



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 188 OF 2017

MBITHI MUYANGA.....1ST PLAINTIFF

CHARLES MUEMA.....2ND PLAINTIFF

PAUL NGUMBI.....3RD PLAINTIFF

AUGUSTINE NGILA.....4TH PLAINTIFF

MUTETI MULI.....5TH PLAINTIFF

VERSUS

MUTHUSI NDETO.....1ST DEFENDANT

MBULWA NTHENGE.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 1st July, 2019 is seeking for the following orders:

- a. That the order given on 30th May, 2019 setting aside the Judgment dated 11th May, 2018 be set aside.*
- b. That the Defendants' Application dated 7th February, 2019 be set down for hearing on merits.*
- c. That the costs of this Application be provided by Defendants.*

2. The Application is supported by the Affidavit of the Plaintiffs' advocate who has deponed that he was served with the Defendants' Application dated 7th February, 2019 on 13th May, 2019; that the said Application did not have a hearing date and that on 13th May, 2019 his office was served with a hearing notice of 30th May, 2019 but his clerk, through inadvertence, mis-diarized the matter and indicated the same as coming up for hearing on 13th June, 2019.

3. Counsel deponed that when the matter came up for hearing, the Plaintiffs' advocate was not in court; that the Defendants' Application dated 7th February, 2019 was heard without the participation of the Plaintiffs and that it is in the interest of justice that the Application be allowed.

4. In reply, the Defendants' advocate submitted that on 13th May, 2019, the Plaintiffs' advocate was duly served with the Application dated 7th February, 2019 together with the hearing notice for 30th May, 2019 and that during the hearing, neither the Plaintiffs nor their advocate were in court.

5. Counsel submitted that on 4th July, 2019, they filed an amended Defence and a Counter-claim which was served upon the Plaintiffs' advocate on 5th July, 2019 and the orders having been issued on 30th May, 2019, the Plaintiffs waited for a month before filing the current Application.

6. The Defendants averred that the amended Defence and Counter-claim has already been filed and is part of the record; that the Plaintiffs are

guilty of undue delay; that the Defendants are the registered owners of the suit property and that the suit should be heard a fresh to enable the Defendants articulate their Defence.

7. The Plaintiffs and the Defendants filed their respective submissions in which they reinstated the depositions in their respective Affidavits, which I have considered.

8. The record shows that on 7th February, 2019, the Defendants filed an Application of even date seeking to set aside the ex-parte Judgment dated 11th May, 2018 and the subsequent Decree issued on 24th August, 2018. The Defendants also sought for leave to file their Defence out of time.

9. The Plaintiffs' advocate has admitted that he was served with the said Application together with a hearing notice for 30th May, 2019 on 13th May, 2019. According to the Plaintiffs' counsel, instead of his clerk diarizing the hearing date as 30th May, 2019, he mis-diarized it for 13th June, 2019. On that ground, the Plaintiffs are seeking to set aside the order of 30th May, 2019 which allowed the Defendants' Application.

10. After the Defendants' Application dated 7th February, 2019 was allowed, the Defendants filed and served the Defence on 3rd June, 2019 which was duly served on the Plaintiffs' advocate.

11. Although the Plaintiffs' advocate has submitted that his clerk diarized the hearing date as 13th June, 2019, he has not annexed a copy of his diary for 30th May, 2019 to show that the hearing of the Application in respect to this suit was never diarized for 30th May, 2019.

12. In his Application dated 7th February, 2019, the 1st Defendant deponed that he was not served with Summons to Enter Appearance and that he only came to learn about the existence of the suit when his son was served with the Decree herein. The 1st Defendant further deponed that he is the registered proprietor of the suit property and that he has a triable Defence.

13. The Plaintiffs herein have not exhibited a draft Replying Affidavit to the Defendants' Application dated 17th February, 2019 to enable the court ascertain if indeed the said Affidavit raises any serious rebuttal to the 1st Defendant's claim that he was never served with the Summons to Enter Appearance. That omission renders the current Application unmeritorious.

14. For the reasons I have given, I dismiss the Application dated 1st July, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE