



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO 283 OF 2017

JAMES MULWA MALUNDA.....1ST PLAINTIFF

CHARLSE MUTISYA KYENZE.....2ND PLAINTIFF

ELIZABETH MBAIKA NZANGI.....3RD PLAINTIFF

VERSUS

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.....DEFENDANT

RULING

1. By a Notice of Motion dated 26th of April 2021 brought under Order 40 Rule 1, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 39 of the Environment & Land Court Act 2011, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the law, the Applicant is seeking for the following orders: -

a) Spent.

b) That this Honourable Court be pleased to set aside the ex-parte judgment entered on 24th of April 2018 pending the inter-partes hearing of this application.

c) That this Honourable Court be pleased to order a stay of execution of the decree in the matter dated 28th September 2020 pending inter-partes hearing of this application.

d) That this Honourable Court be pleased to lift the injunction placed on the suit properties and instead issue a temporary injunction restraining the Plaintiffs herein by themselves and any other person acting on their behalf from any dealings in the subject suit properties pending hearing and determination of the application inter-partes.

e) That this Honourable Court be pleased to order the Plaintiffs to serve the pleadings upon the Defendant and grant leave to the Defendant to file its defence to be able to defend the suit.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of CS. Sharon Obonyo the Acting Chief Executive Officer of the Applicant sworn on 26th of April 2021.

3. A summary of the grounds and the averments is that vide an ex-parte judgment delivered on 24th of April 2018, the court issued an order of injunction against the Defendant and ordered the Applicant to pay Kshs. 100,000/- to each Plaintiff. The Applicant averred that the suit properties legally belong to the Defendant. The Applicant further averred that it was unable to defend the suit as the service of summons and the plaint was not effected upon it. The Applicant argued that it was unable to file a draft defence for want of the Plaintiff's pleadings. The Applicant argued that as a result of the enactment of the Water Act, the Applicant not only changed its name, but also changed its offices as well.

4. The Applicant contends that during the transition period, many files and documents were misplaced and that the Applicant was not certain whether or not the pleadings in this matter were part of the documents that were misplaced. The Applicant contends that it will be just for the Respondent to serve it with the pleadings and for the Applicant to be granted leave to file its defence.

RESPONDENTS CASE

5. The application is opposed vide the replying affidavit of Philip Kisaka Sikolia Advocate sworn on 16th of September 2021. He averred that prior to the commencement of the suit herein, he had issued a demand notice to the Applicant to unconditionally vacate the suit property and remove the fence that it had erected following its trespass on the suit property. That upon receipt of the demand letter, the Applicant wrote back and requested for details and supporting documents to their claim. That thereafter, although the Respondent forwarded the supporting documents as requested, the Applicant failed to comply with the demand prompting the Respondents to institute the present suit.

6. He further averred that the summons to enter appearance together with the plaint were served upon the Defendant who failed to enter appearance or file its defence. That the court having satisfied itself that the Defendant was duly served, directed that the suit proceeds as an undefended suit. He further averred that at the hearing of the suit, the Plaintiff demonstrated to the court that it was the registered owner of the suit property unlike the Defendant who in the present application failed to do so.

7. He contends that the Applicant's allegation that it was unable to exhibit a defence was hollow as nothing stopped it from perusing the court record and obtaining the same from the court record.

SUBMISSIONS

8. The Applicant through its written submissions filed on 11th November 2021 submitted that although the Defendant was served with the summons to enter appearance and the plaint, it was only fair and just to set aside the default judgment. Counsel for the Defendant/Applicant submitted that owing to the enactment of the Water Act, the Applicant changed its name from the National Water Conservation & Pipeline Corporation to National Water Harvesting and Storage Authority. Counsel further submitted that during the transition period, the Defendant moved its offices and as a result, a number of documents and files were inadvertently misplaced. Counsel further submitted that although it was not in dispute that the Applicant was served on 26th of May 2017, the service was effected during the period when the Defendant was undergoing substantial restructuring. To buttress his submissions, Counsel placed reliance on the following cases;

a) Gulf Fabricators Vs County Government of Siaya (2020) eKLR.

b) James Kanyita Nderitu & Another Vs Marlos Philotas Ghikas & Another (2016) eKLR.

9. On the issue as to whether the court should grant the Defendant leave to file its defence, Counsel submitted that as at the time of filing the instant application, they did not have any pleadings save for the judgment and decrees that were served upon it by the Plaintiff's and therefore the Defendant was unable to file its draft defence in response to the plaint. Counsel further submitted that the application was filed at the height of Covid 19 when courts were partially closed and that perusal of court files had been suspended by all the courts. Counsel further submitted that it had tasked the office of the AG to come on record as the matter involves the public interest.

10. The Plaintiff/Respondent submissions were filed on 25th January 2022.

11. Counsel for the Respondent submitted that the issues for determinations were;

a) *Whether the Applicant had established sufficient cause to warrant the grant of the orders sought and if so;*

b) *Whether the Applicant has any defence which raises triable issues.*

12. On the issue whether the Applicant had established sufficient cause to warrant the grant of the orders sought, Counsel for the Respondent submitted that the Applicant had failed to demonstrate a bona fide defence since on the one hand the Applicant denied having been served with the summons to enter appearance and the plaint, while on the other it admits service. Counsel further submitted that since the Applicant was seeking the court's discretion to be exercised in its favour, the Applicant ought to be forthright in its explanation. Counsel relied on the following cases to buttress his submissions.

a) Shah Vs Mbogo and Another (1967) EA 116.

b) Wachira Karani Vs Bildad Wachira (2016) eKLR.

13. Counsel further submitted that the Defendant's Managing Director was served with the summons to enter appearance on 26th of May 2017 and acknowledged receipt by endorsing the official stamp. Counsel argued that the judgment was regular. He placed reliance on Order 6 Rule 1(1), Order 6 Rule 1 (3) and in the case of **Multiscope Consulting Engineers Vs university of Nairobi & Another (2014) eKLR.**

14. On the issue as to whether the Defendant has any defence that raises triable issues, Counsel submitted that the Defendant had failed to exhibit a defence that would assist the court to ascertain if it has a defence that raises triable issues so as to warrant the exercise of the court's discretion.

15. Counsel further submitted that the Defendant's allegation that it was unable to exhibit a draft defence was hollow and unreasonable as there was nothing that stopped it from perusing and obtaining copies of the pleadings from the court file. Counsel contends that even without a defence, the Applicant had failed to provide an affidavit of means to demonstrate the defence that it may have. Counsel argued that by setting aside the judgment, the court would be acting in vain as the Applicant had no defence. Counsel placed reliance on the case of **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd Vs Augustine Kubende (1982-88) KAR 1036.**

ANALYSIS AND DETERMINATION

16. Having considered the application, the grounds, the affidavits and annexures and the rival submissions, I find that the main issue for determination is whether the ex parte judgment and all consequential orders should be set aside.

17. Order 10 Rule 11 of the Civil Procedure Rules provides that ex parte interlocutory judgments in default of appearance or defence may be set aside. It stipulates as follows: -

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or upon such terms as are just.”

18. Courts have the discretionary power to set aside ex parte judgment with a view of doing justice to the parties. The discretion should be exercised to avoid injustice. In the case of **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd Vs Augustine Kubende (1982-1988) KAR**, the court held that;

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.”

19. In the present case, this suit was filed on behalf of the Plaintiffs on 23rd of May 2017 vide a Complaint dated the same day. The Defendant having failed to enter appearance or file its defence, the court on 1st of November 2017, directed that the matter to proceed to formal proof without necessarily entering interlocutory judgment. The matter proceeded to formal proof on 14th of March 2018 and the court rendered its judgment on 24th of April 2018. The Applicant stated that it became aware of the judgment after it was served with a copy of the judgment and decree.

20. It is not in dispute that the Defendant/Applicant was served with the summons to enter appearance and the complaint. The applicant admitted that it managed to trace its file which confirmed that service was effected upon it. The Applicant submitted that owing to the restructuring and reorganization of the Water Act 2016 which establishes the Defendant, the National Water Conservation & Pipeline Corporation changed its name to National Water Harvesting and Storage Authority. The Applicant argued that during the restructuring period which was around the month of June 2017, the Defendant moved to a new office and as a consequence, a number of files and documents were inadvertently misplaced. I find that the Applicant’s explanation as to why it failed to enter appearance and file its defence is plausible and excusable. I find that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of defending his case. Article 50 of the Constitution entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. Halsbury laws of England, 5th edition 2010 v1 61 at para 639 states that;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice.”

21. It is clear that the right to fair hearing is a fundamental human right. I find that no prejudice will be occasioned to the prosecution if the matter is heard on merit.

22. The upshot of the foregoing is that the application dated 26th of April 2021 is allowed in the following terms: -

- a) **The ex parte judgment entered on 24th of April 2018 and all the consequential orders be and is hereby set aside.**
- b) **The Applicant is granted leave to file and serve its defence within 21 DAYS from the date of this ruling.**
- c) **Each party to bear its own costs.**

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MARCH, 2022.

IN THE PRESENCE OF: -

Kisaka for the Plaintiff/Respondent

Mr. Kwemboi – Court assistant