



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 135 OF 2019

MANSUKHALAL JAMNADAS MORJARIA.....PLAINTIFF

VERSUS

NARENDRA CHANDULAL NAGRA.....1ST DEFENDANT

ONESMUS KIMANI NGUNJIRI.....2ND DEFENDANT

JOHN MUTHEE NGUNJIRI T/A TANGO AUCTIONEERS.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

1. On 15th June 2021 the court delivered judgment in favour of the plaintiff. The 1st defendant vide a Notice of Motion dated 17th August 2021 expressed to be brought under Article 159 (d) of the Constitution, Order 12 Rule 7, and order 22 Rule 25 and Order 45 of the Civil Procedure Rules inter alia seeks stay of execution of judgment; setting aside of the judgment and/or review of the same together with all the consequential orders therefrom; and to be allowed to file a defence out of time.

2. The application is based on the grounds set out on the on the body of the application and the affidavit sworn in support of the application by the defendant/applicant. The applicant set out the following grounds in support of the application.

1. *That this application be certified as urgent and service be dispensed with in the first instance.*
2. *That pending the hearing of this Application inter-parte, this honorable court be pleased to stay execution of the judgment issued on 15th June 2021*
3. *That pending the hearing and determination of this Application, this honorable court be pleased to stay execution of the judgment issued on 15th June 2021.*
4. *That judgment entered on 15th day of June, 2021 be set aside and/or reviewed together with all consequential orders arising there from.*
5. *That the defendant be allowed to file defence out of time.*
6. *That cost of this application be provided for.*

3. The applicant's position is that he was not served with the pleadings and only learnt of the instant suit when he was served with the judgment. The applicant asserted that the failure to file a defence was not intentional. He contended he had a good defence and pleaded to be granted an opportunity to be heard on merits. The applicant averred that he would suffer irreparably if the application was not granted whereas the respondent would suffer no prejudice if the application was allowed.

4. The plaintiff opposed the application through the replying affidavit and further replying affidavit sworn by Shayless Kumar (Aka ShayLess) Maganlal Panchmatia (the plaintiff's duly constituted Attorney P/A 72966/1 of 5th November 2020). The plaintiff averred that after he had been unable to serve the 1st defendant personally he sought leave and the court granted leave for the 1st defendant to be served by way of substituted service by way of advertisement in the Daily Nation Newspaper. The plaintiff averred that even though the law firm of

Waiganjo & Company Advocates, who in the present proceedings represent the 2nd and 3rd defendants, had in Nakuru CMC Misc Application No.74 of 2019 represented the 1st defendant as applicant, they declined to disclose to the plaintiff the physical whereabouts of the 1st defendant to facilitate personal service upon him. The plaintiff further asserted that all indications and the conduct of the 1st defendant, point to him having been aware of the proceedings before the court as it was not understandable how the 1st defendant would have in 2019 sought to levy distress on the suit property vide Nakuru CMC Misc. application No.74 of 2019 and fail to know of the institution of the present suit yet the lawyers he had ostensibly instructed in the Chief Magistrate's Court were in the present suit representing some other parties. The plaintiff further averred that even though the 1st defendant deponed that he learnt about the present suit when he was served with the judgment, he was not infact with the judgment served as his whereabouts were not known and he was thus not being truthful and intended to mislead the court.

5. The plaintiff further averred that the 1st defendant had not demonstrated that he had any defence and/or any defence that raised any triable issue to warrant the court to exercise its discretion to set aside the exparte judgment in his favour. The plaintiff asserted that the document exhibited by the 1st defendant in support of his alleged ownership of the suit property appeared fake as the copy of certificate of title produced was incomplete and did not carry the address of the 1st defendant and no documents were exhibited to demonstrate how the 1st defendant acquired the property. The plaintiff contended there was clear and uncontroverted evidence of how he acquired the suit property which the court evaluated before reaching the decision that it did in entering the judgment in favour plaintiff. The origin of the plaintiff's title was clearly traceable but the 1st defendant's title origin is not explained and the title copy and search certificates exhibited by the 1st defendant have the hallmark of having been fraudulently obtained.

6. The plaintiff explained that the Land Registry Deed file had been missing since May 2019 as confirmed vide the Land Registrar's letter dated 31st May 2019 exhibited as "MJA 7" yet the 1st defendant purportedly obtained searches on 21st December 2020 and 26th March 2021 which would not have been possible without the Deed file. The plaintiff averred these searches could not have been valid and/or genuine. The plaintiff further averred the 1st defendant could be a fictitious person as he neither has an address (in the affidavits he used the postal address of his lawyers), and has not signed the affidavits but initialed using capital letters and has not furnished any document or instrument carrying his identify such as an identity card or instrument of transfer.

7. The 1st defendant and the plaintiff canvassed the application dated 17th August 2021 by way of written submissions. The 2nd – 4th defendants neither filed any responses and /or submissions in regard to the application. I have considered the application, the affidavits sworn in support and in opposition and the submissions filed by the parties and I set out hereunder my evaluation of the issues and the determination thereof.

8. This being an application to set aside an exparte judgment the principal issue for consideration and determination is whether on the facts and circumstances the court ought to exercise its discretion in favour of the 1st defendant/applicant and set aside the exparte judgment. In determining whether or not to exercise its discretion to set aside the exparte judgment, the court has to consider and take into account the reasons, if any, that may have occasioned the default in entering appearance and such reason and/or explanations as the applicant may adduce. Where there is evidence that the applicant was served with summons to appear, apart from considering the reason and/or explanations for the failure to appear, the court has to consider whether the applicant has a defence that raises any triable issue in order to allow the applicant to defend the action. If no viable defence is discernable, the court will decline to grant leave to defend.

9. In the case of **James Kanyiita Nderitu & Another -vs- Marius Phillotas Chikas & Another (2016) eKLR** the court of Appeal summarized the criteria upon which the courts exercise discretionary jurisdiction as follows:-

"In regular default judgment, the defendant will have been served with summons to enter appearance or to file a 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 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 lapsed since the 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 others".

10. In the case of **Shah -vs- Mbogo (1967) EA 166** the Court of Appeal established the guiding Principles that a court needs to consider in an application to set aside an exparte judgment. The court stated as follows:-

"Firstly, there are no limits or restrictions on the judge's discretion to set aside except that if the judge 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 to it by the rules. Secondly, the discretion to set aside is intended, to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".

11. The principles enunciated in the case of **Shah -vs- Mbogo** (supra) were reiterated by the Court of Appeal in the subsequent case of **Patel -vs- East African Cargo Handling Services Ltd (1974) EA 75** where the court per Duffus, V.P stated as follows:-

" 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 to 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 there is a defence on 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”

12. In the present matter the 1st defendant avers that he was not served with the summons to appear and could therefore not appear and file a defence. The plaintiff for his part stated that all efforts to trace the 1st defendant to serve him personally were unsuccessful which prompted him to apply for leave to serve the 1st defendant by way of substituted service. The court granted the plaintiff leave to serve the 1st defendant by way of substituted service. The service was duly effected on the 1st defendant by way of an advert in the Daily Nation Newspaper of 27th January, 2020 and an affidavit of service was duly filed on 24th February 2020. Under Order 5 of the Civil Procedure Rules substituted service with the leave of the court is a valid and accepted mode of service. The 1st defendant was therefore properly and regularly served with summons to enter appearance. The *exparte* judgment thus was a valid and regular judgment and cannot hence be set aside solely on the ground of non-service of summons to enter appearance.

13. Once service of summons is found to have been regular as in the instant case an applicant must demonstrate he has a good and/or reasonable defence to the action on merits that raises triable issues to have the judgment set aside. The reasoning is that if demonstrably the applicant has no plausible defence to the action, it would be pointless to set aside a regularly obtained judgment when the outcome in the event of a trial is more or less evident. It would be a delay of justice to the plaintiff to set aside a regularly obtained judgment and to allow a plainly hopeless and sham defence to proceed to trial. The court must however always be cognizant that where a default judgment has been entered the opposite party has not been given a hearing and hence a denial of a right to be heard should only be as a last resort. The discretionary power of the court must be exercised in all instances judicially having regard to all the attendant circumstances. The need to do justice must be pivotal and the discretions must not be exercised whimsically. As expressed in the case of **Patel -vs- East African Cargo Handling Services Ltd (Supra) and Shah -vs- Mbogo (1967) EA 166** the object of the discretion to set aside an *exparte* judgment is so as:-

“—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”

14. The 1st defendant in the draft defence and counter claim annexed to the further affidavit avers that the plaintiff is an imposter and is not the person he purports to be. He further avers that the documents presented by the plaintiff in support of his ownership are not genuine as ostensibly the title was issued on 21st April 2012 which was a Sunday and not a working day. The 1st defendant in the affidavit in support of the application to set aside the judgment does not indicate under what circumstances he got to be registered as the owner of the suit property and neither does he demonstrate in the draft defence and counterclaim how he acquired ownership of the property. If the 1st defendant had purchased the property or the same was gifted to him, it would only have been prudent for the 1st defendant to exhibit a copy of the sale agreement and/or the instrument conferring the gift.

15. Further, the defendant did not exhibit the instrument that was presented to the land office so that he was registered as the owner of the property. Besides the 1st defendant did not tender any evidence to demonstrate that he was paying any rates and/or land rent as the owner of the property. The copy of the certificate of lease dated 19th May 2016 issued in favour of the 1st defendant is not supported and without any supporting documents, the same remains suspicious.

16. To the contrary, the plaintiff has clearly illustrated how he got to be registered as the owner of the suit property. The root of the title now registered in the plaintiff's name is aptly and clearly demonstrated in the documents tendered by the plaintiff in evidence and which the court duly evaluated before rendering the default judgment. In the relevant part of the judgment the court stated as follows:-

“--- the documentation availed by the plaintiff outlines the history of the ownership of the suit property. The property was transferred to Jamnadas Nathoobhai on 30th May 1955; was willed and transferred to standard Bank Ltd, Girdharlal Jamnadas Morjaria and Mansukhlal Jamnadas, Morjaria (the plaintiff herein) as personal representatives of Jamnadas Nathoobhai (deceased) on 22nd March 1974. The property was subsequently on 8th April 1974 transferred and vested in the name of Girdharla Jamnadas Morjaria who was the plaintiff's brother. The said Girdharlal Jamnadas Morjaria willed the property to the plaintiff and the will was duly proved and Grant of probate issued and a certificate of confirmation of Grant of probate issued on 22nd February 2011 in Nairobi HC Succ Cause No.2520 of 2009. The suit property was bequeathed to the plaintiff absolutely and a transfer of the same by transmission was registered on 11th April 2012 and a certificate of lease issued to the plaintiff”.

17. In the judgment at paragraph 13 I observed as follows:

“13. On the basis of the above, I am satisfied the plaintiff was legally and validly registered as the proprietor of the suit property. It is unclear under what circumstance one Narendra Chandulal Nagda (the 1st defendant herein) came to be registered as the owner of the suit property or who he is as he never appeared to defend the suit. The title issued in his favour dated 19th May 2016 exhibited in the plaintiffs bundle of documents in regard to the suit property is suspect and in the face of the title issued to the plaintiff on 21st April 2012 which I have held to be valid. The title issued to the 1st defendant cannot have been a genuine title and may be the reason why the records at the Lands office could not be traced.”

18. I am not persuaded the 1st defendant has any evidence that could rebut the evidence of ownership of the suit property by the plaintiff. It is not lost to the court that in 2019 there was a concerted effort by the 1st, 2nd and 3rd defendants to have the plaintiff's agents evicted from the suit premises on allegations that they had accrued rent arrears. I dare state that whoever the 1st defendant is was aware that the plaintiff was elderly and sickly and could possibly not fight back and hence the choreographed attempt to wrestle the property from him using what was most probably fraudulent documents. The 1st defendant has not in my view demonstrated that he has a defence that raises a triable issue to entitle the court to set aside the *exparte* judgment entered against him. I decline to exercise my discretion in his favour. The Notice of Motion dated 17th August 2021 is devoid of merit and the same is dismissed with costs to the plaintiff as against the 1st defendant.

19. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3RD DAY OF FEBRUARY 2022.

J M MUTUNGI

JUDGE