

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC NO. 245 OF 2017

GILBERT CHARO MSHANGA
PLAINTIFF

VERSUS

CHINA HENAN INTERNATIONAL CO-OPERATION
(GROUP) COMPANY LIMITED
DEFENDANT

RULING

1. The application for determination is the Defendant's Notice of Motion application dated 16/12/2019. It seeks the following orders: -

- 1) Spent**
- 2) Spent.**
- 3) Spent.**
- 4) Spent.**
- 5) That the honourable court be pleased to set aside the judgment of this Honourable Court delivered on the 31/1/2019 and the decree therein as well as the proceedings of the 26/6/2018 and the Defendant be granted leave to file a defence in this case.**
- 6) That the costs of this application be provided for.**

2. The application is supported by the affidavit sworn by **Chen Jun** on 16/12/2019 and on the grounds that judgment was delivered in this suit on 31/1/2019. Prior to that, and upon service of summons to enter appearance, the Defendant instructed the firms of P.G Kaingu & Company and Michira Messah & Co. Advocates to represent it. The said advocates thus filed a memorandum of appearance on 21/12/2017 but failed to file a statement of defence. Moreover, and despite service of the hearing notice

on 26/6/2018, the said advocates failed to attend court for the hearing. The Defendant asserted that all that while, the said advocates neither informed it of the hearing date nor that a defence had not been filed. The Defendant only came to learn that the case had been heard and determined on 10/12/2019 when they were served with the proclamation and warrant of sale.

3. The Defendant pleaded that they have a good defence and counterclaim against the Plaintiff and should not be condemned unheard for the mistakes of counsel. They asserted that the Plaintiff failed to disclose that prior to filing the suit, he had disposed of the suit land to one Leonard Mbonani Bikangi and whose application to be joined to the suit was pending at the time the suit was heard. The Defendant was apprehensive that should the orders sought not be granted, they will suffer irreparable loss without being heard.
4. The Plaintiff filed a replying affidavit which he swore on 15/1/2020, stating that the Defendant has failed to disclose to the court why their advocates failed to file a statement of defence and why they did not take any steps to follow up on the progress of the suit. The Plaintiff added that the suit land **Kilifi/Gede/Mjomboni/973** is still registered in his name and that there was no document showing transfer and or registration of the same in the Defendant's name. The Plaintiff asserted that the defence does not raise any triable issues since the lease agreement relied upon by the Defendant cannot stand for reason that the lessee therein, Leonard

Mbonani, did not have any proprietary right over the suit land. He added that in any case, the counter-claim was not directed to the Plaintiff but the said Leonard Mbonani.

5. The application was canvassed by way of written submissions.

Defendant's submissions dated 27/8/2024

6. Counsel submitted that the main issue for determination is whether the judgment dated 31/1/2019, decree dated 2/12/2019 and proceedings in this suit should be set aside. She was guided generally by the principles for setting aside that were observed in the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR; and Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR where the court cited with approval the case of CMC Holdings Limited v Nzioki [2004] KLR. She thus considered three issues namely, whether the Defendant has provided sufficient reason as to why it failed to file its defence and attend hearing; whether the intended defence raises triable issues and whether it is in the interest of justice to set aside the impugned judgment.
7. On whether the Defendant has provided sufficient reason, counsel explained that once the Defendant instructed the advocates, they were under the *bona fide* belief that their advocates would act appropriately by filing the requisite documents and updating them on the progress of the

suit, especially since the Defendants are foreigners and unfamiliar with the court process. Counsel argued that the discretion to set aside should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake as was held in the Mureithi Charles & another v Jacob Atina Nyagesuka case [supra].

8. On whether the defence raises triable issues, it was counsel's argument that the question of ownership and right to possession of the suit land are key to determining the Plaintiff's claim for trespass; that the draft defence is premised on the allegation that the Defendant was in lawful occupation of the suit land, which if proven, would negate the Plaintiff's claim for trespass. She added that the application for joinder by the said Leonard Mbonani raised pertinent questions on material facts such as the existence and validity of the sale agreement between the Plaintiff and himself. In addition, counsel added that there is evidence of the purchase price which is yet to be rebutted. To counsel, all these amounted to triable issues warranting a full hearing. Again, she relied on the Mureithi case [supra] to buttress her argument.
9. On whether it is in the interest of justice to set aside the *ex-parte* judgment, counsel submitted that the right to be heard is a fundamental principle of natural justice and denying the Defendant a chance to defend itself would amount to an injustice. That not only will it suffer an unfair loss, but also result in the unjust enrichment of the Plaintiff. To counsel, setting aside the impugned judgment and decree will not prejudice the

Plaintiff as he will have the opportunity to argue his case on merits; and that any inconvenience occasioned by the delay can be mitigated. To support this argument, counsel relied on the case of David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR.

Plaintiff's submissions.

10. I have thoroughly perused the court record and establish that the Plaintiff's current advocates did not file any submission. I will therefore consider those previously filed on 10/2/2020. In the said submissions, counsel argued that **Order 12 rule 7** does not give an automatic right that it is mandatory that judgment be set aside. To counsel, it is not sufficient to blame one's advocate for failure to participate in a suit, hence it would be a travesty of justice to set aside the impugned judgment due to the Defendant's indolent conduct. Counsel based his argument on the cases of Tana and Athi Rivers Developments Authority v Jeremiah Kimigho Nyakio & 3 others [2015] eKLR; and Savings and Loans Limited v Susan Wanjiru Muritu Nbi Milimani HCC No. 397 of 2002.
11. On whether the draft Defense raises triable issues, counsel submitted that by virtue of **Section 26** of the Land Registration Act and the fact that the suit property is registered in the name of the Plaintiff, the question of ownership was not an issue. He added that the counter-claim was only directed to the said Leonard Mbonani and that the Defendant ought to have filed a separate suit.

ANALYSIS

12. Issues that arise for determination are: -
- i. **Whether the judgment delivered on the 31/1/2019 and the decree therein as well as the proceedings of the 26/6/2018 should be set aside.**
 - ii. **Who shall bear the costs of the application?**
13. The facts leading to this application are not disputed. The Plaintiff instituted this suit on **11/12/2017**. On **14/12/2017**, the Plaintiff served the Defendant with the summons to enter appearance. Subsequently, the Defendant entered appearance on 21/12/2017 through the firm of Michira Messah Co. Advocates and P.G Kaingu & Company Advocates. Thereafter, the Defendant and his said advocates disappeared. No defence was filed, neither did they attend the hearing. On 31/1/2019, judgment was entered for the Plaintiff against the Defendant.
14. The guiding provision of the Law with regards to setting aside of an ex-parte Judgment such as the one in this case is to be found in **Order 10 Rule 11** of the Civil Procedure Rules which provides: -
- “Setting aside judgment [Order 10, rule 11.]
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.”**
15. Further and as rightly submitted by the Defendant there are two type of *ex-parte* judgments: regular and irregular. The difference between the two was highlighted by the Court of Appeal in **James Kanyiita Nderitu & Another -v- Marios Philotas Ghikas & Another (supra)**, where the learned Judges of Appeal explained: -

"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. 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, but for one reason or another, he had failed 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. EA. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986/ KLR 492* and *CMC Holdings v. Nzioki [2004/ 1 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..."

16. In the instant case, service of summons was not disputed, in fact, the Defendant admitted service and entering appearance. The impugned judgment therefore is a regular one. The Court's power to set aside a judgment is exercised with a view of doing justice between the parties. In the case of **Kimani -v- MC Conwell (1966) EA 545**, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in **Jomo Kenyatta University of Agriculture and**

Technology -v- Musa Ezekiel Oebal (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside *ex-parte* judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”

17. In the case of **John Mukuha Mburu -v- Charles Mwenga Mburu [2019] eKLR**, the Court held that: -

“It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [1990] 1KLR 463.”

18. The present application was filed on 16/12/2019, approximately **2 years** after the service of summons to enter appearance. The Defendant blamed its then advocate for the failure to file a defence on time. There was no sufficient reason given as to why the defence was not filed within the statutory period. This delay is in my view inexcusable. I am nonetheless implored to consider the draft defence and determine whether the same raises triable issues.

19. The court in the case of **Patel -v- E.A Cargo Handling Services Ltd (1974) EA 75** aptly explained a defence on merit as follows;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means as Sherridan J put it ‘triable issue.’”

20. In the case of, **Sebei District Administration -v- Gasyali & others (1968) EA 300 Sheridan J.** also observed that:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.”

21. Going through the draft defence, the Defendant’s contention is that it has not trespassed on the suit property as alleged in the Plaint. It states that he is rightly on the suit property by virtue of a lease between itself and one Leonard Mbonani Bikanga, who is alleged to have purchased the suit property from the Plaintiff around the year **2006**. Notably, the said Leonard filed an application dated **23/1/2018** to be joined to the suit as an interested party. That application has however never been determined. In my view, the issues raised in the draft defence are triable worth to be considered on merit. In this scenario it would be in the interest of justice, if the parties were heard on the merits of their respective claims. However, seeing the period of delay, I find that the matter ought to be heard expeditiously and no deliberate delay on the part of any party be entertained. To achieve this, I set aside the judgment dated **31/1/2019** on the following conditions: -

a. The draft defence and counterclaim shall be deemed to be properly filed upon payment of the prerequisite Court filing fees.

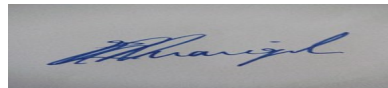
b. The Defendant shall serve the said defence and accompanying documents within 2 days from the date of this order.

c. In default of compliance with order given in (a) and (b) then the order vacating the *ex-parte* judgment shall automatically lapse without further reference to the Court.

d. In view of the fact that this application arose out of the Defendants' own negligence, it is only fair that they bear the consequences. The Defendants shall therefore pay the Plaintiffs the costs of this application together with throw away costs.

e. The matter be set down for case management conference on priority basis on 31/3/2025.

Dated, signed and delivered at Malindi via electronic mail on this 4th day of March 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi".

**MWANGI NJOROGE
JUDGE, ELC, MALINDI**