filed in Court the following day is hereby dismissed with costs.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Morara for the Defendant

Mr. Wananda holding brief for Thuku for the Plaintiff

Teresia – Court Clerk