REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 140 OF 2018

EZEKIEL ANGWENYI.....1ST PLAINTIFF

JAIRUS MOHAMMED NYAOGA.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT

RULING

What is before Court for determination is the Defendant's application dated the 30th July, 2019 brought pursuant to section 3A, 64 and 95 of the Civil Procedure Act and Orders 5, 10, 11, 12, 48, 50 and 51 of the Civil Procedure Rules as well as Article 47 and 159 of the Constitution. The Applicant seeks for the Court to set aside the interlocutory judgment and the ex parte proceedings herein. The application is premised on the grounds that the County Government was not served and yet it has a good defence raising triable issues. Further, that the Plaintiff's claim does not raise any triable issues and the suit is time barred.

The application is supported by the affidavit of MOURICE KAIKAI the County Attorney where he deposes that the County was not properly served with Summons to enter appearance in this matter. He explains that service of pleadings had become a big issue in the County necessitating the County Government to place a public notice within the Court precincts that all Court papers be served upon the legal office. He claims failure to appear in this matter was not deliberate on the part of the County Government. He insists that what is at stake is public interest and urge the Court to grant them a chance. He reiterates that they have a good defence raising triable issues and that the suit is time barred.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by EZEKIEL ANGWENYI where he explains that the Defendant was served with a demand letter dated the 23rd July, 2019 and Summons to enter appearance was served on 14th September, 2018 but they neglected or refused to enter appearance as well as defend the suit. He states that the Plaintiffs sought for default judgment to be entered in their favour vide a letter dated the 12th October, 2018 and filed in court on 21st November, 2018. Further, default judgment was not entered but the Court directed the matter to be set down for formal proof which was done on 23rd May, 2019. He insists on 19th July, 2019 the firm of Messrs Itaya & Company Advocates confirmed having instructions to defend the suit on behalf of the Defendant. Further, the Notice of Appointment of Advocate was filed on 16th July, 2019 but the same is not properly on record. He contend that the Defendant has not annexed a copy of the Notice and the averments are mere afterthought. Further, the Defendant has not provided proper reasons why it failed to defend the suit. He reiterates that the annexed Draft Defence does not raise triable issues and should not be allowed.

Both the Applicant and Respondents filed their respective submissions which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 30th July, 2019 including the parties' affidavits and submissions, the only issue for determination is whether the Court should set aside the interlocutory judgment and the ex parte proceedings herein and Defendant allowed to defend the suit.

As to whether the Court should set aside the interlocutory judgment and the ex parte proceedings herein and Defendant allowed to defend the suit. The applicant in its submissions has relied on the cases of ***Tours & Travel Limited V National Bank of Kenya Ltd (2018) eKLR Ternic Enterprises Ltd V Water Front Outlets Ltd (2018) eKL***R to buttress its arguments. The Plaintiffs/ Respondents in their submissions reiterated their opposition above and relied on the cases of ***Mwachupa Haranga Ndurya V Krytalline Salt Limited (2018) eKLR; Francis Mbalanya V Cecilia N. Waema (2017) eKLR and Evangeline Nyegera (Suing as the Legal Representative of Felix M' Ikiugu alias M'Ikiugu Jeremiah M' Raibuni (Deceased) V Godwin Gachagua Githui & Another (2019) eKLR*** to support their opposition.

Order 10 Rule 6 of the **Civil Procedure Rules** stipulates thus:' **Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request**

in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.'

Order 10 Rule 9 of the **Civil Procedure Rules** provides that:' **Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.**' While Order 10 Rule 10 of the Civil Procedure Rules provides that:**' The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.'** Further Order 10 Rule 11 of the Civil Procedure Rules stipulates thus:**' 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.'**

In the instant case, the Plaintiff's obtained default judgement against the Defendant on 26th November, 2018. On perusal of the Plaint, I note the claim is not of a liquidated nature but the Deputy Registrar still proceeded to enter interlocutory judgment contrary to the provisions of Order 10 rules 6, 9 and 10 of the Civil Procedure Rules which have been cited above.

In the case of **Altana Corporation Limited v Clarence Matheny Leadership Training Institute;National Land Commission & another (Interested Party) [2019] eKLR** Justice Chacha Mwita while dealing with a matter where the Deputy Registrar entered an interlocutory judgement as against the Defendant had this to say: **' Once the court arrives at the conclusion that the judgment was irregular, it must set it aside as a matter of course. In this regard, the Court of Appeal stated in *James Kanyiita Nderitu & another v Marios Philotas Lilikas & another* [2016] that**;

> ***"In an irregular default judgment…the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, 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 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"***

29. The right to be heard was underscored by the Supreme Court of India in *Sangram Singh v Election Tribunal Koteh* 1955 AIR 425 thus;

> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."***

The impugned default judgment though was not entered because the Applicant had not been served but because the default judgment was entered prematurely. That is before time allowed by the rules of procedure had lapsed. The action deprived the Applicant an opportunity to be heard and was therefore condemned unheard.'

The Plaintiffs' insists the Defendant was duly served, a fact they dispute. Further, that the draft Defence does not raise triable issues. The Defendant has annexed a copy of the draft defence in it's supporting affidavit which it contends raises triable issues.

In the case of **Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P at page 76** stated:

"…. 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".

I note the Plaintiffs have vehemently insisted that the draft Defence does not raise triable issues. However, from a glimpse of the same, I opine that it indeed raises triable issues which cannot be determined unless the suit is set down for hearing. Further, the Constitution at article 50 gives a right to a party to be heard which right. I cannot decline to grant to the Defendant herein.

It is against the foregoing that I find the application dated 30th July, 2019 merited and will proceed to allow it. I will proceed to set aside the interlocutory judgement entered against the Defendant on 26th November, 2018 as well as the resultant proceedings. Further, I proceed to grant the Defendants leave of 14 days to file and serve its Defence.

Costs of the Application is awarded to the Plaintiffs.

Date signed and delivered in open court at Kajiado this 12th day of March, 2020.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Kingoi holding brief for the advocate for plaintiff/respondent

Court assistant- Mpoye