



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 166 OF 2009

KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF

-VS-

AERIAL DEVELOPERS LIMITED

ENOCK TUITOEK

SAMMY SILAS KOMEN MWAITA.....DEFENDANTS

RULING

1. By an Amended Notice of Motion dated 15th August, 2019 brought under Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63E of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya, the 1st and 2nd Defendants/Applicants seek orders.

1. ...

2. That pending inter parties hearing and determination of this application there be a stay of execution.

2A. That the Honourable Court be pleased to set aside the judgment delivered on 10th July 2019.

3. That the 1st and 2nd Defendants herein be granted leave to defend the suit as per the annexed Draft Defence.

4. That the costs of this application be provided for.

2. The Application is premised on the grounds set out on the face of the motion namely:

a. The 1st and 2nd Defendants/Applicants were not informed or aware of the hearing of the suit and the same was heard in their absence.

b. The 1st and 2nd defendants did not file defence.

c. The failure to attend court for the hearing was not their fault as they did not have any information of the proceedings.

d. It is in the interest of justice that the orders sought be granted as the Applicant's right to be heard will be denied and stand to suffer irreparable loss and damage.

3. The application is further supported by the grounds contained in the supporting affidavit of Enock Tuitoek sworn on 15th August 2019 in which he reiterates the grounds in support of the application. In addition, he deposes that sometime in January 2019 he was informed by Mr. Kipkenda Advocate that a neighbour who has a similar matter similar to the one herein was making enquiries about him and he instructed the firm of Kipkenda & Co. Advocates to find out about the same but they never communicated back. That on or about 30th June, 2019 he met the said person who informed him that he had come across information that judgment on this matter was scheduled for 10th July, 2019. He avers that he filed an application to defer the said judgment but the same was overtaken by events as the judgment was delivered on 10th July 2019 hence the amended Notice of Motion. He states that the failure to attend court for hearing was not intentional but because he was not aware of the hearing date or the proceedings prior to the said hearing and had not filed any defence. The applicants aver that they are desirous

of defending the suit and are willing to comply with the terms and conditions the court deems fit to impose in order to grant the orders sought. The applicants have annexed a draft defence and counter claim.

4. In opposing the application, the plaintiff filed a notice of preliminary objection and ground of opposition dated 19th August 2019. Briefly, the plaintiff contends that following the delivery of judgment on 10th July, 2019, the court lacks jurisdiction to hear and determine the application herein. The plaintiff avers that The application is bad in law, grossly incompetent, fatally defective, misplaced, misguided, misconceived, unfounded and legally untenable, and an abuse of the court process. The plaintiff avers that the application is incurably bad in law for material non-disclosure of crucial facts, adding that the same does not meet the requisite legal threshold for issuance of the orders sought. The plaintiff contends that the application and the orders sought herein is manifestly aversive to public interest and statutorily prejudicial to discharge of the plaintiff's constitutional and statutory mandate. The plaintiff urged the court to dismiss the application with costs.

5. The application was canvassed by way of written submissions. The applicants filed their submissions on 14th October, 2019 while the plaintiff filed theirs on 17th October, 2019.

6. I have perused and considered the application, the response as well as the Notice of Preliminary Objection. I have equally perused and considered the written submissions and the list of authorities availed by the learned advocates for the parties. The main issue to determine is whether the default judgment entered herein should be set aside and the 1st and 2nd defendants granted leave to defend the suit.

7. The plaintiff instituted this suit by a plaint dated 9th June 2009. The record shows that the firm of Kadima & Co. Advocates entered appearance for 1st, 2nd and 3rd defendants on 23rd June 2009. However, on 13th July 2009, M/s Kadima & Co. Advocates filed a defence for the 3rd defendant only. There were no defences filed by the 1st and 2nd defendants. After several years with no action being taken in the matter, the court, pursuant to the provisions of Order 17 rule 2 of the Civil Procedure Rules issued a notice to show cause why the suit should not be dismissed which was heard on 19th May 2017. The court in exercise of its discretion, did not dismiss the suit but instead set it down for hearing. The matter proceeded ex-parte on 18th December, 2018 in the absence of the defendants. Judgment was subsequently delivered in favour of the plaintiff on 10th July, 2019. The 1st and 2nd defendants have now filed the present application to set aside the judgment and for leave to be granted to them to file defence out of time. The application is brought under Order 10 rule 11 of the Civil Procedure Rules among other provisions of the law.

8. Order 10 of the Civil Procedure Rules deals with the consequence of non-appearance, default of defence and failure to serve. Rule 11 of Order 10 provides as follows:

11. Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Going by the above provision of the law, it is clear therefore that the court has jurisdiction to set aside the judgment entered herein contrary to the plaintiff's submission.

9. In the case of **James Kanyiita Nderitu & Another –v- Marios Philotas Ghikas & Another (2016)KLR**, the Court of Appeal while discussing the criteria for allowing an application for setting aside a default judgment, such as the one in this case, expressed thus:

“In a regular default judgment, the defendant will have been 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..... ”

10. In the application herein, the 1st and 2nd defendants have attributed the failure to file defence and to attend court for the hearing to lack of knowledge of the proceedings and failure to be informed of the hearing date. As already stated, whereas a memorandum of appearance was filed by Ms Kadima & Co Advocates for all the three defendants, the defence filed was only in respect to the 3rd defendant. It is not clear why a memorandum of appearance was filed by one advocate for all the three defendants but immediately thereafter a defence was only filed for one defendant. In my view, the explanation advanced by the applicants may be genuine.

11. Besides taking into account the reason for the failure of the applicants to file defence and the failure to attend court during the hearing, I am obliged to consider whether the intended defence raises triable issues. I note that the applicants have annexed a defence in which they not only deny the plaintiff's claim but have also raised a counter-claim. The 1st and 2nd defendants aver that the suit property was unalienated government land until it was allotted to the 1st defendant and title issued in the year 2000, hence acquiring an indefeasible title. It is their contention that the title to the suit property was acquired lawfully. In addition the applicants have raised a counter-claim seeking inter alia, a declaration that the 1st defendant acquired a valid and indefeasible title over the suit property and that the 2nd defendant has been wrongly joined as a party to the suit. I find that the defence raises triable issues which warrant meritorious consideration by the court.

15. In the case of **Tree Shade Motor Limited –v- D. T. Dobie and Company (K) Limited & Another (1998)KLR**, the Court of Appeal stated:

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff’ claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defend.... There are ample authorities to the effect that notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits.”

12. I feel that it is in the interest of justice to allow the applicants to defend the suit and the matter to be determined on merit this being a dispute over land. In doing so, I invoke Article 159 of the Constitution in order to render substantive justice.

13. The totality of the foregoing is that the application herein has merit and is hereby allowed. I hereby set aside the default judgment entered on 10th July 2019.

I direct the applicants to file and serve their defence within 14 days from the date of this ruling. In addition, the applicants shall pay all thrown away costs to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of February 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mohamed holding brief for Nyakundi for 1st & 2nd Defendants/Applicants

Makori for plaintiff/respondent

Yumna Court Assistant

C.K. YANO

JUDGE