



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 158 OF 2019

NEEM PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

WELLS FARGO LIMITED.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 4th November, 2020, made under Order 10 Rules 6 and 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the defendant/applicant seeks orders:

1. Spent

2. That the ex-parte judgment entered against the defendant herein in default of appearance and all consequential orders be set aside.

3. That the defendant be granted leave to file its memorandum of appearance out of time and the statement of defence already filed be deemed to have been filed within time.

4. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to grant.

2. The application is supported by the affidavits of Willis Ayieko and further affidavit of Kennedy Mokaya and on the following grounds:

a. That the plaintiff obtained ex-parte judgment on 3rd October, 2019 against the defendant in default of appearance and thereafter the plaintiff has taken several steps on prosecution of this matter ex-parte.

b. That the defendant was served with summons to enter appearance but inadvertently omitted to instruct an advocate in time to enter appearance and defence as required by law.

c. That the delay in entering appearance and filing statement of defence on the part of the defendant is excusable and this Honourable Court should exercise the discretion in favour of the defendant.

d. That the defendant has a good defence on merits as against the plaintiffs claim and they should be accorded an opportunity to ventilate the same.

e. That in the interest of justice and fair play the defendant's application should be allowed.

3. In the affidavit in support of the application, it is sworn that notwithstanding the participation of the defendant/applicant in this matter on an application by the plaintiff, the defendant has never filed its memorandum of appearance as required by law. That the omission to enter appearance in this matter and file defence within time was occasional by the fact that the instructing client that gave instructions to the firm of Mokaya & Onyambu Advocates came from Middle East Bank Limited and not from the defendant herein and that there appears to have been a lapse and/or breakdown of communication as pertains to the defence of this matter. It is averred that the defendant has a good defence on merits as against the plaintiffs claim and a draft copy of the statement of defence has been annexed. It is the defendant's contention that the omission to enter appearance and file statement of defence was not deliberate and it is therefore excusable. The defendant urged the court to grant the orders sought.

4. In opposing the application, the plaintiff filed a replying affidavit sworn by Mary Wangari Mbugua. It is the plaintiff's contention that the

application is without merit as it does not proffer any reasonable explanation why the defendant failed to file their statement of defence within the period prescribed by the rules. That the defendant has evidently treated the issue of setting aside the judgment in default of defence endorsed over a year earlier on 3rd October, 2019 and the ensuing formal proof proceedings together with the plaintiff's written submissions filed on 9th October, 2020 with scornful contempt and as proceedings that the court ought to set aside as a matter of course without considering the serious prejudicial effect of the prayers sought. It is stated that the firm of Mokaya & Onyambu Advocates, and in particular Mr. Mokaya, the Advocate bringing the present application to set aside the ex-parte proceedings herein has always participated in this matter in his capacity as advocate representing the defendant during the hearing of the plaintiff's application dated 2nd September, 2019. Further, that the said firm of Advocates abandoned its chamber summons application to cease from acting for the defendant dated 3rd August 2020 effectively remaining on record for the defendant and thus defeating the argument that there were no instructions to continue acting in the matter as the panacea for not having filed a memorandum of appearance and defence on time. That the applicant's counsel has been transacting this matter on behalf of the defendant, and even argued the plaintiff's application dated 2nd September, 2019 and therefore had sufficient time and opportunity to file the defence on time and/or to make the present application without having to let the present suit to the stage it is today. That the explanation given is a mere excuse and ought to be disregarded as Middle East Bank Limited has never been a party to this suit. That the defendant is represented by an advocate namely Evans Soita China who is the legal officer who swore the replying affidavit sworn on 7th October, 2019 on behalf of the defendant in relation to the plaintiff's application dated 2nd September, 2019, hence the defendant cannot purport not to have understood the requisite procedure. That the annexed defence is littered with mere denials and does not raise any triable issues, the court having found in favour of the plaintiff on 11th December, 2019 and which the defendant complied with on 21st December, 2019, making the issue of trespass and the plaintiff's ownership of the suit properties uncontroverted facts.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties who also relied on decided cases. I have considered the application together with the affidavit in support and against. I have also considered the submissions filed and the authorities cited. The principles guiding the court in exercising its discretion in applications such as this have been settled. It is trite that the court has wide powers to grant such orders save that where the discretion is exercised, the court will do so on terms that are just.

6. In the case of **Shah –v- Mbogoh (1967) EA 116** at page 123, it was stated:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

7. In the case of **Patel –v- EA Cargo Handling Services Ltd. (1974) 1EA 75** at page 76, **Sir Ruffus P.** stated thus:

“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 as is the case here the court will not usually set aside the 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.”

8. I have perused the court record. This suit was commenced by the plaintiff by way of plaint dated 2nd September, 2019 and filed in court on 3rd September, 2019. Accompanying the plaint was a notice of motion dated 2nd September, 2019 seeking orders of eviction, prohibitory injunction and vacant possession brought under certificate of urgency. When the said application came before me ex-parte on 3rd September, 2019, I directed that the application be served for inter-partes hearing on a date to be given at the registry. The application was then fixed for hearing on 7th October, 2019. When the application came up for hearing on 7th October, 2019, Ms. Wamithi advocate appeared for the plaintiff while Mr. Mokaya advocate appeared on behalf of the defendant. The defendant through Mokaya & Onyambu Advocates filed a notice of appointment of advocate and replying affidavit sworn on 7th October, 2019 by Evans Soita China, legal officer of the defendant company. Both advocates submitted on the application and the court reserved its ruling to 11th December, 2019 when the same was delivered in the presence of the two advocates. The record further shows that the firm of Mokaya & Onyambu Advocates filed an application dated 3rd August, 2020 to cease acting for the defendant but it appears the said application was never prosecuted. In the affidavit in support of that application, Mr. Mokaya stated on oath that his firm had the conduct of the defence case for and on behalf of the defendant. He further deposed that the firm had totally lost touch with the defendant and all their efforts both in writing and by telephone calls asking the defendant for further instructions to continue acting in the matter have not borne fruits and that it appeared that the defendant was not interested in the case any more, hence the application to cease from acting.

9. From the above, it is quite clear that the defendant was always aware of the case and was represented by counsel throughout the proceedings. The application herein to set aside the default judgment is only an afterthought and is meant to delay the finalization of this matter. In my considered view, the defendant has not presented before court any good ground to warrant the grant of the orders sought. I have also perused the annexed draft statement of defence filed. In my view, the said draft defence consists of mere denials and raises no triable issues warranting the court's discretion to set aside the interlocutory judgment, considering the court's finding in favour of the plaintiff vide the ruling delivered on 11th December, 2019. The court has also noted that the application has been brought after an inordinate delay of over one year and no explanation has been given for such delay.

10. By reason of the foregoing, I find that the notice of motion dated 4th November, 2020 lacks merit and the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE