



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE 286 OF 2011

DANIEL SAITOTI MURERO.....1ST PLAINTIFF
WILLIAM RAKITA MURERO.....2ND PLAINTIFF

PAPIYO INVESTMENTS CO. LTD.....3RD PLAINTIFF

VERSUS

SAHAKAR LIMITED.....DEFENDANT

RULING

This Ruling concerns the Notice of Motion dated 15th November 2011 and filed on 16th November 2011 by the Defendant (*applicant*) for orders -

(a) that a temporary stay of execution of the ex parte judgment entered herein on 14th November 2011 in default of defence and any other proceedings subsequent thereto pending inter- partes hearing and final determination of the Application.

(b) that the ex-parte judgment entered against the Defendant/Applicant on 14th November 2011 be set aside.

(c) that the Defendant be granted leave to defend the suit.

(d) costs of the Motion.

The Motion is purportedly based upon the provisions of Articles 22 (d) and 159(2)(d) of the Constitution, Order 22, rule 22(1), Order 50 rule 51 of the Civil Procedure Rules Section 3A and 63(e) of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*) and Section 3 of the Environment and Land Court Act, 2011 and also purportedly, all enabling provisions of law.

When the Motion was urged before me on 20th February 2012, Mr. Kinyanjui applied for an order to disallow the Defendant's Supplementary Affidavit sworn on 24th January 2012 by Patrick Wachira, the

Defendant's Advocate on record, unless the said Advocate was willing to be put on the witness box and be cross-examined on the contents of his Affidavit. In the event, the said Advocate, who was present in court, declined to be so put in the witness box and be cross-examined. Consequently the said Defendant's Advocate's Supplementary Affidavit sworn on 24th January 2012 and filed on 26th January 2012 was struck out and is not therefore considered in this Ruling.

The Motion raises two issues, **firstly** whether the *ex parte* judgment entered in default of defence should be set aside, and **secondly** whether the Defendant should be allowed to defend the suit.

The procedural law regarding the entry of defence, and consequences thereof is set out in Sections 20, and 25 of the Civil Procedure Act. Section 20 provides that where a suit has been instituted the Defendant shall be served in manner prescribed to enter appearance and answer the claim.

Section 25 provides that, after the case has been heard, the court shall pronounce judgment, and on such judgment a decree shall follow. However there are exceptions to this general rule. It shall not be necessary for the court to hear the case before pronouncing judgment where *inter alia* the Defendant has not entered appearance as may be prescribed, or the defendant, having entered such appearance, has failed to file a defence within the time prescribed.

The procedural law with regard to entering an appearance, and filing of a defence and consequences of default to do so, are set out in Order 10 of the Civil Procedure Rules, 2010. Rule 9 of the said Order empowers the court to enter judgment where the Defendant has failed to file a defence within the time prescribed after entering an appearance.

Rule 10, of Order 10 enables the court to set aside or vary judgment which has been entered in default of defence, on such terms as are just.

The Defendant has not invoked any of those provisions in its Notice of Motion, and has also breached rule 11 of the said Order 10, that prescribes that the application for setting aside be made by way of Chamber Summons, and not a Notice of Motion. Although both Notices of Motion and Chamber Summons are heard in open court, it is at the discretion of the court whether or not to hear a Chamber Summons (*which by definition are supposed to be heard in chambers*) in open court, or hear Notices of Motion in chambers (*whereas it should be heard in open court*), it is still a requirement of procedural law that these subtle requirements be observed. They are necessary for the orderly regulation and determination of civil disputes.

The discretion to depart from them, by exercise of inherent powers under Section 3A, or 63(e) of the Civil Procedure Act or indeed Article 22(3)(d) or 159(2)(d) of the Constitution are matters for the court, and do not regulate the procedural law laid down both in the Civil Procedure Act and the rules made thereunder. It is therefore both incompetent and abuse of procedural law and rules to ignore them and engage in voyages of exploration on the court's exercise of jurisdiction without undue technicalities.

The twin issues raised about whether the *ex parte* judgment be set aside and the defendant be allowed to defend the suit are sides of the same coin. The Defendant must show cause why the default judgment should be set aside.

The applicant contends that there was no undue delay in filing the defence. The Defendant's Managing Director and therefore instructing director had travelled out of the country, and none of his fellow directors was comfortable enough to give instructions to their counsel on how to prepare the defence, or to sign witness statements in line with the Civil Procedure Rules, and that the said director returned to the country on 11th November 2011, and managed to file the Statement of Defence on 16th November 2011, some 2 days after entry of judgment on 14th November 2011. The delay was therefore neither unreasonable nor inordinate.

The Defendant also claims that the purported decree for eviction is null and void and unenforceable, that the Applicant will suffer prejudice if its application is rejected, that it would occasion

it irreparable loss or if it were driven away from the judgment seat, it would be denied an opportunity to be heard, and thus condemning it contrary to the rules of natural justice, that the Defendant is a lessee and not a licensee or an invitee.

Order 10 rule 9 confers upon the court a wide and unfettered discretion to set aside judgment in default of defence. Such discretion must however be exercised judiciously, and not whimsically.

It is now almost a "*cliche*" that no defence should be struck out if it raises even one triable issue. I would say that no defendant should be driven away from the judgment seat if its defence raises even one triable issue, and no prejudice would be occasioned to the plaintiff.

In this case, there will not only be no prejudice occasioned to the plaintiff, if the default judgment is set aside, but there is good ground for setting aside the said judgment. The Defence raises serious issues that the purported decree is a nullity, void and unenforceable, issues which need to be canvassed at length and determined at a hearing. The only question is what terms would be just?

The Defendant's counsel asked for costs in the sum of Ksh 100,000/=, a deposit of Kshs 1 million by way of security for mesne profits, and a sum of Ksh 2 million as security for costs. Counsel for the Defendant submitted that a sum of Ksh 5,000/= for costs would be adequate.

I have considered these rival claims. There is no basis for an order for mesne profits. Such an order would fall due if it is shown, at end of the full hearing that the Defendant was a trespasser, and in unlawful occupation of the plaintiff's land. There is no application for security for costs, and no grounds have been advanced for such security. It has not been shown for instance that the Defendant is a foreign company, or that its directors or management is non-resident in Kenya. I therefore decline to make any order for either mesne profits or security for costs.

I however allow, the Defendant's Notice of Motion first referred to above, on terms that the Defendant pays thrown away costs of Ksh 60,000/= and files its Statement of Defence and witness statements (*if any*) within 14 days of this order.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 30th day of May 2012

M. J. ANYARA EMUKULE
JUDGE