



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC NO. 56 OF 2018**

**MOSONIK ARAP KATAM.....PLAINTIFF**

**-VERSUS-**

**KIPLANGAT ARAP DIGIRA.....DEFENDANT**

**RULING**

1. What is before this court for ruling is the Notice of Motion application dated 16<sup>th</sup> June, 2020 and filed in court on 18<sup>th</sup> June, 2020 by the counsel for the defendant/applicant under certificate of urgency.

2. The application is expressed to be brought under **Sections 1A, 1B,3,3A and 63 (e) of the Civil Procedure Act, Order 10 Rules 4, 10 and 11, Order 51 Rule 1 of the Civil Procedure Rules** and all enabling provisions of the law. The application seeks the following orders: -

**1) Spent**

**2) Spent**

**3) That the ex parte judgement and the consequential decree on record against the Defendant/Applicant herein together with all other consequential and subsequent orders, notices and other process arising there from be reviewed, varied discharged and or set aside.**

**4) That the defendant/applicant herein be granted leave to file and serve his Memorandum of Appearance, replying affidavit and statement of defence and counter claim out of time and that the replying affidavit, draft statement of defence and counter claim hereto attached be deem ad properly filed and served upon the plaintiff/respondent herein subject to payment of the requisite court fees.**

**5) That this honourable court be pleased to issue such other and or further orders that it may deem fit and just in the interest of justice.**

3. The application is predicated on the grounds on its face and is further supported by the affidavit of Kiplangat Arap Sigira, the defendant/applicant herein, sworn on 16<sup>th</sup> June, 2020.

4. The defendant/applicant has deposed inter alia that on 4<sup>th</sup> May, 2020 or thereabout he received information from his Advocate notifying him that there was a matter in court between him and the plaintiff/respondent herein which had proceeded to hearing and that judgement had been passed against him requiring him to transfer a portion of his piece of land to the plaintiff/respondent, that he proceeded to Narok ELC Registry where he confirmed the existence of such matter filed against him by the plaintiff/respondent, that he had no information and had never been served with any pleadings and or any hearing notice informing him to attend court by the plaintiff's/respondent's advocates, that he is informed by his advocates on record which information he verily believes to be true that on perusal of the court record, the Advocate did not establish that there are affidavits of service purporting that the defendant/applicant had been served with the pleadings as well as the hearing notices by the process server, that he has further been informed by his Advocate on record which information he verily believes to be true that the plaintiff/respondent had not disclosed in his pleadings or in his oral testimony in court that there was a related matter in Narok CMCC ELC case no. 116 of 2018 where the defendant/applicant is the plaintiff and the plaintiff/respondent is the defendant which no disclosure itself is a good ground for setting aside the exparte judgement.

5. The application is opposed by Mosonik Arap Katam, the plaintiff/applicant vide his replying affidavit sworn at Narok on 24<sup>th</sup> May, 2021 and filed in court on even date. The affiant has deposed inter alia that he filed the originating summons dated 15<sup>th</sup> August 2018 against the defendant/applicant and served the latter with the same, all mentions and hearings, that the defendant/applicant in total disregard of the High

Court Civil Suit No. 56 of 2018 OS went ahead to file a plaint dated 12<sup>th</sup> July, 2018 in court on 16<sup>th</sup> June, 2018 and obtained summons which the defendant/applicant proceeded to serve upon him and he immediately presented the said document to his Advocate on record, that he has been advised by his Advocates on record and which he believes to be true that the defendant/applicant cannot purport that he was not aware of the case filed on 6<sup>th</sup> May, 2020 when they filed a notice of appointment yet they were aware of suit No. 116 of 2018 in the lower court which is indicated in his defence and counter claim, that it is now over 3 years since this case was filed and that the defendant/applicant was afforded enough time to defend the suit which he never did.

6. On the 14<sup>th</sup> June, 2021 the court directed that the application be canvassed by way of written submissions.

7. The plaintiff/respondent and the defendant/applicant filed their written submissions on 25<sup>th</sup> October, 2021 and 10<sup>th</sup> February, 2022 respectively.

8. Highlighting of submissions was fixed for 7<sup>th</sup> December, 2021. Come the said 7<sup>th</sup> December, 2021 the learned counsel on record for the parties opted not to highlight their submissions. It should be noted that as at 7<sup>th</sup> December, 2022, the defendant/applicant was yet to file and serve his submissions. As it were, Mr. Kilele, the learned counsel for the defendant/applicant made oral submissions whereby he framed two (2) issues for determination. The first issue was that the matter in the lower court involving the parties herein was filed before the suit herein. The counsel went on to submit that the plaintiff/applicant fully participated in the lower court's proceedings. He pointed out that the issue of a pending suit in the subordinate court involving the same parties was never brought to the attention of the court. It was also the counsel's submissions that the proceedings in the lower court were never stayed and as such there have been parallel proceedings. The counsel added that the issue of non-disclosure is the reason why they were in court.

9. The second issue was on service where upon the learned counsel submitted that they reserved their right to cross-examine the process server on his affidavit of service. The counsel proceeded to seek the court's direction on the issue.

10. In response, the learned counsel for the plaintiff/respondent urged that the submissions by the counsel for the defendant/applicant are not related to the application dated 16<sup>th</sup> June, 2020. The counsel pointed out the submissions are like a preliminary objection and that according to the record, there is no such preliminary objection. The counsel urged the court to disregard the submissions by the defendant/applicant.

11. It was also the counsel's submissions that the issue of service should be disregarded as it ought to have been brought in advance and they be notified so that they could respond.

12. Regarding the issue of non-disclosure of the lower court's case, the counsel submitted that their replying affidavit and paragraph 2 of their submissions show that the same was disclosed. The counsel concluded by submitting that the reason why they were in court was to take a date for ruling.

13. In his written submissions Mr. Kilele reiterated the two issues and further identified two (2) more issues for determination. These were:-

**(i) Whether the judgement in favour of the plaintiff/respondent was irregular.**

**(ii) Whether the defendant/respondent has a defence on merits raising triable issues.**

14. On whether the defendant/applicant was properly served, the counsel relied on **Section 20** of the **Civil Procedure Act** which provides as follows:-

**“Where a suit has been duly instituted the defendant shall be served in a matter prescribed to enter appearance and answer the claim”.**

15. It was the counsel's submissions that service upon the defendant/applicant was irregular and not in conformity with the provisions of **Order 5 Rule 1 of the Civil Procedure Rules**. The counsel pointed out service of summons is as provided for in **Order 5 Rules 6 and 7** of the **Civil Procedure Rules** which are explicit that service of summons shall be made by delivering or tending the duplicate thereof. The counsel submitted that in paragraph 3 of the plaintiff's/respondent's replying affidavit filed on 24<sup>th</sup> May, 2021, it is stated that the defendant/applicant was served and proceeded to annex an affidavit of service. The counsel pointed out that summons to enter appearance were never issued upon the defendant/applicant and nor was he served with a hearing notice thus it was their contention that the defendant/applicant was not properly served.

16. On whether the judgement in favour of the plaintiff/respondent was irregular, the counsel submitted that the defendant/applicant only learnt that judgement had been entered in favour of the plaintiff/respondent on 4<sup>th</sup> May, 2020. The counsel urged that the judgment was entered prematurely without service of summons to enter appearance and therefore it is irregular, annuity and should be set aside ex debito justitiae.

17. In support of his submissions, the counsel relied on two authorities which he did not supply to the court. It should be noted that it is good practice for parties to supply the court with the authorities that they rely on.

18. On whether the defendant/applicant has a defence on merits raising triable issues, it was the counsel's submissions that this is an issue the court should not venture into consideration and added that the right to be heard before an adverse decision is taken is fundamental.

19. On whether the plaintiff/respondent has a duty to disclose the existence of a pending suit in the lower court, the counsel submitted that

the latter had participated in those proceedings and he was dishonest and mischievous in filing this suit.

20. On the other hand, the counsel for the plaintiff/respondent submitted that the defendant/applicant was aware of this suit but chose not to defend it. He also submitted that there was delay in filing this application.

21. Having read the application together with the replying affidavit and the rival submissions filed by the counsel on record for the parties, I am of the view that the issues for determination are:

(i) Whether or not the court should set aside the judgement dated 5<sup>th</sup> May, 2020 and all consequential orders and

(ii) Whether or not the court should grant leave to the defendant/applicant to enter appearance and file his defence and counter claim out of time.

22. Even though the defendant/applicant has denied service of summons to enter appearance and to file his defence, the affidavit of service sworn by one Wilson C. Kimeto, a process server, at Narok on 11<sup>th</sup> October, 2018 shows that the defendant/applicant was served on 18<sup>th</sup> September, 2018 at 9.00am at Sigowet village where he resides. I further note that the defendant/applicant did not apply to cross-examine the process server even though his counsel submitted the defendant/applicant reserved the right to do so. In my view, the defendant/applicant ought to have applied to cross-examine the process server before he proceeded to argue the instant application. As it were, there is nothing on record that shows that service of summons upon the defendant/applicant was not proper.

23. On whether the judgement entered against the defendant/applicant was regular or not the Court of Appeal sitting at Malindi had this to say: -

**“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement 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 judgement. 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 to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default, judgement, 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 judgement was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is the interest of justice to set aside the default judgment, among other. See Mbogo & another -Versus- Shah (Supra), Patel -Versus- E.A Cargo handling Services ltd (1975)EA 75 Chemwolo & Another -Versus- Kubende (1986)KPR 392 and CMC Holdings Versus Nzioki (2004)KLR (173). In an irregular default judgement, 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 judgement 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 issue or whether there has been inordinate delay in applying to set aside the irregular judgement. 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 (see Onyango Oloo –Versus- Attorney General (1986-1989 EA 456)”.**

24. Having found that service upon the defendant/applicant was regular, it follows therefore that the judgement herein was regularly entered. It was therefore upon the defendant/applicant to lay factors before this court which could enable it exercise its unfettered discretion in his favour. I do note that the defendant/applicant did not attach the draft defence and a draft replying affidavit alluded to in prayer 4 of the Notice of Motion application so that the court can determine whether or not it raises triable issues.

25. Be it as it may, there is no dispute that there is Narok Chief Magistrate’s Court Civil Case No. 116/2018 involving the same parties herein. The latter was filed on 12<sup>th</sup> July, 2018 while the Originating Summons herein was filed on 16<sup>th</sup> August, 2018. I would agree with the counsel for the defendant/applicant that the plaintiff/respondent herein had an obligation to disclose to this court about the existence of another pending case before the Chief Magistrate’s Court. His conduct of rushing to this court to file the Originating Summons herein is in my view, an abuse of the court process. On that ground alone, I will exercise the court’s discretion in favour of the defendant/applicant and proceed to allow the notice of motion application as hereunder:-

**3) That the ex parte judgement and the consequential decree on record against the Defendant/Applicant herein together with all other consequential and subsequent orders, notices and other process arising there from be reviewed, varied discharged and or set aside.**

**4) That the defendant/applicant herein be granted leave to file and serve his Memorandum of Appearance, replying affidavit and statement of defence and counter claim out of time and that the replying affidavit, draft statement of defence and counter claim hereto attached be deemed properly filed and served upon the plaintiff/respondent herein subject to payment of the requisite court fees.**

26. Costs of the application shall abide the outcome of the substantive suit.

**DATED, SIGNED AND DELIVERED ON THIS 22ND DAY FEBRUARY, 2022.**

**Mbogo C.G**

**Judge**

**22/2/2022**

In the presence of: -

CA: T.Chuma