



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 66 OF 2012

NAFTALY MURIITHI NJUKI

A.K.A NAFTALI M. NJUKI PLAINTIFF

VERSUS

ABDIRAHMAN ABDILAH I 1ST DEFENDANT

BEATRICE MULI 2ND DEFENDANT

ROBERT MUNG'ARE NYAKUREMA 3RD DEFENDANT

ABDALLA NZIOKA 4TH DEFENDANT

DISCTRICT LAND REGISTRAR, LAMU 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

THE LAMU LAND CONTROL BOARD 7TH DEFENDANT

RULING

This ruling is in respect of a Notice of Motion application by the defendant/applicant dated 27th May 2021 seeking for the following orders: -

a) Spent

b) Pending the hearing and determination of this application, the court does stay the writing and delivery of its judgment.

c) The court order marking the defence case as closed be reviewed and set aside and the 1st Defendant's case be reopened and the 1st Defendant be heard on his defence.

d) That costs of this application be provided for.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st defendant filed submissions and relied on her supporting affidavit dated 27th May 2021 and grounds on the face of the application. It was counsel's submission that the defence case was closed for non-attendance and parties directed to file submissions for judgment. That counsel only learnt about this on 4th May 2021 when the suit was slated for mention to confirm filing of written submissions.

Counsel for the 1st defendant averred that her non-attendance on the date set for defence hearing was unintentional and an inadvertent oversight for the reasons that counsel believed that there was a pending ruling to be delivered on 19th September 2019. That the ruling was not delivered and the court directed that the same will be delivered on notice.

Counsel further averred that her office was not served with any other notice until 10th March 2021 when she was served with the mention notice and the Plaintiff's written submissions. Counsel stated that if at all there was any notice served regarding the hearing date, it was possible that the same was served during the outbreak of the Covid-19 pandemic when offices adopted the Ministry of Health guidelines to work from home.

Counsel submitted that she has given sufficient explanation and urged the court to exercise its discretion as per the case of **Shah v. Mbogo [1968] EA 93** and grant the orders as prayed. Counsel further relied on the case of **Multiscope Consulting Engineers v University of Nairobi & another [2014] eKLR** and submitted that every person has a constitutional right to justice, to be heard and a right to a fair trial as enshrined under Articles 48 and 50 of the Constitution of Kenya. That the plaintiff will not be prejudiced if the application is allowed.

Counsel for the plaintiff opposed the application vide a replying affidavit sworn on 16th June 2021 by Randolph Tindika, counsel on record for the Plaintiff. Mr. Tindika averred that they served the 1st Defendant on 3rd November 2020 with a hearing notice which he annexed to the affidavit.

It was counsel's averment that if the court is inclined to allow the application then the 1st defendant should pay thrown away costs of Kshs. 30,000/-.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant has given sufficient explanation to enable the court to exercise its discretion in his favour to set aside the order closing the defence case.

Counsel for the plaintiff submitted that when this suit came up hearing on 4th March 2021, none of the Defendants attended court and upon being satisfied with the service of the hearing notice, the Plaintiff was allowed to proceed with the hearing.

Such applications for setting aside orders are discretionary but the same must be exercised judiciously. The court is obliged to exercise discretion as per the guiding principles laid down in the case of **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** as follows:

"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. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173."

Counsel for the applicant does not deny that she was served with the hearing notice as per the filed affidavit of service. Her only explanation for not attending court is a blame on Covid 19 pandemic and the Ministry of Health guidelines on working from home.

In the case of **Wachira Karani vs. Bildad Wachira [2016] eKLR** the court in setting aside an ex parte order was of the following view,

" although it is an elementary principle in our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions. "

The Judiciary had put alternative ways of accessing the courts through the virtual platform which initially had teaching problems but later picked up very well. Counsel for the plaintiff filed a replying affidavit and stated that if the court is inclined to grant the orders then he would pray for thrown away costs of Kshs. 30,0000/.

I have considered the application, the affidavits and submissions by counsel and find that the court would only be inclined to allow the orders due to Covid 19 but this does not mean that the defendant will escape unscathed. Other litigants especially their advocates managed to navigate the digital platform. Counsel did not tell the court whether she had a challenge in accessing the court. No sufficient cause has been shown, but in the interest of justice I do allow the reopening of the defence case and stay the writing and delivery of judgment on condition that the 1st defendant pays thrown away costs of Kshs 30,000/ within the next 30 days failure to which the order lapses.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF
NOVEMBER, 2021.**

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M.A. ODENY JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.