



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL CASE NO. 69 OF 2011**

**STEPHEN SILA NDUNDA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NGUMBI MBILUNGU MBUSU.....DEFENDANT/APPLICANT**

**RULING**

1. The Application dated the 27<sup>th</sup> July, 2011 is brought pursuant to the provisions of **Section 1A, 1B and 3A** of the **Civil Procedure Act; Order 10 rule 11; Order 3 Rule 2** of the **Civil Procedure Rules** and all enabling provisions of the law.
2. The Applicant seeks issuance of orders that; the interlocutory judgment entered on 18<sup>th</sup> April, 2011 and all sub-sequential orders be set aside; the defendant be granted leave to file the defence out of time and the annexed draft defence be deemed as duly filed and served.
3. The application is premised on grounds that the defendant was not served with Summons to Enter Appearance; the defendant has a good defence that raises triable issues and the defendant is desirous of defending the claim herein.
4. The applicant deposed an application in support of the application in which he stated that he became aware of the suit when the Lands Officer notified him that the respondent had written to the District Land Registrar attempting to block his dealings with a **James Mutua**. He had previously obtained the necessary consents to transfer the land which he had sold at Kshs. 320,000/= out of which he had paid Kshs. 180,000/= leaving a balance of Kshs. 140,000/= by the respondent. The balance that was payable in one weeks' time has never been paid which made him sell the land to another person and he notified the respondent to collect his deposit.
5. Further, he deposed that he was never served with summons to enter appearance and demanded that the process-server be availed for cross-examination. The respondent is demanding transfer of land without paying full consideration. He concluded by stating that he bought bankers cheque and sent it to the respondent who rejected it.
6. In response thereto the respondent stated that the applicant was served with summons to enter appearance in his presence. He claimed ownership of the land, being a first buyer and having paid Kshs.140,000/= on time but the respondent declined to take the money as the 2<sup>nd</sup> buyer offered him more.

7. The court in exercising the discretion to set aside an interlocutory judgment has to take all issues into consideration and also to ensure that a litigant does not suffer injustice or hardship as a result of inter alia excusable mistake ( *see Mbogo and another versus Shah [1968] 93*. Also in exercise of the discretion the court must look at the defence and decide whether it has merit or not and whether the defendant can successfully defend his claim.

8. In the case of *Standard Bank PLC and Another versus Agrinvest International Inc and Another [2010] EWCA Civ 1400* the Court of Appeal held inter alia:-

*“In the ordinary way a Defendant who seeks to set aside a regular default judgment must be able to show that he has a real prospect of successfully defending the claim. Whatever the circumstances of the case, there is nothing to be gained, and much to be lost, by setting aside a judgment that will be reinstated after the parties have incurred the cost and delay of a trial. If that requirement has been satisfied, however, the court will still need to consider the circumstances of the case more generally before deciding whether to grant the relief sought”.*

9. In the instant case, the basis of the application is that the applicant was not served with the plaint and summons to enter appearance. According to the process-server, **James Mbithi**, he traveled to the applicant’s place of residence as directed by the respondent. Unlike the respondents he did not aver that he was in company of the respondent. Although he states that the applicant declined to acknowledge service, this court must consider whether or not the draft defence raises triable issues.

10. In the case of *Olympic Escort International Co. Ltd and 2 Others -versus -Parminder Singh Sandho & Another [2009] eKLR* the Court of Appeal held:-

*“It is trite that, a triable issue is not necessary one that the defendant would ultimately succeed on. It need only be bonafide”.*

11. The draft defence annexed to the application not only raises bonafide issues but triable issues? The circumstances of the case call upon this court to ensure that substantial Justice is served.

12. In the premises;-

- i. I do set aside the interlocutory judgment entered herein on 18/4/2011 plus all consequential order.
- ii. Leave be and is hereby granted to the applicant/defendant to file the defence out of time within 14 days.
- iii. The draft defence shall be deemed as duly filed upon payment of the requisite fee. The defence shall be served upon the respondents as provided by the law.
- iv. Costs of the application shall be borne by the applicant in any event.

13. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS THIS 18<sup>TH</sup> day of MARCH, 2015.**

**L.N. MUTENDE**

**JUDGE**