REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1907 OF 2007 (O.S.)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF THE REGISTERED LAND ACT AND

LAND REFERENCE NO. KIAMBAA/KIHARA/T181

NJUGUNA MANGARIA (DECEASED)

WINSTON WARUIMBA NJUGUNA.....PLAINTIFFS

VERSUS

EVAN MATINDI

MARGARET GACIKU MATINDI.....DEFENDANTS

RULING

The application that comes up for ruling is the one dated 10/09/2019 and is supported by the affidavit of Margaret Gaciku Matindi sworn on 10/09/2019. The application brought by the 2nd Defendant seeks the setting aside of the judgement delivered on 27/01/2017 and orders for stay of execution of decree. It also seeks unconditional leave to defend the suit in terms of the draft statement of defence and that the statement of defence attached to the application be deemed to be properly filed. Further, that David Irungu Njema be cross examined on his affidavit of service sworn on 2nd October 2009.

The application was not opposed as the Plaintiff did not file a replying affidavit although served. The brief history of this suit is that the Plaintiffs filed the Originating Summons dated 14/06/2006 claiming adverse possession of the parcel of land known as Kiambaa/Kihara/T181 ("the Suit Property") registered in the name of the 2nd Defendant. From the court record, it is clear that the Defendants did not enter appearance nor did they file any documents in opposition to the suit and on the strength of the affidavit if service of David Irungu Njema sworn on 2/10/2009, the court proceeded to hear the matter and deliver a judgement.

The court has considered the application, the supporting affidavit, written submissions and the authorities cited by the 2nd Defendant.

Prayer 2 of the application cannot be granted for the reason that it seeks stay of execution of the interlocutory judgment delivered on 27/01/2017 and all consequential orders arising therefrom pending hearing and determination of this application. By the time of delivery of this ruling the application will have been heard and determined and that prayer will have been rendered moot.

The court has considered prayer 3 of the application which seeks orders of setting aside the judgment of the court given on 27/1/2017. The affidavit of service sworn by the server one David Irungu Njema deponed to the fact that on 22/06/2006 he received the Originating Summons from the Advocates for the Plaintiffs for service upon the Defendants. He averred that he proceeded to the residence of the Defendants who are husband and wife at Gachie Sub-location. He confirmed that he was directed to the Defendants' home by the 2nd Plaintiff who pointed him out to him. The process server further stated that he introduced himself and the purpose of his visit and that the 1st Defendant called out the 2nd Defendant and some three young men who were the Defendants' sons who were very hostile and who demanded that the process server serves the documents on their family lawyer. Further, the process server stated that the Defendants refused to acknowledge service of the documents by signing on the reverse of his copy after he explained that he could not serve the documents on their lawyer. The process server then left the unacknowledged documents with the Defendants.

The 2nd Defendant did not say anything or make any comments regarding the manner in which the process server claimed to have served the court documents on the 1st Defendant and herself. All that she stated in her affidavit was that she was never served with the pleadings and summons and that she was never notified of the proceedings in any way whatsoever. Further, the 2nd Defendant did not tell the court if indeed she was not aware of the existence of the suit when and under what circumstances she learned of the existence of the suit.

The applicable principles in setting aside of judgements have been enunciated in a long line of precedents. In **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another, Msa Civil Appeal No. 6 of 2015** , the learned Judges of Appeal had this to say; -

> *"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. 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. EA. Cargo Handling Services Ltd (1975) EA 75*** *,* ***Chemwolo & Another v Kubende [1986] 1 KLR 492*** *and* ***CMC Holdings v Nzioki [2004] 1 KLR 173****).*

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See ***Onyango v Attorney General [1986-1989] EA 456)****'.*

It is this court's view that the failure by the 2nd Defendant to address the issue of service as deponed to by the process server leads to the conclusion that service was indeed effected on the Defendants as stated in the affidavit of service. The judgment entered on 27/01/2017 against the Defendants was regularly entered. The Defendants chose to forego the opportunity to be heard by failing to enter appearance and file defence within the stipulated period or at all. Consequently, the court does not find it necessary to call the process server for cross-examination as prayed in the application for the reason that the averments made in the affidavit of service have not been specifically denied or challenged.

The court has further considered the length of time that has elapsed since the default judgment was entered and is of the view that the period is inordinate and no explanation has been given for the delay in moving this court to set aside the judgement. The court does not accept the 2nd Defendant's contention that she was not aware of the suit. The court is of the view that the 2nd Defendant was aware of the suit and the period it took for her to bring the application to set aside judgement is inordinate.

Further, it is noted that the 2nd Defendant does not mention in the body of the application and the supporting affidavit what her defence to the Plaintiffs claim is, which would demonstrate that the 2nd Defendant does have a good defence to the Plaintiffs' claim.

The 2nd Defendant's application dated 10/09/2019 lacks merits and is dismissed with no orders as to costs.

Delivered virtually at Nairobi this 29th day of July 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Brian Ochieng for the Defendants

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff