



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 2228 OF 2007**

CATHERINE NYAMBURA.....PLAINTIFF

=VERSUS=

PETER SHIKHULE.....1 ST DEFENDANT

PAULINE WAMBUI.....2 ND DEFENDANT

PAUL RADHALO ODWESSO.....3 RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4 TH DEFENDANT

REGISTRAR OF LANDS AT NAIROBI.....5 TH DEFENDANT

**RULING**

1. The plaintiff brought this suit through a plaint dated 29/10/2007 in which he sought the following verbatim orders:

- i. A declaration that the plaintiff is entitled to be registered as proprietor of the land being LR No. Nairobi/Block 63/418*
- ii. An order for cancellation and rectification of the land register by the 5th defendant by registration of the plaintiff as proprietor of the land.*
- iii. In the alternative but without prejudice to the above, indemnification by the 4th and 5th defendants of the loss occasioned by them in the line of duty owed to the plaintiff in the whole transaction in terms of monies expended in purchasing the land special damages being a total of Kshs. 602,685/-*
- iv. General damages*
- v. Costs of this suit together with interest on 3 above*
- vi. Any other just relief*

2. Subsequently, Kubo J granted the plaintiff leave to serve summonses upon the 1st, 2nd and 3rd defendants through a notice in the Daily Nation Newspaper. Consequently, on 1/3/2008, the plaintiff published a notice in the Daily Nation Newspaper. Only the 4th and 5th defendants entered appearance in the suit.

3. The suit was subsequently heard by Angote J who on 25/11/2016 rendered a default judgment in which he granted the following verbatim orders:

- a) A declaration be and is hereby issued that the plaintiff is entitled to be registered as proprietor of the land known as Nairobi/Block 63/418.*
- b) An order be and is hereby issued directed to the 5th defendant to cancel and rectify the register in respect of the land known as Nairobi/Block 63/418 and register the plaintiff as the proprietor of the said land forthwith.*
- c) The defendants to pay the costs of the suit.*

4. On 16/5/2019, the 3rd defendant, Paul Radhalo Odwesso (**the applicant**) brought a notice of motion dated 13/5/2019 seeking an order setting aside the said judgment in the following terms:

1) **Spent**

2) **That the proceedings herein and the judgment delivered on 25th November 2016 be set aside and the 3rd defendant be accorded an opportunity to enter appearance and defend the suit.**

3) **That the matter be heard afresh on the merits.**

4) **That costs of this application be borne by the plaintiff.**

5. The applicant contends that he resides in Texas, United States of America, having relocated there in September 1992. At all material times, he was in the United States of America and he was not aware of the suit. His case is that he came back in 2018 and sought to develop the suit property. He obtained appropriate approvals. His architect subsequently received a phone call from City Hall advising him that the suit property had an ownership dispute. The caller gave the architect an internet link of this court case. Using the link, he was able to access the judgment herein.

6. It is the applicant's case that his failure to enter appearance and defend the suit was due to the fact that he was not personally served with summons to enter appearance and that he could not see the notice in the Daily Nation because he resided in the United States of America and was not in Kenya when the notice was carried in the Daily Nation Newspaper. He adds that Postal Box Number 19017 which was used to effect postal service of summons is not his local postal address and that his correct local postal address is Box 17017, Makongeni, Nairobi.

7. The applicant contends that he has a valid defence to the plaintiff's suit. His case is that he purchased the suit property from the 2nd defendant who held a registered title. Secondly, the 2nd defendant held a lease from the 5th defendant. He obtained a search which indicated that the 2nd defendant was the registered proprietor of the suit property. Upon paying purchase price in full, he was registered as proprietor of the suit property and he was issued with a certificate of lease. He took possession and has been in possession of the suit property since then.

8. In response, the plaintiff filed a notice of preliminary objection dated 15/7/2019 in which she contends that the application offends the mandatory provisions of Order 9 rules 7 and 9 of the Civil Procedure Rules. In addition, the plaintiff filed a replying affidavit sworn on 15/7/2019 in which she deposes that the applicants' advocates do not have *locus standi* because they were not properly on record. She adds that the applicant should have been vigilant enough to read the Daily Nation online. She further deposes that the explanation tendered by the applicant is not adequate because it took the applicant 12 years to contemplate developing the suit property. Her case is that it would be prejudicial to her to re-open the case. Lastly, she deposes that the applicant has not shown any remorse or undertaken to abide by any condition the court may lay and has not exhibited any draft defence disclosing triable issues.

9. The 3rd defendant (applicant) filed submissions dated 16/8/2019. Counsel for the 3rd defendant submitted that the judgment rendered on 25/11/2016 was an irregular one because the 3rd defendant was not properly served with summons. He relied on the decision in **Oriental Commercial Bank Ltd (formerly the Delphis Bank Ltd) v Pradeep Ian Makhecha (as the Administrator of the Estate of the Late Hasmukh Pranjivan Makhecha t/a Makhech & Co Advocates) & Anor HCCC No 474 of 2007**.

10. It was further submitted that the 3rd defendant had every right to be heard and not condemned unheard. Counsel argued that Article 50 (1) of the Kenyan Constitution requires that a dispute should be decided in a fair and public hearing. He added that Article 159 (2) (a) requires that in exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall be done to all irrespective of their status. It was further argued that the judgment entered was irregular and it cannot be said that the court is *functus officio*. Counsel submitted that the 3rd defendant had demonstrated that he was not in the country when the summons was served through the newspaper. Reliance was placed on the case of **Monika Herta Elfriede Behrmann v Mubia Holdings Limited ELC No 57 of 2016**. Lastly, it was submitted that where there was no service, one does not have to show that he has an arguable case. Reliance was placed on the case of **James Kanyiita Nderitu & Anor v Marios Philotas Ghikas & Ano Civil Appeal No 6 of 2015**.

11. The plaintiff (respondent) filed written submissions dated 26/11/2019. Counsel for the plaintiff submitted that there was proper service of summons and what the court needs to determine is whether the plaintiff was aware that the 3rd defendant was outside the country for her to effect service through the Embassy. Counsel submitted that the plaintiff was not aware that the 3rd defendant resided in the United States of America. Counsel further submitted that the 3rd defendant could not explain how he bought the property in 2006 then disappeared only to reappear after 12 years to develop the property. She added that the judgment rendered on 25/11/2016 was a regular judgment which should not be set aside.

12. I have considered the application together with the rival affidavits, the preliminary objection, and the rival submissions. I have also considered the relevant legal framework and jurisprudence relating to the key questions falling for determination in this application. Four key issues fall for determination in this application. The first issue is whether the applicant's advocates are properly on record in this suit. The second issue is whether failure to exhibit a draft defence is fatal to the applicant's application for an order setting aside the default judgment against him. The third issue is whether the applicant has satisfied the criteria for the court's exercise of the discretionary jurisdiction to set aside a default judgment. The last issue relates to costs of the present application. I will make brief analysis and pronouncements on the four issues sequentially in the above order.

13. The first issue is whether the applicant's advocates are properly on record. The plaintiff contends that the present application offends the provisions of Order 9 rules 7 and 9 of the Civil Procedure Rules 2010 and that the applicant's advocates do not have *locus standi* in this matter. Order 9 rule 7 provides as follows:

**7. Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.**

14. Order 9 rule 9 provides as follows:

**9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

**a) upon an application with notice to all the parties; or**

**b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

15. My understanding of Order 9 rule 7 is that where a party has previously sued or defended a suit in person and subsequently decides to appoint an advocate, that party shall file and serve a notice to that effect. On the other hand, Order 9 rule 9 applies to a suit where judgment has been rendered and a party who had an advocate on record wishes to either change the advocate or act in person. In either of the two scenarios, that party is required to either seek and obtain prior leave of the court or file a consent signifying concurrence of the advocate who was previously on record.

16. In the present matter, the applicant did not have any previous advocate on record. His present advocates are the first firm of advocates appointed by him. He had not participated in the proceedings herein. His current advocates came on record through the instrument of a notice of appointment of advocates dated 13/5/2018 and filed on 16/5/2019. The present application was similarly filed on 16/5/2019. In my view, Order 9 rule 7 does not apply to the applicant because the applicant had not previously defended this suit in person. The first filing made by the applicant in this suit is the notice of appointment of advocate dated 13/5/2019 and filed on 16/5/2019. That was the proper instrument which the applicant was required to file in the circumstances of this case. My finding on the first issue therefore is that the applicant's advocates are properly on record.

17. The second issue is whether failure to exhibit a draft defence is fatal to the applicant's application for an order setting aside the ex-parte judgment against him. Exhibition of a draft defence is not a statutory requirement. Our courts have however been consistent that a party seeking an order setting aside a regular default judgment must demonstrate that he has a defence which raises triable issues. The purpose of a draft defence is to demonstrate the triable issues which would fall for determination in the event that the regular judgment is set aside. Secondly, where triable issues can clearly be discerned from the evidential materials placed before the court, omission to exhibit a draft defence is not a sufficient basis for locking the applicant out of the seat of justice. In determining whether or not there are triable issues, the court looks at the totality of all the evidential materials placed before it; it does not look at the draft defence alone. In exercising this discretionary jurisdiction, the question which the court seeks to answer is whether the evidential materials placed before it demonstrate any triable issue to warrant the setting aside of the regular default judgment.

18. In the present suit, the applicant contends that he purchased the suit property from the 2nd defendant in 2006. The 2nd defendant was allegedly the registered proprietor at the time. The applicant holds what he calls a valid lease and a valid certificate of lease relating to the suit property. The plaintiff similarly contends that he purchased the suit property from the 1st defendant in 1998. It is therefore clear that a triable issue relating to the question of ownership of the suit property falls for determination in this suit. In the circumstances, it is my finding that the applicant's failure to exhibit a draft defence is not fatal to the plea for a setting aside order.

19. The third issue is whether the applicant has satisfied the criteria upon which the court exercises the discretionary jurisdiction to set aside a default judgment. This question ought to be answered in the context of the nature of the default judgment; whether the default judgment is a regular one or an irregular one. The **Court of Appeal** distinguished the two categories of judgments and summarized the applicable criteria in **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another [2010]eKLR:**

***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 an unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as reason for the failure of the defendant to file his memorandum of appearance or defence as the case may be; the length of the 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...***

***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 regular; it can set aside the judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue 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 disclosure, is because the party against whom it is entered has been condemned without notice of allegations against him or an opportunity to be heard in response to those allegations. The right to be heard against an adverse decision is taken against a person is fundamental and permeates our entire justice system.***

20. It is not contested that the applicant resided in Texas, United States of America, at all material times. All that the plaintiff says is that she was not aware that the applicant resided in the United States of America at the material time. It is noted from the court record that at the time

Kubo J allowed service of summons through a notice in the Daily Nation, he was not informed that the 3rd defendant resided in the United States of America. Similarly, at the time Angote J heard the case in the absence of the applicant, he too was not informed that the applicant was a resident in the United States of America. Had this fact been brought to the attention of Kubo J and Angote J, the two Judges would have required the plaintiff to comply with the requirements of Order 5 rules 22, 25, 26, 27, 28 and 29 of the Civil Procedure Rules. In the present matter, the plea for leave to effect substituted service through a notice in the Daily Nation was allowed on the basis that the applicant was a resident in Kenya and was likely to see the notice in the Nation Newspaper. The applicant contends that he did not see the notice because he was residing in Texas in the United States of America at the time. That fact has not been controverted.

21. The question which arises is whether the resultant ex parte judgment was a regular one or not. My answer to that question is that the resultant judgment in so far as it related to the applicant was not a regular one. I say so because the applicant was a resident of the United States of America. In the absence of compliance with the legal requirements for service of summons outside Kenya, the resultant judgment was an irregular default judgment. Had the fact that the 3rd defendant was a resident of the United States of America been brought to the attention of the court, the court would have directed that the mandatory requirements of the law relating to service of summons on a defendant who is a resident of another country be followed. Regrettably the court was not aware of this fact.

22. In light of the foregoing, I am satisfied that the applicant has demonstrated that he was not served with summons to enter appearance. He has also demonstrated that he was not aware of this suit at all material times. Thirdly, he has demonstrated that there is a triable issue relating to ownership of the suit property, calling for determination. In a nutshell, he has satisfied the criteria upon which our courts exercise the discretionary jurisdiction to set aside an irregular default judgment.

23. In light of the above findings, the 3rd defendant's notice of motion dated 13/5/2019 is allowed in terms of prayers 2 and 3. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Ogutu for the 3rd for the defendant

June Nafula - Court Clerk