



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 29 OF 2016**

**1. AMIL SAHEB**

**2. SHAIKH ASGERALI SIDIQALI NOORBHAI**

**3. SHAIKH SHABBIR BHAI SHALK BURHANUDDIN BURHANI**

**4. MULLA ASGERALLI RAABALI BHARMAL**

**5. YAHAYA MULLA FAKHRUDIN GULAMHUSAIN**

**[ALL SUING AS THE NOMINEES APPOINTED BY HIS HOLINESS**

**D.R. MUFADDAL SAIFUDDIN WHO IS THE TRUSTEE OF DWAT**

**– E- HUDIYAH KENYA REGISTERED TRUSTEE FOR AND ON**

**BEHALF OF THE BOHRA COMMUNITY IN LAMU].....PLAINTIFFS**

**VERSUS**

**MUHAMED ALI MUHAMED.....DEFENDANT**

**RULING**

1. By this Notice of Motion dated 29<sup>th</sup> November 2019 and filed herein on 2<sup>nd</sup> December 2019, Mohamed Ali Mohamed [the Defendant/Applicant] prays for orders that this Honourable court be pleased to set aside its judgment delivered herein on 28<sup>th</sup> September 2018 and to direct that the matter be heard on merit.

2. The Application which is supported by an affidavit sworn by the Defendant/Applicant is premised on the grounds:

*i. That the Defendant was served with the summons to enter appearance and other pleadings herein on or about 11<sup>th</sup> March 2016;*

*ii. That on 22<sup>nd</sup> April 2016, the Defendant instructed Alando & Company Advocates to represent him in the matter;*

*iii. That the said Advocate filed a Memorandum of Appearance and Statement of Defence on 23<sup>rd</sup> May 2016;*

*iv. That the Defendant was never served with an application herein dated 17<sup>th</sup> February 2016;*

*v. That neither the Defendant nor his Advocate were deservd with a letter of invitation to attend the Court registry to fix the case for pre-trial or hearing;*

*vi. That the Defendant was never served with a hearing notice for the hearing held on 27<sup>th</sup> November 2017 and only came to learn the matter was heard and determined on 25<sup>th</sup> November 2019 when he was served with warrants of sale;*

**vii. That the Defendant has a good defence to the Plaintiff's claim but was condemned unheard; and**

**viii. That unless the judgement and decree is set aside, the Defendant shall suffer irreparable loss and prejudice and it is only fair and just that he be given a chance to be heard.**

3. The Plaintiffs are however opposed to the application. In a Replying Affidavit sworn on their behalf by their Advocate on record Meenad Hassan and filed herein on 3<sup>rd</sup> February 2020, the Plaintiffs aver that the Defendant neither filed nor served a Memorandum of Appearance and/or Statement of Defence and the matter therefore proceeded by way of formal proof.

4. The Plaintiffs further aver that the Defendant's Statement of Defence annexed to the Supporting Affidavit does not raise any triable issue and merely consists of denials.

5. I have carefully considered both the application and the response thereto. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. The principles that govern an application to set aside judgment were laid out in *Patel –vs- E. A Cargo Handling Services Ltd [1974] EA 75* where Sir William Duffus observed as follows:

***“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 it by the rules. I agree that where it is a regular judgment as is the case herein the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit. In this respect defence on merits does not mean in my view, a defence that must succeed, it means as Sheridan J., put it “a triable issue”, that is an issue which raises a prima facie defence and which should go to trial for adjudication”***

7. Arising from the foregoing, in an application such as this, the court ought to consider not only whether the Applicant has established sufficient cause to warrant the setting aside of its judgment but also whether the Applicant's defence raises triable issues.

8. From the Defendant's affidavit filed in support of the application, there was no dispute that he was served with the summons to enter appearance on the 11<sup>th</sup> March 2016. Under the Rules, the Defendant was required to file an appearance within 15 days, that is by 26<sup>th</sup> March 2016. A Memorandum of Appearance was however not filed until 25<sup>th</sup> April 2016 but was apparently never served upon the Plaintiffs. Thereafter, the Defendant filed a Statement of Defence on 23<sup>rd</sup> May 2016 which again was not served upon Plaintiffs.

9. As at the time of filing of the suit, the Plaintiffs equally filed an application under certificate of urgency dated 17<sup>th</sup> February 2016 seeking orders of injunction. When that application came up for hearing on 25<sup>th</sup> April 2016 before the Honourable Justice Angote, the Defendants were presumably on the basis of the Memorandum of Appearance filed represented by an Advocate who was holding brief for Messrs Alando & Company Advocates who had entered appearance for the Defendant. On that day however, the Plaintiff withdrew the application and urged the court to strike out the Memorandum of Appearance.

10. The record reveals that the court marked the application as withdrawn but did not proceed to strike out the Memorandum of Appearance as sought. Prior to the date for the application, the Plaintiffs had also by a request for judgement date 30<sup>th</sup> March 2016 and filed in court on 1<sup>st</sup> April 2016 requested for judgment against the Defendant on account that the Defendant had failed to enter appearance in the matter. On 5<sup>th</sup> April 2016 the Deputy Registrar of the court directed on the face of the request for judgment that the file be placed before the judge for formal proof.

11. Thereafter and despite the Defence filed on record, the Plaintiffs fixed the matter for mention before the Honourable Judge on 31<sup>st</sup> October 2016 where they sought an endorsement of their request for judgement on account that the Defendant had not entered appearance. There is no indication whatsoever that the mention notice was served upon the Advocates who were already on record for the Defendant and/or that the court's attention was brought to that fact. The Learned Judge hence directed that the matter be fixed for formal proof.

12. Arising from the foregoing, I had the least hesitation in agreeing with the Defendant that there was no service of the hearing notice upon himself and/or his advocate and that therefor this matter proceeded erroneously in their absence.

13. On that basis alone, I think the Defendant is entitled as of right to the setting aside of these proceedings in order to be afforded a hearing.

14. Accordingly, I allow the Motion dated 29<sup>th</sup> November 2019, set aside the judgment delivered herein on 28<sup>th</sup> September 2018 and the consequential decree and hereby direct that the matter be heard on merit.

15. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF AUGUST, 2021.**

**J.O. OLOLA**

**JUDGE**