



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC CIVIL SUIT NO. 773 OF 2012**

**MARGARET WAIRIMU MUCHERU KARURI.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE NJERU MUCHERU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHRISTOPHER MUGAMBI.....1<sup>ST</sup> DEFENDANT**

**TOM ONYANGO.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for the court's consideration is the defendant's *Notice* of Motion dated **28<sup>th</sup> May 2013**, brought under **Order 12 Rule 7 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act** and the High Court Practice Rules. The defendants are seeking that the orders granted in court on **6<sup>th</sup> December 2012** be set aside and or varied and the application dated **30<sup>th</sup> October 2012** be heard afresh interprties.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the 2<sup>nd</sup> defendant who stated that they were served with the application without a hearing date or hearing Notice and later the application was heard on **13<sup>th</sup> November 2012** without the defendants. They therefore want the orders granted by the court on **6<sup>th</sup> December 2012** be set aside and the application dated **30<sup>th</sup> October 2012** be heard afresh. That when they instructed the advocate he filed a Memorandum of appearance without the knowledge that this application had already been heard. That in the interest of justice, the orders of **6<sup>th</sup> December 2012** should be set aside for hearing of the application inter parties.

This application is opposed. The plaintiffs filed their grounds of opposition on **24<sup>th</sup> September 2012** and stated that the defendants' application was defective and an abuse of the court process because when the application was heard before the court the advocates were not on record therefore the advocates could not be served and that there has been inordinate delay on bringing this application.

Parties canvassed this application by way of written submissions. The defendants reiterated the contents of their affidavit. The plaintiffs in their submissions gave a brief overview of what transpired in the hearing of the application dated 30<sup>th</sup> October 2012 and reiterated the contents of their affidavit.

I have considered the affidavit and the written submissions of the parties herein. The issue for this

courts determination is whether the defendants' application merits the orders sought to have the orders of **6<sup>th</sup> December 2012** set aside.

Applications to set aside *ex parte* orders are governed by **Order 12 Rule 7 of the Civil Procedure Rules** which states that;-

***“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”***

The rule cited above bestows on the court wide discretion to set aside *ex parte* order, but in doing so, the court must be satisfied that to do so would meet the ends of justice given the circumstance of the case. The circumstances that warrant setting aside an *ex parte* orders are

- i. ***firstly, court will usually set aside the ex parte order where it is proved that there has been no proper service .***
- ii. ***Secondly, the defendant must demonstrate not only that he or she was prevented by sufficient cause from filing a defence within the requisite period, but also that there is merit in the defence to the case.***
- iii. ***In addition to the above, a defendant who wishes to have an the ex parte judgment set aside should act reasonably and promptly, and in event of delay in making the application, he or she should explain the reasons for such delay.***

In the instant case, the defendants have not disputed service of the pleadings of this case but they claim that they were not served with a hearing date to the application dated **30<sup>th</sup> October 2012**. I have perused the court file and found the Affidavit of service deponed by **Martin Mutua** on **12<sup>th</sup> November 2012**.The said Affidavit indicated that the documents that were served upon the two defendants were a plaint, verifying affidavit, plaintiff's list of witnesses and documents and the Notice of Motion application dated **30<sup>th</sup> October 2012** and scheduled for hearing on **13<sup>th</sup> November 2012**.The Notice of Motion dated **30<sup>th</sup> October 2012** had on the face of it a hearing date of **13<sup>th</sup> November 2012** .A further perusal of the court file shows that the defendants filed their Replying Affidavit on **20<sup>th</sup> November 2012**.This was a week after the court had heard the plaintiffs application and ostensibly this is the time the court file is kept at the judge's chambers awaiting a ruling. It was not therefore possible for the Judge to consider the said affidavits for the reasons that as at the time the affidavits were filed the file was not at the registry but at the judge's chambers. This meant that the only time these two pleadings were filed in the court file was after **6<sup>th</sup> December 2012** after the judge had rendered her decision. The fact that they filed their pleadings a week after the hearing of this case lends credence to the affidavit of service of **Martin Mutua** that he indeed served the defendants with the pleadings with the date indicated on the face of the application. This court therefore does not find any sufficient reason to set aside the order on the grounds of service of documents to the defendants.

Assuming even for arguments sake that the defendants were not served with a hearing Notice. The contested application was heard on **13<sup>th</sup> November 2012** and the court delivering its ruling on **6<sup>th</sup> December 2012** and an order was issued on **22<sup>nd</sup> February 2013** restraining the defendants from dealing with the suit property pending the hearing and determination of the suit. This instant application was filed in court on **28<sup>th</sup> May 2013** four months after the defendants had known that the application had been prosecuted and orders issued therein .They have not explained the delay in filing their application and have also not demonstrated the prejudice the said orders of the court has caused to them.

The Court therefore do not find any reason why the orders issued by this court on **22<sup>nd</sup> February 2013** should be set aside. I have perused the court file and note that the parties have closed their pleadings and that the defendant has actually complied with order 11 of the Civil Procedure Rules. The plaintiff

must also move in speed to have the matter set down for hearing and determination of this suit.

Having now carefully considered the Defendant's Notice of Motion dated **28th May 2013** , the Court finds it devoid of merit and consequently dismisses the same entirely with costs to the Plaintiff.

It is so ordered.

**Dated, Signed and Delivered this 22nd day of May, 2015**

**L.GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Court Clerk: Nyangweso

**Court:**

Ruling read in open Court in the absence of the parties. Date was taken in the presence of the parties advocates.

**L.GACHERU**

**JUDGE**

**22/5/2015**