



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 3 OF 2018

**IN THE MATTER OF ARTICLES 23, 40 (3), 47, 67, 186 AND SCHEDULE 4 PART 2 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 40(3)
AND 47 OF THE CONSTITUTION**

BETWEEN

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANIZATION.....PETITIONER

VERSUS

KISII COUNTY.....1ST RESPONDENT

IBRAHIM MOSE-MEMBER OF COUNTY ASSEMBLY

BOBARACHO WARD.....2ND RESPONDENT

RULING

INTRODUCTION

1. Before me is a Notice of Motion dated 31st December 2019 in which the Applicant seeks the following orders:

1. Spent.

2. **THAT** the firm of S. Mainga & Co. Advocates be granted leave to come on the record for the 2nd Defendant/Applicant herein in place of the firm of M/s Kennedy Onsembe Advocates since judgment has already been delivered in this instant suit.

3. **THAT** there be a stay of execution against the judgment dated 29th August 2019 and all consequential orders and/ or proceedings arising there from pending the hearing and determination of this application inter-partes.

4. **THAT** the ex-parte judgment obtained by the Petitioner/Respondent herein be set aside unconditionally.

5. **THAT** the 2nd Defendant/Applicant be granted leave to defend this suit on merit

6. **THAT** the instant suit do start de novo

7. **THAT** costs of this application be provided for

2. The Application is premised on grounds (a)-(n) of the application and the Supporting Affidavit of **Ibrahim Mose** sworn on 31st December 2019.

The Respondent filed a Replying Affidavit sworn on 24th February 2020.

3. The matter came up for inter-partes hearing on 24th March 2020 when the parties were directed to canvass the Application by way of written submissions.

ISSUES FOR DETERMINATION

1. Whether the ex parte judgment that was entered into by the court in favour of the Plaintiff should be set aside.
2. Whether the Applicant has a reasonable defence on merits raising triable issues.
3. What consequential orders may be granted.
4. Who is entitled to costs.

ANALYSIS AND DETERMINATION

4. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

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

5. In the case of *James Kanyiita Nderitu & Another [2016] eKLR*, the court of Appeal stated thus:

*“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 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I 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 issue 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.”

6. I would like to point out that the principles which guide the exercise of discretion to set aside a default judgment are now well settled.

In *Evans v Bartlam [1937] A C 473 Lord Atkin [at p. 480]* opined thus in regard to the principles.

“One is that, where judgment was obtained regularly, there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he had a prima facie defense...The principle obviously is that unless and until the court has pronounced a judgment upon merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure”.

7. In the same case, *Lord Wright [at 489]* stated:

“In a case like the present, there is a judgment, which though by default is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication...The court might also have regard to the applicant’s explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion is empowered by the rule to impose”.

8. In a nutshell, the court’s discretion to set aside a regular default judgment entered pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules is unlimited and unfettered and is not to be vitiated by any extraneous factors but may be influenced by the defense tendered or reasons advanced by the applicant for the delay or default. Above all else, the court must ensure that at the end of the day, justice prevails.

9. Regrettably the Petitioner/Respondent failed to file their submissions but merely filed their List and Bundle of Authorities on 2nd March 2020.

10. In their submissions, the Applicant argued that they were unaware that there was a judgment delivered against them. They fail to give reasons why they did not follow the proceedings and only reacted by instructing the firm of Samuel N, Mainga & Co. Advocates after they had been informed that a judgment had been entered. This in itself is not sufficient reason as to why there was delay in filing a Defence in the Petition.

11. The Applicant submitted that in the event that the court fails to grant the prayers sought in the Application, prejudice would only be suffered by one party in this matter; the 2nd Defendant/Applicant.

12. The Applicant argued that they stand to be condemned unheard if the prayers they seek are not granted and urge the court to be guided by the case of **Mbaki & Others vs Macharia & Another (2005) 2 EA 206**.

13. In their submissions, the Applicant urged the court to be guided by the case of **Tree Shade Motors Ltd vs Dt Dobie & Another (1995-1998) 1EA 324**. It was their argument that the judgment delivered on 29th August 2019 ought to be set aside on the basis of the Applicant's Defence annexed to the Application.

14. The onus was on the Applicant to fault the service. From the record there is an Affidavit of Service sworn by an Advocate of the High Court of Kenya (Teddy Enos Ochieng Onyango) on 9th April 2018 where service is shown to have to been effected at the official office of the 2nd Defendant/Applicant herein. The Applicant having failed to fault this service, and in the absence of evidence on record to deem the service as improper, it is incumbent upon me to deem the ex-parte judgment as regular.

15. The judgment would therefore only, be set aside on grounds other than non-service of summons. This notwithstanding, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits.

16. Additionally, I have scrutinized the draft Defence annexed to the Application dated 31st December 2019 and conclude that the same is broadly mere denials; I am not convinced that the Applicant has put forth a reasonable Defence that raises triable issues that would so incline me to exercise my discretion in their favour. In my view the same appears to be a sham put forth to delay the ends of justice.

17. Consequently, the ex-parte judgment delivered on 29th August 2019 stands. I return a verdict that the Application dated 31st December 2019 does not merit setting aside the default judgment and is hereby dismissed.

The costs of this Application be in the cause.

It is so ordered.

Dated, Signed and Delivered, at Kisii this 28th day of January, 2021.

J. M. ONYANGO

JUDGE