



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 3 OF 2018

THERESIA KATUKU VULU.....PLAINTIFF/RESPONDENT

VERSUS

KAVATA MUENDO NDOLO.....1ST DEFENDANT

MUENI MUTUNDU.....2ND DEFENDANT

MUTUKU MUENDO.....3RD DEFENDANT/APPLICANT

KANINI MUENDO.....4TH DEFENDANT/APPLICANT

NDANU MUENDO.....5TH DEFENDANT/APPLICANT

NDAMBUKI MUENDO.....6TH DEFENDANT/APPLICANT

RULING

1. The application for determination is the one dated 16th September, 2020 filed by the Defendants/Applicant under certificate of urgency. It is brought under Sections 1, 1A, 3 and 3A of the Civil Procedure Act and Order 9 Rules 9 and 10, Order 12 Rule 7, Order 51 Rules 1, 3, 4 and 10 of the Civil Procedure Rules, 2010.

2. The Applicants seek the following Orders: -

i) Spent

ii) Spent

iii) Spent

iv) THAT this Honourable Court be pleased to set aside the ex-parte proceedings of 7th October 2019 and the subsequent judgment of 29th April 2020, re-open the hearing of the case and afford the Applicants a right to be heard.

v) THAT the Honourable Court be pleased to vary the judgment of 29th April 2020 and any subsequent decree and/or orders on such terms as it deems fit.

vi) THAT the costs of this application be provided for.

3. The application is supported by the affidavit of Ndambuki Muendo, the 6th Defendant/Applicant, sworn on 16th September, 2020 on his behalf and that of the 3rd, 4th and 5th Defendants/Applicants. The basis of the application is that this matter proceeded *ex-parte* on 7th October 2019 because the Applicants' former Counsel on record failed to inform them about the hearing and consequently, judgment was entered against them. The affiant further deposed that the Applicants learnt about the judgment after being served with an eviction notice dated 17th August, 2020 from the Respondent's Counsel thus prompting the instant application. That the Applicants are eager to have their day in court to defend the Respondent's claim over the suit property which they say is family inheritance. That the mistake of their former counsel should not be visited upon them and it is in the interest of justice that the case be reopened.

4. The Plaintiff/Respondent has opposed the application vide her replying affidavit sworn on 5th October, 2020. The affiant has deposed

therein that the application is frivolous, misconstrued and an abuse of the court process. That the application is composed of hollow averments since a hearing notice was duly served upon the Applicants' former counsel. That the application has been made in an effort to deprive the Plaintiff/Respondent from the fruits of her judgment hence it ought to be dismissed with costs.

5. Only the Applicants filed their submissions in line with court directions issued on 24th September, 2020. In their submissions dated 20th January, 2021, the Applicants submitted that they have satisfied the conditions as set out under Order 12 Rule 7 of the Civil Procedure Rules, 2010. They further submitted that their defence raised triable issues and should the application be disallowed; they would suffer substantial loss. In support of their submissions, the Applicants relied on three sets of authorities namely: -

1) **Patel -Vs- EA Cargo Handling Services Ltd [1974] EA 75;**

2) **Mbogo -Vs- Shah [1968] EA 93;** and

3) **Samuel Kiti Lewa -Vs- Housing Finance Co. of Kenya Ltd & Another.**

6. The Applicants have sought the discretion of this Court under Order 12 Rule 7 of the Civil Procedure Rules, 2010. It provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

7. It is their submission that they were unable to defend the suit before judgment was delivered *ex-parte* on account of their former advocate's omission of failing to inform them of the hearing. For this reason, they have urged this court not to visit the mistake of counsel on them and to therefore allow them liberty to defend the suit.

8. I am cognizant of the fact that orders for setting aside are within the wide discretion donated by the rules governing the procedure of this court. Thus, the only question to be answered by the Applicants is whether their former advocate's mistake is excusable as to merit the reopening of the case and whether when reopened, the Applicants have a reasonable defence on record.

9. In this inquiry, I am guided by the Court of Appeal decision in **CMC Holdings Limited -Vs- Nzioki [2004] 1 EA 23 (CAK)** where the learned judges held as follows: -

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”

10. The Court of Appeal went on further to state as follows: -

“The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the Applicant failed to turn up for hearing on the hearing date but also whether the Applicant has reasonable defence which is usually referred to as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”

11. I have considered the statement of defence on record to assess whether the same has triable issues. It is noted at paragraph 4 therein, that the Defendants have denied being in full possession of the suit property and even further, that they have never sold any land to the Plaintiff as alleged in the plaint. To my mind, the averments in the defence are reasonable and would require a trial in order to be fully substantiated. I am, therefore, in agreement with the Defendants/Applicants on the cited decision of the Court of Appeal in **Patel -Vs- EA Cargo Handling Services Ltd [1974] 1 EA 75 (CAM)** wherein Sir William Duffus P held thus: -

“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 the 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. I have also taken note that this application was made approximately one month after the Applicants were threatened with eviction from the suit property. I do not hold the Plaintiff's/ Respondent's view that the application is a machination towards depriving the Plaintiff/Respondent from enjoying her judgment. I also do not think that the application has been made in an effort to delay the course of justice.

13. It is on the strength of the foregoing that I allow the application in terms of prayer number four (4). Costs will abide the outcome of the main suit.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 28TH DAY OF MAY, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi