



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 213 OF 2014

MARCELLO PERRUCCHETTI.....1ST PLAINTIFF

MARILENA BELLI.....2ND PLAINTIFF

VERSUS

KINUTHIA HOLDINGS LIMITED.....1ST DEFENDANT

OBADIAH KIOKO KAVIVYA.....2ND DEFENDANT

CAROLINE NJOGU T/A MS. J THONGORI &

CO ADVOCATES.....3RD DEFENDANT

KWALE DISTRICT LAND REGISTRAR.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. This ruling is in respect to a Notice of Motion dated 28th October 2020 brought by the 3rd defendant. The application is anchored on Article 50 of the Constitution of Kenya 2010, Section 1A, 1B, 3A of the Civil Procedure Act and Order 10, Rule 11, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law and seeks the following orders:-

a. Spent

b. That there be a temporary stay of execution of the decree issued against the 3rd defendant/applicant pending the hearing and determination of this application inter-parties.

c. That this Honorable court be pleased to set aside and vary the judgement and any other orders issued subsequently on the 28th September 2020 as against the 3rd defendant/applicant in this matter pending the hearing and determination of the main suit in the matter.

d. That this honorable court be pleased to grant leave to the 3rd defendant/applicant to file its defence and accompanying documents or in the alternative deem the draft defence filed herein as duly filed.

e. That the costs of this application be borne by the respondents herein.

2. The application is based on the supporting affidavit of Caroline Njogu who states that she had instructed the firm of Kemosi Mogaka & Co Advocates to act on her behalf in the matter but realized that they had not entered appearance nor filed any pleadings. That the applicant only became aware of the judgement entered against her through the Newspaper on 18th October 2020 where the same was published. That the applicant's advocate then on record ventured into politics and failed to link her up with the advocate who took over the matter despite numerous requests from her. The applicant insisted that the court should allow the application failure of which the plaintiffs would proceed to execute the judgement against the applicant, who would suffer injustice and hardship. The applicant attached a draft copy of a statement of defence that according to her raises triable issues.

3. The plaintiffs opposed the application vide a Notice of Preliminary Objection dated 6th November 2020 on the grounds that the application was an abuse of court process, a non-starter, incurably defective and cannot stand in law; that the application offends the mandatory provisions of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya and is an affront to the express provisions of Order 9 Rule 7 of the Civil Procedure Rules, that the application is frivolous, vexatious and violates mandatory provisions of the law and laid down procedure and cannot be sustainable and ought to be dismissed with costs in limine.

4. The plaintiff further filed a replying affidavit sworn by Marcello Perruccheti dated 13th November 2020 in which it was stated that the 3rd defendant was duly served with an application to amend the plaint to add the 2nd, 3rd and 5th defendants as well as the amended plaint. That the 3rd defendant was also served with a pre-trial conference notice which she acknowledged. The affidavits of service have been annexed. It is stated that the 3rd defendant did not file any opposition to the application for leave to amend, failed to attend court nor file her defence, hence the matter proceeded without her participation. That despite being accorded the right to be heard and being accommodated severally, the 3rd defendant deliberately refused to attend court. That the application is a deliberate attempt by the 3rd defendant to obstruct or delay the course of justice, adding that there is no sufficient reason as to why the court should set aside the judgement herein. It is the plaintiffs' contention that the application has also been brought after the inordinate delay which has not been explained. The plaintiffs contended that the draft statement of defence filed by the 3rd defendant did not raise any triable issue instead proves that involvement of the 3rd defendant in fraud.

5. In opposition of the application, the 1st defendant filed a replying affidavit sworn by Monica Wambui Kinuthia dated 23rd December 2020 and stated that the applicant knew of the amended plaint as she acknowledged receipt of the same. Further that, the applicant chose to instruct the firm of Kemosi Mogaka despite knowing that the said firm had previously acted for the plaintiffs thus creating a conflict of interest. That the applicant continued to sit back instead of looking for the contact of the advocate who was charged with her case until the matter was heard and determined. That the applicant is not a layperson but an advocate of the High Court and therefore obligated to check up on her matter not only rely on her advocate.

6. The 1st defendant also stated that the applicant has no interest in the suit property and thus not aggrieved by Order 1, 2, 3, 4, 5, 6, and 9 of the judgement and it would not be fit for court to set the entire judgment aside for the benefit of the 3rd defendant. The 1st defendant concluded by stating that the application is an abuse of the court process as it does not disclose any valid reason for setting aside of the judgement.

7. The 2nd defendant supported the application vide a replying affidavit sworn by Obadiah Kioko Kavivya dated 21st December 2020 who stated that he and the 3rd defendant were ordered in the judgement to collectively refund Kshs 14,500,00 to the plaintiffs and also pay damages of 1,000,000 plus costs to the suit. He stated that he could not participate in the trial as he was indisposed and his advocate could not cross examine the witnesses. He further alluded that he supports the judgement being set aside to enable the 2nd and 3rd defendants to raise their defences and be heard by court.

8. I have considered the application, the responses as well as the submissions made. The issue before me for consideration is whether the judgement entered herein against the 3rd defendant should be set aside and the applicant granted leave to defend the suit. However before I consider the main issues, the plaintiffs have submitted that the application should be dismissed on the grounds that the same has been supported by a defective affidavit. It is the plaintiff's submission that the said affidavit was sworn at Diani yet the same was attested in Mombasa before a Commissioner of Oaths. The plaintiffs submissions is that this was contrary to the provisions of Section 5 of the Oaths and Statutory Declaration Act which provides that:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

9. I am in full agreement with the plaintiffs' submission. Nonetheless Article 159 (2)(d) of the Constitution makes it clear that when called upon to administer justice, the courts or any other tribunal which exercises judicial authority, shall not be blindly enslaved by procedural technicalities. Whereas the Constitution does not urge the courts to disregard procedural technicalities, it also states that the courts should strive to deal with substantive issues in the matter and decide them on merit rather than having the application struck out or dismissed on the basis of a technicality. Therefore I do hold that the application is not defective and that the same is properly before court.

10. I now turn to the issue whether or not the orders sought should be granted. The principles guiding the court in exercising its discretion in an application such as this are well settled. Its trite that the court has wide powers to grant such order save that where the discretion is exercised, the court will do so on terms that are just.

11. In the case of **Shah V Mbogoh (1967) EA 116** at page 123, it was stated:

“This discretion is intended so be exercised 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.”

12. In the case of **Patel V E.A Cargo Handling Service Ltd (1974) 1 EA 75** at page 76, Sir Duffus P stated thus:

“There is no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be first..... 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 judgement as it is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence no merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “triable issue” that is an issue which raises

a prima facie defence and which should go on trial for adjudication.”

13. This suit was commenced by way of a plaint dated 14th August 2014. The suit was originally filed by the plaintiffs against one defendant, Kinuthia Holdings Limited. The plaintiff then later made an application to amend the plaint and enjoin the 2nd, 3rd, 4th and 5th defendants.

14. The plaintiffs' application to amend the plaint and enjoin the 2nd, 3rd, 4th and 5th defendants was granted on 2nd March 2017. The amended plaint was filed on 25th April 2017. Once a court has granted leave to enjoin a party to the suit, the plaintiff should issue fresh summons to the new defendants and file an affidavit of service provided for in Order 1 Rule 10 (4) which states:-

“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

15. The plaintiffs were required by law to issue summons to enter appearance to the applicant as well as serve the amended plaint. From perusing the court file, the plaintiffs' return of service filed is for the application to amend the plaint to enjoin the applicant as a 3rd defendant. There is no affidavit of service that confirms that the 3rd defendant was served with summons to enter appearance nor court directions to dispose with the duty to serve the same on the 3rd defendant. In this case, I am not persuaded that the 3rd defendant herein was properly served as required by Order 1 Rule 10 (4) notwithstanding that she knew about the case and had instructed a firm to represent her. In the supporting affidavit, the applicant states that she became aware of the judgement after it was published in the newspaper on 18th October 2020. Further to that the applicant states that she instructed the firm of Kemosi Mogaka to act on her behalf but later released the firm had not entered appearance nor filed any defence. In addition, the 3rd defendant has annexed draft statement of defence that demonstrates that the 3rd defendant has triable issues worth going to trial. The 3rd defendant states that by the time the plaintiffs came to her office to make the transaction they had already met with the 2nd defendant who was the vendor. The defence further states that the 3rd defendant conducted due diligence while acting as the advocate for the plaintiffs and any monies that she received was wired to the 2nd defendant and that the 3rd defendant did not retain any money and prays the plaint to be dismissed with costs. The draft statement of defence as laid down by the 3rd defendant in my view does bring out triable issues that would warrant court to set aside the entire judgement as entered.

16. As already stated, the applicant was not properly served as provided by Order 1 Rule 10 (4) of the Civil Procedure Rules. Further, the proposed defence certainly raises triable issues which in my view call for trial. The plaintiffs have not demonstrated how they will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit.

17. The overriding objective of court would no doubt come to the aid of the applicant. The upshot is that the application is allowed. The 3rd defendant is directed to file and serve her defence within 14 days from the date of this ruling. Considering the circumstances of this case, I order that the applicant bears the costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MAY, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE