



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 170 OF 2018**

**DR. SELINA VUKINU AMBE..... PLAINTIFF**

**VERSUS**

**MONIQUE MWANIGA MUKAYAGI ..... DEFENDANT**

**RULING**

1. By her Notice of Motion dated 27<sup>th</sup> May 2019, the defendant *Monique Mwaniga Mukayagi* (the applicant) moved this court seeking that the interlocutory judgment entered on 1<sup>st</sup> October 2018 in favour of the plaintiff *Dr. Selina Vukinu Ambe* (Respondent) for failure to file a memorandum of appearance be set aside and that she be granted leave to file her statement of defence.

2. The applicant also sought orders that the statement of defence annexed to the affidavit supporting the motion be admitted on record upon payment of the requisite fees and that costs of the application be costs in the cause.

3. The application is supported by the grounds stated on its face, the applicant's supporting affidavit and the annexures thereto.

The applicant contends that she is the proprietor of house number 606 at Greenpark Estate which she had leased to a tenant until May 2019; that she only became aware of the existence of the suit filed against her by the plaintiff sometime in September 2018 when the manager of Greenpark Estate handed her a letter dated 25<sup>th</sup> July 2018 to which summons issued in the suit were attached.

4. The applicant averred that on receiving the summons, she immediately instructed her advocates to file appearance and defence but this was not done because when the advocates went to file their notice of appointment dated 11<sup>th</sup> September 2018, the court file was missing from the court registry; that subsequently, her advocates prepared a statement of defence but on presentation to the court registry, it was rejected as interlocutory judgment had already been entered.

5. It is the applicant's case that the default judgment was irregularly entered and that since she has a good defence to the respondent's claim, it was in the interest of substantive justice to set it aside to facilitate hearing of the suit on its merits.

6. The application is opposed through a replying affidavit sworn by the respondent on 18<sup>th</sup> September 2019. According to the respondent, the default judgment was regular as the applicant was personally served with summons to enter appearance on 26<sup>th</sup> July 2018 but failed to do so and failed to file a defence within the stipulated time.

7. The respondent further denied the applicant's claim that the court file was missing in the month of September 2018 claiming that her advocates were able to access it in the same month when they requested for entry of interlocutory judgment. She also contended that there was unreasonable delay in filing the application and that the applicant's intended defence amounted to mere denials and did not raise any triable issues. She urged me to find that the applicant had failed to lay sufficient basis to warrant the exercise of the court's discretion in her favour and implored me to dismiss the application for lack of merit.

8. By consent of the parties, the application was prosecuted by way of written submissions which I have duly considered alongside the authorities cited by both parties.

9. I wish to begin by pointing out that under *Order 10 Rule 11* of the *Civil Procedure Rules*, the court has unfettered discretion to set aside a default judgment and any consequential orders on terms it considers just. This discretion must however be exercised judiciously taking into account the peculiar circumstances of each case and the ends of justice.

10. It is trite that where there is evidence that a defendant was not served with summons to enter appearance, any default judgment entered

against such a defendant would be irregular and ought to be set aside as a matter of right. The exercise of the court's discretion only sets in where there is evidence that the defendant was duly served with summons but for one reason or the other failed to enter appearance or file a defence within the prescribed time.

11. In the latter case, the exercise of the court's discretion is guided by a consideration of several factors which include the reason or explanation given for failure to enter appearance or file a defence within the stipulated time; the length of time that had passed since the default judgment was entered; whether the defendant's intended defence raises triable issues and the prejudice each party was likely to suffer if the application was allowed or dismissed – See: *Patel V EA Cargo Handling Services Ltd, (1974) EA 75, Mbogo & Another V Shah, [1968] EA 93 and James Kanyita Nderitu & Another V Marios Philotas Ghikes & Another [2016] eKLR.*

12. Applying the above principles to the facts in this case, I find that though the respondent claimed in paragraph 3 of her replying affidavit that the applicant was personally served with summons to enter appearance on 26<sup>th</sup> July 2018 and that she had annexed an affidavit of service as proof of that fact, no such affidavit of service was actually annexed.

13. The court record shows that the affidavit of service dated 19<sup>th</sup> September 2018 which was annexed to the respondent's second request for judgment on the basis of which the default judgment was entered shows that the applicant was in fact not personally served. The process server, *Jeremiah Motika* deponed that the summons was sneaked inside house number 527 at cluster 3 of Greenpark Estate where the applicant allegedly resided.

14. The applicant has in her supporting affidavit deposed that she was the proprietor of house number 606 not 507 Greenpark Estate where the summons were left by the process server. She has also sworn that she only started living in the estate in May 2018 after the tenant who had rented the premises left. This averment has not been specifically denied by the respondent in her replying affidavit. The same has not therefore been controverted. In the premises, I am unable to find as a fact that the applicant was personally served with the summons or that the summons were actually left in the house in which she resided.

15. The applicant has asserted that she only became aware of the summons in September 2018 when a letter to which they were attached was given to her by the manager of the estate. A perusal of the said summons reveal that they are dated 23<sup>rd</sup> July 2018 and they required her to enter appearance within 15 days of service. If the court was to proceed on the basis of the applicant's admission regarding the date of service, it would follow that she was required to enter appearance on or before 9<sup>th</sup> September 2018.

16. The applicant has explained that upon becoming aware of the summons, she immediately instructed her advocates on record to enter appearance on her behalf but they were unable to do so in time since the court file was missing and when it resurfaced, efforts to file appearance and defence failed since they were rejected on presentation to the court registry on grounds that default judgment had already been entered. This explanation by the applicant is in my view plausible considering that the notice of appointment of her advocates though dated 11<sup>th</sup> September 2018 was not filed until 9<sup>th</sup> October 2018.

17. A reading of the applicant's intended defence shows that the applicant is denying having published the words complained of and that the words contained in the *what's app* post attributed to her were defamatory. In a suit for defamation, these denials constitute serious triable issues which can only be investigated or proved by evidence in a trial.

18. Given the foregoing, I am satisfied that the applicant has demonstrated sufficient cause to warrant the exercise of the court's discretion in her favour. I have no doubt in my mind that the interests of justice would be better served if the default judgment was set aside so that the suit can be heard and determined on merit. In any case, if the application was allowed, the respondent is not likely to suffer any prejudice that cannot be adequately compensated by an award of costs.

19. In the end, I find merit in the Notice of Motion dated 27<sup>th</sup> May 2019 and it is hereby allowed in terms of prayer 2. The applicant is granted leave to file and serve her defence within the next 21 days. Costs of the application will be costs in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED** at NAIROBI this 14<sup>th</sup> day of May 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ongeri for the plaintiff

No appearance for the defendant

Ms

Carol:

Court

Assistant