



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 154 OF 2016**

**MUTHIKE MWAI.....1<sup>ST</sup> PLAINTIFF**

**MOSES MURIUKI MWAL.....2<sup>ND</sup> PLAINTIFF**

**KIACURU MWAI MATHANGU.....3<sup>RD</sup> PLAINTIFF**

**JAMES NGABU MWAL.....4<sup>TH</sup> PLAINTIFF**

**STEPHEN MATHANGU MWAL.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF KIRINYAGA.....DEFENDANT**

**RULING**

The defendants/Applicants vide a Notice of Motion dated 7<sup>th</sup> November 2019 brought under *Order 10 rule 11, Order 9 rule 9, Order 51 rule 1 CPR and Section 1A, 1B & 3A CPA* sought the following orders:

**(1) Spent.**

**(2) That this Honourable Court be pleased to grant the firm of Wanyonyi & Muhia Advocates leave to come on record for the Defendant/Applicant.**

**(3) That a stay of execution of the Ex-parte judgment entered on the 6<sup>th</sup> July 2018 be granted pending the hearing and final determination of this application.**

**(4) That this Honourable Court be pleased to set aside the ex-parte judgment entered on the 6<sup>th</sup> July 2018 and all other consequential orders on record pending the hearing and final determination of this suit .**

**(5) That the defendant/Applicant be granted leave to file its defence out of time in the suit in terms of the draft defence annexed hereto.**

**(6) That costs of this application be provided for.**

The application is premised on grounds shown on the face of the said application supported by the affidavit of Carolyne Kinyua sworn the same date. The application is opposed with a replying affidavit sworn by Muthike Mwai, the 1<sup>st</sup> plaintiff sworn on 30<sup>th</sup> January 2020. The replying affidavit is further supported by numerous annexures.

When the application came up for interparties hearing on 4<sup>th</sup> February 2020, the parties through their counsels agreed to dispose the same by affidavit evidence and written submissions.

**DEFENDANT'S/APPLICANT'S CASE**

The Applicant stated that she has never been served with summons to Enter Appearance, the plaint, the hearing notice and all documents in relation to the suit. She stated that they instructed the firm of Wanyonyi & Muhia Advocates to come on record who upon perusal of the Court file confirmed that the matter proceeded ex-parte for non-attendance of the defendant and judgment was entered against the defendant. She also deponed that the record indicates that the hearing of this suit proceeded Ex-parte after the Court was satisfied that the defendant was

indeed served as reflected from the affidavit of service filed in Court. She stated that according to the affidavit of service, the summons were allegedly served on the County Attorney and the formal proof notice was allegedly served upon the County Secretary whom upon making a follow-up realized that he did not have records of this matter. Upon making inquiry from other departments, judgment had already been entered. The deponent further deponed that the confusion of allegedly serving two different offices caused great delay in Entering Appearance. She stated that lack of proper service compromised the right of the defendant to a fair hearing as envisaged under *Article 50 of the Constitution of Kenya, 2010*. She stated that the defendant was not aware of the proceedings in the suit since it was never served with any documents and that the plaintiffs will not suffer any prejudice if the orders sought are granted. She contends that she has a defence which raises triable issues.

### **1<sup>ST</sup> PLAINTIFF/RESPONDENT'S CASE**

The 1<sup>st</sup> Respondent opposed the application stating that on 10<sup>th</sup> day of October 2016, the defendant/Applicant was served with summons to Enter Appearance but failed to Enter Appearance. She stated that interlocutory judgment was entered by the Court and the matter fixed for formal proof. On 9<sup>th</sup> May 2017, the Applicant appointed the firm of Patrick N. Muriithi & Co. Advocates who filed a notice of Appointment and though he was granted leave to regularize his position, he never did anything and the case proceeded Ex-parte and judgment was delivered on 6<sup>th</sup> July 2018. The Respondents contends that this application is an afterthought and that the same should be dismissed.

### **ANALYSIS AND DISPOSITION**

I have considered the Notice of Motion application, the affidavit evidence and the applicable law. The defendant/Applicant is seeking to set aside the Ex-parte judgment entered against her on 6<sup>th</sup> July 2018 and all consequential orders. The reasons are that they were never served with the plaint or any other documents in regard to this suit. The 1<sup>st</sup> Respondent attached a copy of Summons to Enter Appearance which reflects an acknowledgment stamp by the defendant/Applicant dated 10<sup>th</sup> October 2016. The 1<sup>st</sup> defendant also attached a Notice of appointment of Advocate by the firm of Patrick N. Muriithi Advocate dated and filed on 9<sup>th</sup> May 2017. The defendant/Applicant has not denied that the Summons to Enter Appearance was not received from their offices and the stamp appended thereon does not belong to them. There is also an affidavit of service by one Joseph Nduku Njuki advocate who is an officer of this Court sworn on 3<sup>rd</sup> November 2016 indicating that the Summons to Enter Appearance, plaint, verifying affidavit, plaintiffs' statement, list of documents and witnesses were effected upon the defendant on 10<sup>th</sup> October 2016. The defendant/Applicant has not challenged those depositions given on oath or even sought to cross-examine the maker as to the veracity of those averments. I have no reason to doubt the contents of the affidavit of service by the officer given that the Applicant has not controverted or even sought to cross-examine the maker. Suffice to add that principles for setting aside Ex-parte judgments have been set out in numerous decisions and precedents. In the case of *Patel Vs E.A. Cargo Handling Services Ltd (1974) E.A 75*, the Court held:

***“There are no limits or restrictions on the Judge’s discretion to set aside or vary ex-parte judgment 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”.***

In the same vein, the Court in the case of *“Shah Vs Mbogo (1967) E.A. 166* held thus:

***“The discretion to set aside an Ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.***

In the instant case, the suit was filed on 5<sup>th</sup> October 2016 vide a plaint dated the same date. The Summons to Enter Appearance was issued on 7<sup>th</sup> October 2016 and served upon the Applicant on 10<sup>th</sup> October 2016. The defendant/Applicant was expected to Enter Appearance within 15 days from the 10<sup>th</sup> October 2016. It was not until 9<sup>th</sup> May 2017, almost one year later when the defendant instructed the firm of Patrick N. Muriithi Advocate who then filed a Notice of Appointment. By the time the defendant instructed the said firm of Patrick N. Muriithi Advocate, formal proof had been conducted and interlocutory judgment entered. The plaintiff/Respondent had even sought leave to enter interlocutory judgment which application was served upon the defendant/Applicant as can be seen from the Notice of Motion dated 6<sup>th</sup> April. It was that application which prompted the defendant/Applicant to instruct the said advocate who filed the Notice of Appointment on 9<sup>th</sup> May 2017 but went to slumber until after interlocutory judgment was entered. I agree with the Respondents contention that the application by the defendant is an afterthought. Be that as it may and considering the draft defence which has been annexed to the supporting affidavit and considering that denying a subject a hearing is the last resort of the Court, I reluctantly allow the application on the following terms:

- (1) The Ex-parte judgment entered on 6<sup>th</sup> July 2018 and all consequential orders are hereby set aside.***
- (2) The firm of Wanyonyi & Muhia Advocates are granted leave to Appear for the defendant.***
- (3) The defendant is granted leave to file and serve their defence within 14 days from today.***
- (4) The defendant to pay the plaintiff drawn away costs of this application assessed at Ksh. 10,000/= within 14 days from today.***

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 29<sup>th</sup> day of May, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. *Ms Kinyua holding brief for Beacco for the Defendant*
2. *Ms Wambui holding brief for Nduku Njuki for Plaintiffs*
3. *Mbogo – Court clerk*