



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 42 OF 2020

FRANCIS KIBET ARAP SEREM.....PLAINTIFF

VERSUS

MICHAEL KIMTAI NDIWA.....DEFENDANT

RULING

The Application

1. The application dated 7/4/2021 and filed in court on the same date has been brought under **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act, Order 10 Rule 11, Order 51 Rule 1 & 4** of the **Civil Procedure Rules, Article 159 (2)** of the **Constitution of Kenya**. The defendant seeks the following orders:-

- (1) That the ex parte judgment entered against the applicant herein and all consequential orders herein be set aside.**
- (2) That there be stay of further proceedings herein pending the hearing and determination of this application.**
- (3) That the applicant herein be granted leave to file his defence out of time and defend the suit.**
- (4) That costs be in the cause.**

2. The application is supported by the affidavit sworn on 7/4/2021 by the defendant. The grounds on the face of the application are that failure to file appearance and defence was not deliberate. The applicant states that filing defence and copies of documents required at the hearing would only have been possible upon being served with the plaintiff's further documents whose service had been ordered by the court on 1/12/2021 but the said documents were never served and have never been served to date. It is also stated that the defendant and his family members were diagnosed with an illness and one family member passed on hence the delay. The defendant avers that he has a good defence and attaches a copy to the application.

The Response

3. The plaintiff filed his replying affidavit on 19/4/2021 stating that the application is an abuse of the process of the court; that sufficient cause has not been shown as to why the court should exercise its discretion favourably towards the defendant and the defendant has already filed appearance through the same firm Teti & Company which has now filed the application; that judgment in default of defence has been entered and notice served thereof; that by 1/12/2020 the defendant's defence was long overdue appearance having been filed on 3/8/2020 and the plaintiff's counsel only applied for leave just in case he needed to file any documents after the defence was filed; that leave to file a reply to defence could not bar the defendant from filing its defence and that the filing of defence is not predicated upon the filing of further documents.

4. The plaintiff filed his written submissions on 26/4/2021. The defendant filed his submissions on 3/5/2021.

5. Determination

6. I have considered this application, the response and the filed submissions.

7. This court has unfettered discretion to set aside judgment entered upon such conditions as it deems proper. This court has noted it is true that the record reflects that the parties appeared before it on 1/12/2020 and Mr. Maiyo appearing for the plaintiff conceded that he has not complied. On that date the plaintiff was given **14 days** to comply and the defendant was given **14 days** to comply from the date of service of

the defendant's documents. The plaintiff has not denied the defendant's allegation that no documents have never been served on the defendant after that date.

8. I find that it is a reasonable ground for the defendant to rely on when he states that he was awaiting the defendant's documents to enable him file a comprehensive defence.

9. When a plaintiff seeks time to file more documents it is prudent that a defendant would await service of those documents before filing a defence in a matter so that the defence encompasses all the issues.

10. The fact that the parties stayed for a long time before returning to court made matters worse and in my view the plaintiff should have indicated to the defendant as a matter of courtesy that no further documents were intended to be filed in the matter so that the defendant may feel free to file his defence.

11. Besides I have noted that the defendant has indicated in his affidavit that his family underwent traumatic times between December 2020 and April 2021 owing to illness and in my view the defendant may be excused for the delay in filing the defence and its documents.

12. Consequently it is the opinion of this court that the application dated 7/4/2021 should be granted and I therefore grant it in terms of Prayers Nos. (3) and (4) thereof.

13. The defendant shall file and serve his defence as well as copies of all documents he intends to rely on within **14 days** from the date of this order. The hearing date earlier fixed, that is, **16/6/2021** is hereby retained.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 6th day of May, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE