



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 192 OF 2014

GALANA OIL KENYA LTDPLAINTIFF

VERSUS

DAVID GIKARIA1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

LAND REGISTRAR, NAKURU COUNTY.....3RD DEFENDANT

RULING

1. By Notice of Motion dated 19th August 2019, the first defendant seeks setting aside of the proceedings herein. The application is supported by an affidavit sworn by the first defendant. He deposed that his advocates perused the court file and advised him that there are on record affidavits of service claiming that service was effected upon him through Violet Nzinza, his wife. He added that there has been pending a judicial separation cause being CM Judicial Separation Cause No. 1 of 2011 (Nakuru) between him and his said wife wherein the plaintiff's advocates herein acted for his wife and therefore all along knew that his wife and him were living apart. He urged the court to allow the application since he has a serious interest on the suit property.
2. The plaintiff opposed the application through a replying affidavit sworn by its director, George Ngige Kahira. He deposed that the first defendant was duly served with all court process herein and annexed an affidavit to that effect sworn by the process server, Manuel Sakayo Markey. He added that the judicial separation cause referred to by the applicant was terminated and that the parties therein reconciled.
3. The second and third defendants did not respond to the application or participate in its hearing. Both the applicant and the plaintiff filed and exchanged written submissions.
4. I have considered the application, the affidavits and the submissions.
5. This matter has been pending in court since 1st July 2014 when the plaint was filed. Prior to filing of the present application, there had about 9 court attendances leading up to the plaintiff's and defence cases being closed on 27th May 2019. The applicant seeks setting aside of those proceedings. In such an application, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] 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 unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of 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. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173*).*

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 irregular; it can set aside the default 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 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.

6. The applicant has not specifically deposed that he was not served with summons to enter appearance. Besides stating that his advocates perused the court file and informed him that the matter had proceeded, he has not stated how he came to know about the fact that the matter was in court thus necessitating instructions to his said advocates. In the absence of proof that he was not served with summons, I am persuaded that he was actually aware of the existence of the suit. Although he has attempted to discredit service of hearing notices which is said to have effected on him through his wife by referring to judicial separation proceedings between himself and his wife, I note that the pleadings he has annexed in regard thereto were filed over 9 years ago. He has not referred to the current status of the matter or even annexed any final order granting judicial separation. An applicant seeking an equitable order has a duty to make a full and frank disclosure. I am not persuaded that the applicant herein has been forthright. In the circumstances, I take it that the applicant and Violet Nzinza are still husband and wife and that they are not separated.

7. The applicant is a member of parliament representing Nakuru East Constituency. By virtue of the nature of his work entails shuttling between the constituency and the National Assembly, it is possible that locating him may be a challenge, as in fact the process server has stated in his affidavit. **Order 5 rule 12** of the **Civil Procedure Rules** permits service on any adult member of the family of the defendant who is residing with him. I am persuaded that the applicant was indeed served not only with summons to enter appearance but also hearing notices. In such circumstances, I have unfettered discretion on whether or not to grant the orders of setting aside.

8. In considering whether or not to grant the orders sought, I take into account that the overall mission of the court is to do justice between the parties. The application herein has been made prior to date of delivery of judgment being set. Justice in the circumstances requires that we give the applicant an opportunity to present his case. In view of the circumstances that I have already adverted to, I am persuaded that a conditional setting aside would be appropriate in the circumstances. Any prejudice to the plaintiff can be compensated by an award of costs. In determining the quantum of the costs, I will take into account the effort made so far in prosecuting the matter and the applicant's failure to make a full and frank disclosure as regards the circumstances that led to him not defending the matter thus far.

9. In the end, I make the following orders:

a) The proceedings herein are set aside.

b) The first defendant shall pay to the plaintiff thrown away costs of KShs 50,000 (fifty thousand) within 14 (fourteen) days of delivery of this ruling.

c) The first defendant to file and serve statement of defence, list and bundle of documents, list of witnesses and witness statements within 14 (fourteen) days of delivery of this ruling.

d) In default of compliance with any of the conditions in a) and b) above, Notice of Motion dated 19th August 2019 shall stand dismissed with costs to the plaintiff.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 11th day of June 2020.

D. O. OHUNGO

JUDGE