

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 245 OF 2016

MOHAMED ALI MAALIM PLAINTIFF/RESPONDENT

-VERSUS-

SULEIMAN SWALEH FADHILI DEFENDANT/APPLICANT

MEJUMAA ALI MWAKILEO DEFENDANT/APPLICANT

RULING

1. The notice of motion dated 27th February 2018 seeks to set aside the ex parte judgment entered on 13.6.2016 as against the defendants and that they be granted leave to defend the suit. The application is supported by the grounds on the face of it inter alia that the defendants were not served with the summons to enter appearance and hearing notice and they only came to know about the case at execution state. That the Court has discretion to set aside the judgment.
2. The application is further supported by the affidavits sworn by both defendants. The 2nd defendant deposed she was never personally served. The 1st defendant also deposed that he learnt of the suit through an order left in possession of their tenants in the suit premises. They all deposed that they have a meritorious defence as contained in the annexed draft defence.
3. The application is opposed by the plaintiff through the replying affidavit dated 19th March 2018. The plaintiff has annexed the affidavit of service sworn by Joshua Mutua dated 29th September 2016 that explained how he served the 1st defendant. The plaintiff also deposed that the draft defence is a mere denial and that the application has been brought after undue delay.
4. Parties filed written submissions which I have considered. Was service of summons effected upon the defendants? From the pleadings filed by the parties herein, it is evident that the 1st defendant is a brother to the 2nd defendant. In the affidavit of service by Joshua Mutua, he stated that he called the 1st defendant on his cell phone No 0723293269 and they agreed to meet at Castle Hotel located at Moi Avenue Mombasa at 4 pm on 8th September 2016. That the 1st defendant came and Mr Mutua served him for himself and on behalf of the 2nd defendant. That the 1st defendant signed the copy of the summons to enter appearance.
5. The 1st defendant in his supporting affidavit has not denied that he signed the summons nor that he met Mr Joshua Mutua as deposed nor that the cell phone number given does not belongs to him. He cannot therefore state that he did not know about this case until the decree was left with his tenants at the suit premises. Secondly, the 1st defendant having received documents on behalf of the 2nd defendant, service upon the 2nd defendant was presumed as done pursuant to the provisions of order 5 rule 12 of the Civil Procedure Rules.
6. Does the draft defence raise a triable issue? At paragraph 4 of the draft defence, it is pleaded that the plaintiff purchased the property but failed to clear the purchase price and hence the property in the title remains unsold until the plaintiff pays the entire purchase price being a balance of Kshs 1,500,000= . Part of the documents filed together with the plaint is a sale agreement draw between the parties dated 25.9.2011. There is also filed an acknowledgement slip dated 11th October 2012 signed by the 1st defendant. In the said acknowledgement slip Mr Suleiman (1st defendant) signed that the balance of Kshs 1,500,000 was to be paid upon surrender of vacant possession. Lastly there is filed in the plaintiff's documents a demand letter dated 7.4.2016 addressed to the defendants asking for vacant possession and expressing the plaintiff's willingness to pay this balance if vacant possession is surrendered.
7. Besides the draft defence, the applicants did not annex any document to their supporting affidavit to show why the plaintiff is not entitled to vacant possession of the suit premises. Setting aside of ex parte proceedings is an exercise of the Court's discretion and a party must persuade the Court why such discretion should be exercised in their favour particularly by demonstrating that the orders sought are not intended to obstruct the cause of justice (**Shah vs Mbogo (1967) E. A 116**). In this case, this proof is lacking and I agree with the plaintiff that the draft defence is a mere denial.
8. In summary, I make a conclusion that the defendants were duly served with the summons to enter appearance but failed to take steps to defend themselves. Secondly that the draft defence annexed does not raise any triable issues. The upshot is that the defendants do not deserve the orders sought to set aside the ex parte judgment delivered on 13.7.2017. The said application is dismissed with costs to the plaintiff.

Dated, signed & delivered at Mombasa this 3rd October 2018

A. OMOLLO

JUDGE