REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 59 OF 2017

1. MOHAMED HASSAN ALI...............................1ST PLAINTIFF

2. REHEMA HASSAN...2ND PLAINTIFF

3. ALI KHAMISI JUMA.......................................3RD PLAINTIFF

4. JUMAA ABDALLA NGUZO...........................4TH PLAINTIFF

5. SULEIMAN NGWARE....................................5TH PLAINTIFF

-VS-

1. RUKIA HASSAN..1ST DEFENDANT

2. MOHAMED KHERI.................................2ND DEFNENDANT

3. SELF LAMIR...3RD DEFENDANT

4. SWALEH HASSAN.......................................4TH DEFENDANT

RULING

By a notice of motion dated 24th July, 2020, brought under Section 1A, 3, 3A of the Civil Procedure Act and Order 10 Rule 11 and 1. Order 51 of the Civil Procedure Rules, the Defendants/Applicants seek for orders:

> **1. Spent**
>
> **2. That this Honourable Court be pleased to stay the execution of the ex-parte judgment of this court delivered herein on 9th July, 2020 by Hon. C. K. Yano, and all orders pursuant thereto pending the hearing and determination of this application.**
>
> **3. That this Honourable court be pleased to set aside the ex-parte judgment entered on 9th July 2020 and all consequential orders thereto.**
>
> **4. That such further or other orders be made as the interest of justice may demand.**

2. The application is supported by the affidavit of Swaleh Hassan sworn on 24th July, 2020. The defendants aver that they gave instructions to the firm of Were Geoffrey & Co. Advocates to commence conduct in the suit, and after filing of the defence and response documents, the advocate was taken ill and had to be away and could not complete his obligation with regard to the matter. That the said advocate’s illness was not anticipated and that his health condition was well known condition to the members of the legal fraternity. That the advocate’s absentia was not in any way meant to frustrate the case but rather arose out of unforeseen circumstances. The defendants aver that they have instructed another advocate to take over the conduct of their case and that they have a good defence to the plaintiffs claim. That the mistake of counsel should not be visited upon the defendants herein, adding that the court has discretion to set aside the ex-parte judgment under Order 10 Rule 11 of the Civil Procedure Rules. The defendants have annexed an affidavit sworn by Were Geoffrey Advocate in which he states inter alia, that he was taken ill and had to seek prompt medication which inadvertently forced him to shut down his practice due to the urgency of the condition.

3. In opposing the application, the plaintiffs filed grounds of opposition dated 5th August 2020 and a replying affidavit sworn by Mohamed Hassan Ali, the 1st plaintiff. It is the plaintiffs' contention that the application is misconceived, fatally defective, bad in law, incompetent and otherwise a gross abuse of the court process and does not raise any substantive prayer to be determined by this court. They contend that the application is fatally defective and is filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules since the firm of Thabit, Wampy & Kitonga Advocates is not properly on record for the defendants and thus cannot purport to file the application herein on behalf of the defendants. That the application is brought with the sole aim to frustrate the plaintiffs from enjoying the fruits of their valid proper and lawful judgment. It is averred that at all times, the defendants' advocates then on record M/s Were Geoffrey & Co. Advocates was served with hearing notices which the said firm always acknowledged service by stamping the same without any reservations whatsoever. That therefore the defendants were aware of the hearing dates but deliberately chose not to participate despite being duly served.

4. Both parties filed written submissions in support of their opposing positions and relied on decided cases.

5. I have considered the application together with the affidavits in support and against. I have also considered the submissions filed and the authorities cited. The principles guiding the court in exercising its jurisdiction in applications such as this have been settled. It is trite that the court has wide powers to grant such orders. A court should exercise its discretion in an application to set aside judgment judiciously. In the case of **Shah –v- Mbogoh and Another (1967) EA 116** which was upheld by the Court of Appeal in its decision in **Mbogo and Another –v- Shah (1968) EA 98**, it was held *inter alia* as follows:

> "**Applying the principles that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice**."

6. The decision in the case of **Patel –v- Cargo Handling Services Limited (1974) EAA 75** is also on the same principles and it was held:

> "**There is no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just….The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it " a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."**

7. In this case, the plaintiffs filed this claim by way of a plaint dated 24th February, 2017 which was amended on 17th March, 2017. In the plaint, the plaintiffs are seeking for judgment against the defendants jointly and severally for a permanent injunction restraining the defendants from trespassing into the suit property and a mandatory order of injunction compelling the defendants to bring down the illegal and/or unlawful structures and walls erected in the suit property together with costs of and incidental to the suit. The defendants entered appearance through the firm of Were Geoffrey & Company Advocates and filed a joint statement of defence dated 31st March 2017 in which they denied having trespassed or encroached onto the suit property. The matter was fixed for hearing on 11th March 2020. The court upon satisfying itself that the defendants were duly served with a hearing notice proceeded on 11th March 2020 to record the evidence of the plaintiffs in the absence of the defendants and subsequently thereafter judgment was delivered on 9th July, 2020. It was after the delivery of the said judgment that the defendants filed the present application.

8. The plaintiffs advocates have submitted that the application before court is fatally defective and is filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules for the reasons that the firm of Thabit, Wampy & Kitonga Advocates is not properly on record for the defendants and thus cannot purport to file the application herein on behalf of the defendants without an order of the court and/or consent from the firm of Were Geoffrey & CO. Advocates since judgment has already been passed. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

> "**9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –**
>
> > **a. Upon an application with notice to all the parties; or**
> >
> > **b. Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.** "

9. I have perused the court record. There is a consent dated 23rd July 2020 filed on 29th July, 2020 signed by both Were Geoffrey & Co. Advocates and Thabit, Wampy & Kitonga Advocates. It is therefore clear that there was compliance with the provisions of Order 9 Rule 9. The firm of Thabit, Wampy & Kitonga are granted leave to act for the defendants and the Notice of Change of Advocates filed is deemed properly filed and served.

10. In this matter, service is not disputed. The only reason given by the defendants for failing to attend court is that their advocate was taken ill and had to be away and could not complete his obligation with regard to the matter. I have however perused the affidavits filed, including the one by Mr. Were Geoffrey advocate. There is no document presented to support the alleged illness. Moreover, the hearing notice that was served upon Were Geoffrey & Company Advocates were duly received and stamped by the said Advocate without any reservation whatsoever. In this case, I am not satisfied with the explanation given for failure by the defendants to attend court during the hearing. The reason advanced is not supported by any evidence, and the court cannot exercise its discretion in their favour.

11. The court has also looked at the joint statement of defence filed. The same is a mere denial and raises no triable issues. From the material on record, it is clear that the suit property was distributed by the Kadhi's court in Succession Cause No.158 of 2007 and each beneficiary given their respective portions. I am persuaded that the defence filed, which is a mere denial, is not reasonable. Prima facie the statement of defence filed does not raise any reasonable defence to the plaintiffs' claim. I am therefore not persuaded that I should exercise my discretion to set aside the ex-parte judgment herein. Having looked at the pleadings before me, on their face value, there is no prima facie triable issue that was raised by the defence filed herein.

12. In the result, I find that the Notice of Motion dated 24th July 2020 lacks merit and the same is hereby dismissed with costs to plaintiffs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE