



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 287 OF 2012**

**ALI HASSAN CHISONZO & 3 OTHERS.....PLAINTIFFS**

**VERSUS**

**JANE CIARUNJI CHESAINA & 4 OTHERS.....DEFENDANTS**

**RULING**

1. By a notice of motion dated 4<sup>th</sup> January 2019 brought under Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the Civil Procedure Act and Section 68 of the Land Registration Act, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants seek orders:

1. That the application be certified urgent and be heard ex-parte in the first instance.
2. That the interlocutory judgment entered herein on 11<sup>th</sup> August 2014 in default of appearance and defence be set aside.
3. That the judgment and the decree given on 17<sup>th</sup> November 2017 be set aside.
4. That in the meantime pending the hearing and determination of this application an order of inhibition do issue inhibiting the registration of any dealing with the suit premises namely KWALE/DIANI/1955-KWALE/DIANI/1974 (both inclusive).
5. That the costs of this application be provided for.

2. The application is based on the grounds set out on the face of the motion, namely:

- i. The summons to enter appearance filed by the Plaintiffs was never served upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendants personally.
- ii. The plaintiffs served the summons to enter appearance by advertisement in the Daily Nation but the said publication was never brought to the notice or attention of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- iii. The interlocutory judgment entered herein in default of appearance was wrongfully entered as the plaintiff's suit is not for a liquidated claim neither is it for pecuniary damages or for detention of goods. The said judgment should be set aside ex-debito justiae.
- iv. In any event the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have a good defence to the plaintiffs suit and should be allowed to urge their defence at a trial of the suit so that the suit can be determined on merit.
- v. The plaintiffs have obtained judgment based on a false premises that the suit premises constitute their ancestral land when in fact the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been in occupation of the suit premises since the year 2008.
- vi. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants purchased the plot of land known AS KWALE/DIANI/377 from the 1<sup>st</sup> defendant for a valuable consideration. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants had no knowledge or notice of the alleged or any impropriety of the 1<sup>st</sup> defendant's title. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were therefore innocent purchasers for value without notice and thereby acquired good title.
- vii. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants then subdivided the said TITLE NUMBER KWALE/DIANI/477 into KWALE/DIANI/1955 -1974 and have since sold KWALE/DIANI/1973 and KWALE/DIANI/1974 to a 3<sup>rd</sup> party. The said 3<sup>rd</sup> party is clearly affected by the

judgment and decree herein yet it is not a party to this suit.

viii. The plaintiffs stand to suffer no prejudice as their suit will in the event the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's application is allowed be heard and determined on its merit.

3. The application is further supported by the grounds contained in the affidavit of BHARAT GIRDHARLAL THAKER, the 2<sup>nd</sup> defendant sworn on 4<sup>th</sup> January 2019 in which he reiterates the grounds in support of the application. He deposes that he has been wrongly sued as BHARAJ GIRDHARLAL THAKER while the 3<sup>rd</sup> defendant has been wrongly sued as GANGHYAM PREMJI PABARI. He avers that they purchased the parcel of land known as KWALE/DIANI/477 from the 1<sup>st</sup> defendant and obtained a title deed. They have exhibited the agreement for sale, transfer and title deed. That subsequently they applied for a change of user from agricultural to residential and subdivided the said land into 19 subdivisions, namely KWALE/DIANI/1955 to KWALE/DIANI/1974 (both inclusive) and TITLE NO.KWALE/DIANI/477 was then closed upon the said subdivisions. Copies of the certificate of search confirming the closure and the titles for the subdivisions have been exhibited. That they sold and transferred TITLE NUMBERS KWALE/DIANI/1973 and 1974 to a 3<sup>rd</sup> party by the name Cheetah Enterprises Limited. The applicants reiterate that they were never personally served with the summons to enter appearance in the suit and only learnt of the suit when they perused the court file on 3<sup>rd</sup> January 2019 after receiving information that someone was clearing the land on the strength of a court order. It was then that they discovered service was effected by advertisement in the Daily Nation of 27<sup>th</sup> June 2014 which the applicants claim they never saw. Further, that their names were incorrectly stated as Bharah and Ganghyam. The applicants contend that they have a good defence to the plaintiff's suit and have annexed a draft defence.

4. In opposing the application, the plaintiffs filed a replying affidavit sworn by Salim Athman Bandari, the 2<sup>nd</sup> Plaintiff on 28<sup>th</sup> June 2019. Briefly, the plaintiffs contend that the applicants were duly served by way of advertisement in the widely circulating newspaper, but the applicants chose not to defend the suit. It is the plaintiffs' contention that the application is not merited and is an abuse of the court process besides being filed late in the day. The plaintiffs aver that they are in occupation of the suit property.

5. The court directed the parties to canvass the application by way of written submissions. The applicants filed their submissions on 2<sup>nd</sup> October, 2019 through their advocates on record, M/s Kamoti Omollo & Company Advocates. Mr. Okanga, the advocate for the plaintiffs did not file any submission and informed the court that he was relying entirely on the replying affidavit.

6. I have considered the application. The only issue is whether the ex-parte judgment entered herein should be set aside and the applicants granted leave to file their defence out of time. The law on the setting aside of ex-parte judgment is now well settled. The principles guiding the setting aside ex-parte orders are trite that the court has wide powers to set aside such ex-parte orders save that where the discretion is exercised, the court will do so on terms that are just.

7. In the case of **Patel – v- East Africa Cargo Handling Services Limited (1974) EA 75, at page 76 Duffus P** stated thus:

“There is no limit or restriction on the judge's discretion 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 to it by the rules. I agree that where it 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 merits. 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.**”

8. In *Shah – v Mbogo & Another (1967) EA 116* at page 123, Harris J stated.

“This discretion is intended so be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

9. In this case the summons to enter appearance was served through advertisement in the Daily Nation Newspaper. The applicants have stated that they never saw the advertisement and the same was not brought to their notice or attention. It is their contention that they only came to know about the existence of this suit when on 3<sup>rd</sup> December 2018 they received information that someone was clearing their land on the strength of a court order. That they instructed their advocate on record to peruse the court file and it was then it was discovered service had been effected by substituted service through advertisement in the Daily Nation Newspaper of 27<sup>th</sup> June 2014. Even then, the applicants add that their names were misspelt.

10. From the supporting affidavits, the applicants have in my view given sufficient reason to persuade this court to exercise its discretion in their favour. Besides taking into account the reason for the failure of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to file their memorandum of appearance or defence, I also have to consider whether defence raises triable issues. I have looked at the draft defence filed. The applicants have denied the plaintiff's claim. The applicants have pleaded inter alia, that they are innocent purchasers for value without notice and that the plaintiff's suit is time barred. In my view, the defence raises triable issues which call for trial. The applicants have not demonstrated that they will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine all the issues in dispute and decide the case on merit. The overriding objective of the court would no doubt come to the aid of the applicants.

11. In the result, I find merit in the notice of motion dated 4<sup>th</sup> January 2019 and the same is allowed in the following terms:

**a. The application is allowed in terms of prayers (2), (3) and (4) thereof.**

**b. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants to file and serve their defence within 14 days of the delivery of this ruling.**

**c. Costs shall be in the cause.**

**DATED, SIGNED and DELIVERED at MOMBASA this 17<sup>th</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Omollo for 2<sup>nd</sup> & 3<sup>rd</sup> defendants/applicants

Okanga for plaintiffs/respondents

Yumna Court Assistant

**C.K. YANO**

**JUDGE**