



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 391 OF 2017

FUNZI VIEW CO. LTD.....PLAINTIFF/RESPONDENT

VERSES

SAMMY NYAMBATI NYABOISI

CAROLINE NJOKI MBOI..... DEFENDANTS/APPLICANTS

THE ATTORNEY GENERAL.....DEFENDANT

RULING

The application is dated 3rd May 2021 and is brought under Order 10 rule 11, Order 22 rule 22 and Order 51 rule 1 of the Civil Procedure Rules, Section 1A of the Civil Procedure Act, Chapter 21, Laws of Kenya, seeking the following orders;

1. That this application be certified urgent and service of the same be dispensed with in the first instance.
2. That the firm of A.O AMINGA & CO. ADVOCATES be granted leave to act for the 1st and 2nd Defendants/ Applicants herein.
3. That this Honourable court be pleased to set aside the interlocutory Judgement entered by this Honourable court in default of appearance and Defence upon any conditions it deems just and expedient.
4. That this Honourable Court be pleased to order a stay of execution pending the determination of the Defendants application seeking leave to defend this suit.
5. That all orders and actions consequential upon the said judgment be set aside until disposal of this Application.
6. That this Honourable Court be pleased to grant the 1st and 2nd Defendants leave to file and serve their Defence out of time.
7. That the 1st and 2nd Defendants Defence a draft thereof is annexed hereto be deemed to be duly filed.
8. That the costs of this application be in the cause.

It is based on the grounds that the default ex parte judgment against the Defendants was obtained in breach of the Principles of Natural Justice as the Defendants had not been given the opportunity to state their case on merit. That there is no provision for entry of interlocutory judgment in a case seeking declaration for ownership of land. That interlocutory judgments only apply to matters specified under Order 10 Rule 6 of the 2010 Civil Procedure Rules to which the instant suit does not belong. That the Defendants/Applicants draft statement of Defence a copy thereof is annexed hereto raises serious triable issues. That it is in the interest of justice that the orders of stay of execution be granted and the Defendants be granted leave to defend this suit. That unless the proceedings herein are stayed and the judgement set aside the Defendants/ Applicants shall stand condemned unheard for an excusable delay. That the Defendants stand to suffer irreparable losses as a result of the effect of the ex-parte judgment obtained by the Plaintiff without their knowledge and or participation. That the Plaintiff will not in any way be prejudiced by the Defendants claim and any loss suffered if any or at all may be compensated by way of costs. That it is in the interest of justice that the orders of stay of execution be granted and the Defendants be granted leave to defend this suit.

The Respondent submitted that the Plaintiff was and still remains the registered owner of property Title No. Kwale/Funzi Island/ 256 measuring approximately 0.5 Hectares (Approx. 1.235 acres) situated in Kwale District Funzi Location and in possession of the Original Title Deed in respect of the said suit property. (they annexed and produced a true copy of the Title Deed marked as PVBI). That the Plaintiff herein instituted a suit against the Defendants jointly and severally vide a Plaint dated 31st October 2017 and filed in court on the same day

seeking for Judgment against the Defendants herein for the illegal, irregularly and unlawful Title issued by the 3rd Defendant to the 1st and 2nd Defendant contrary to the law and/or without any justification whatsoever. That upon filing the Plaintiff on 31st October 2017 and upon issuance of the Summons/ dated 1st November 2017, his Advocate on record Messrs Khalid Salim instructed their process server Peter Ogweno Omogi to effect service on the Defendants. That on 7th November 2017, the said process server served the Attorney General on behalf of the 3rd Defendant, wherein they acknowledged service. However, the aforementioned process server, Mr. Peter Oweno Omogi could not serve the 1st and 2nd Defendants in person. That in view of the foregoing the Plaintiff filed an application dated 10th January, 2018 seeking leave to serve the Summons and Plaintiff upon the 1st and 2nd Defendants by way of substituted service by way of publication of an advertisement in one of the local Daily Newspaper and the 1st and 2nd Defendant do enter appearance within 15 days from the date of such publication. That the above mentioned application was heard and determined, subsequently, the Honourable Court issued an Order on 22nd February, 2018 wherein it allowed the application and ordered that the Plaintiff to serve the Plaintiff and Summons to the 1st and 2nd Defendants by way of substituted service by way of publication of an advertisement in one of the local daily newspapers and the 1st and 2nd Defendants to enter appearance within 15 days from the date of such publication. (Produced is a true copy of the said Order issued on 23rd February, 2018 marked 2A). That pursuant to the above mentioned Order, the Plaintiff served the Plaintiff and Summons to the 1st and 2nd Defendant vide a publication made on the Standard Newspaper of Thursday 8th March, 2018. (produced a true copy of the said publication of 8th March, 2018 marked as PVB2). After the lapse of the period granted on the 1st and 2nd Defendants to enter appearance, the Plaintiff consequently filed Request for Judgment dated 16th April, 2018 and filed in court 17th April, 2018 against the 1st and 2nd Defendant, which the matter was fixed for formal proof on the 3rd May, 2019 and thereafter Judgment was endorsed as prayed in the Plaintiff and a Decree as well issued on 3rd February, 2020. (Produced is a copy of the said Judgment and Decree marked as FPVB3). That the 1st and 2nd Defendants have failed, refuse and/or declined to enter appearance as Ordered by this Honourable Court despite service being effected upon them through the above mentioned publication, which is a newspaper of nationwide circulation.

This court has considered the application and the submissions therein. The Court's power in considering an application to set aside an interlocutory judgment is discretionary. As held in the case of *Patel vs E.A. Cargo Handling Services Ltd* (1974) EA 75;

“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 fetter the wide discretion given it by the rules.”

In the same vein, the Court in the case of *Shah vs Mbogo* (1967) EA 166, held that;

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

In the case of; *Patel vs E.A. Cargo Handling Services Ltd* (1974) (supra) the Court held that:-

“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.’

Similarly in the case of *Ree Shade Motors Ltd vs D.T. Dobie & Another* (1995-1998) IEA 324, it was held that:-

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

The court is further guided by the case of *James Kanyिता Nderitu & Another vs Marios Philotas Ghikas & Another*, Civil Appeal No. 6 of 2015 eKLR (Msa), the learned Judges of Appeal had this to say:-

*“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 other. See *Mbogo & Another v. Shah* (supra), *Patel v. EA. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986/ KLR 492 and *CMC Holdings v. Nzioki* [2004/ 1 KLR 173].*

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 a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended

defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason 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. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456]).

It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the way they prosecute their cases. On the issue of service, I find that there was proper service and the 1st and 2nd Defendants were served by substituted service as ordered by the court as they could not be traced. The 3rd Defendant was served personally and filed a defence. Interlocutory judgement was entered on the 5th November 2018. On the hearing date all the Defendants failed to attend court despite being properly served. The matter proceeded to trial, judgement was entered on the 3rd February 2020. The Applicants then woke up one year later on the 3rd May 2021 and filed this application. The Respondent stated that the supporting affidavit should be struck out as the deponent is a stranger to these proceedings. The Applicant stated that it was a mix up on the dates by the advocate as the power of attorney is dated after the application. I accept this explanation and the same has cured the said technicality. The Applicant states that interlocutory judgement should not have been entered as this is not a liquidated claim. Be that as it may, I find that the matter went to full trial and the Plaintiff's witness produced all the requisite documents and satisfied the trial Judge Yano on a balance of probabilities. He was also satisfied that service of summons was properly done and I hold the same view. I have perused the draft defence annexed to the application and find that it is a mere denial and does not raise any triable issues. I find the Applicants have been indolent and I do not accept their excuse that they resided in the United States hence their lack of participation in the trial and also the delay in filing this application. Having found that there was proper service I find that the application lacks merit and is therefore is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE