



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 50 OF 2016

RATILAL GHELA SHAH

DI NUMATI RATILAL GHELA SHAH

BHIKU RATILAL GHELA SHAH.....PLAINTIFFS/RESPONDENTS

VERSUS

CHAIRPERSON MVITA CONSTITUENCY

DEVELOPMENT FUND COMMITTEE.....DEFENDANT

MP. HON ABDULSWAMAD SHARIFF NASSIR

CONSTITUENCY DEVELOPMENT FUND BOARD.....DEFENDANTS/APPLICANTS

RULING

This application is dated 9th August 2021 and is brought under Section 1A, IB, 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Under Order 10 Rule 11 Order 51 Rule 1 seeking the following orders;

1. THAT this Application be certified as urgent and service thereof be dispensed with in the first instance.
2. THAT this Honourable Court be pleased to issue stay of execution of the judgement and decree of this Honourable Court issued on 27th May, 2021 pending hearing and determination of this Application.
3. That this Honourable Court be pleased to set aside the judgement and decree of this Honourable court issued on 27th May, 2021.
4. THAT this Honourable Court be pleased to grant leave to the 1st and 2nd Defendants to enter appearance and file Defence out of time.
5. THAT costs of this Application be provided for.
6. THAT this Honourable Court may be pleased to issue any other order it may deem fit to grant in the circumstances.

It is based on the grounds that the Plaintiffs obtained judgement against the 1st and 2nd Defendants herein on 27th May, 2021. That the said judgement was obtained exparte as the 1st and 2nd Defendants did not enter appearance and/or file Defence. That there was a miscommunication between the 1st - 2nd and 3rd Defendants leading to the 1st and 2nd Defendants being unrepresented. That the 3rd Defendants only represented themselves in court and failed to notify the 1st and 2nd Defendants that they ought to seek independent legal advice. That the 1st and 2nd Defendants do not have a legal department and rely on the 3rd Defendant for legal advice. That there was also a change in management which further led to confusion as the current manager was under the impression that all legal matters were being handled by the 3rd Defendant. That the Judgement once executed will be highly prejudicial as it will lead to the demolition of the Doctor's quarters for Mvita Clinic. That the 1st and 2nd Defendants have a good Defence that raises pertinent triable issues that ought to be considered on merit. That failure to enter appearance and file Defence was not deliberate on the part of the 1st and 2nd Defendants but due to miscommunication between the parties. That it is in the interest of justice that the application herein be allowed as prayed.

The Respondents submitted that on 27th May 2021, the court delivered the judgment in this matter on merit after being in court for over five years. The 1st and 2nd Defendants were duly served with summons to enter appearance, application and court order. The 1st and 2nd Defendant do not dispute that they were served and were aware of the existence of this case or that judgment would eventually ensue. The service of the court summons, pleadings and court orders were served upon each of the Defendants. None indicated that he would appear or be represented by the other. Despite the admitted service upon them, the 1st and 2nd Defendants did not deem it important to enter appearance or file defence leading to them requesting judgment in default of appearance which was entered on 27th January 2017. Annexed and marked RGS is copies of the Request. The Deputy Registrar entered interlocutory judgment subject to formal proof which was conducted by the court and both the Plaintiff and the 3rd Defendant gave their testimonies. The reasons advanced by the deponent Omar Shariff to back the application are unconvincing, spurious and unmeritorious. That Simon Maina Ndweka, the 3rd Defendant's witness stated under oath in court that the 1st and 2nd Defendants were aware of the case but had no interest in defending it and that all their letters to the 1st and 2nd Defendants were ignored. That the annexed draft defence raises no triable issues, is baseless and a sham. There is no merited ground or proposed defence to warrant the court setting aside a valid judgment rendered upon full hearing. The 1st Defendant is only apprehensive of the consequence of the judgment and would want to delay the Plaintiffs' realization of the fruit of the same. They urge the court to dismiss the application with costs to the Plaintiffs.

This court has considered the application and the submissions therein. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. As held in the case of *Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75*:-

"There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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."

In the same vein, the Court in the case of *Shah vs Mbogo (1967) EA 166*, held that:-

"this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

In the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) (supra)* the Court held that:-

"That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication."

Similarly in the case of *Ree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

The court is further guided by the case of **James Kanyũta Nderitu & Another vs Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKLR (Msa)**, where 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/ 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 0100 v. Attorney General [1986-1989 EA 456]*).*

It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the

way they prosecute their cases. On the issue of service, I find that there was proper service and the defendants acknowledge the same by stamping and signing the documents on the 18th April 2016. The 3rd defendant entered appearance on the 14th April 2016. The matter proceeded to trial with the 3rd defendant and final judgement was entered on the 27th May 2021. The applicants then just woke up when the judgment and decree were up for execution and filed this application on the 9th August 2021. The applicants state that there was miscommunication and they assumed the 3rd defendant was representing them. I find the applicants have been indolent and I do not accept their excuse. I also see no triable issues raised in their defence. Having found that there was proper service I find that the application lacks merit and is therefore dismissed with costs to the plaintiffs/respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7TH DECEMBER 2021.

N.A. MATHEKA

JUDGE