



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 248 OF 2016**

**CELINA MUTHONI KITHINJI..... PLAINTIFF**

**[Suing on her behalf and on behalf of 5 others]**

**VERSUS**

- 1. SAFIYA BINTI SWALE**
- 2. SHEE KHA BIN MOHAMED**
- 3. ESHA BINTI MOHAMED**
- 4. FATUMA BINTI MOHAMED**
- 5. MANTHURA BINTI MOHAMED**
- 6. BUTHAINA BINTI MOHAMED**
- 7. ATIA BINTI MOHAMED**
- 8. ARAFA BINTI MOHAMED**
- 9. FADHILI BINTI MOHAMED.....DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 24<sup>th</sup> April 2019 by the Respondents seeking to set aside the judgment delivered on 15<sup>th</sup> March 2018 and grant the respondents leave to file their defence. The application is supported by the affidavit of Fadhili Binti Mohamed, the 9<sup>th</sup> respondent sworn on 24<sup>th</sup> April, 2019. It is deposed that the respondents were never served with summons to enter appearance and only got to learn about the case after the issuance of the decree and when the applicants filed an application seeking to have the Land Registrar register them as legal owners of the suit property. The respondents aver that they have always been in occupation of the suit land and that the applicants have never been in occupation and have marred these proceedings with falsehoods. It is also deposed that save for two respondents, all the others were deceased by the time they were sued. Copies of death certificates have been attached.
2. The applicants filed a replying affidavit sworn by Celina Muthoni Kithinji on 6<sup>th</sup> February, 2020. It is deposed that the pleadings in this matter were served upon the respondents by way of substituted service through advertisement in Standard Newspaper on 15<sup>th</sup> December 2016 and 12<sup>th</sup> January, 2017. The applicants deny that the respondents have been in occupation of the suit land.
3. The application was canvassed by way of written submission which the advocates for both parties duly filed and which the court has considered. After going through the pleadings, affidavits filed and the parties' submissions, the court finds that the issue for determination is whether the application meets the threshold for setting aside ex-parte judgment.
4. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

***“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.”***

5. In the case of **Patel –v- E.A. Cargo Handling Services Limited (1974)EA 75**, it was held:

**“There are no limits or restrictions on the judge’s discretion to set aside or vary an 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 it by the rules.”**

The same court further held as follows:

**“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect, defence on merits does not mean a defence that must succeed. It means a ‘triable issue’ that is an issue which raise prima facie defence which should go to trial for adjudication.”**

6. In the case of **Shah –v- Mbogo (1960) EA 166** it was held as follows:

**“ This 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.”**

7. It is not in dispute that the respondents herein were served with summons to enter appearance by substituted service through advertisement. It has also emerged that at the time of the alleged service, some of the respondents were already deceased. It goes without saying that dead people could not read advertisement in a newspaper. It has also been deposed by the respondents that they have been in possession and occupation of the suit land since time immemorial and that the applicants are strangers to the suit land. The court notes that this raises a triable issue in this matter.

8. In light of all the facts and circumstances of this case, it would be just and reasonable to set aside the judgment herein. The court will therefore exercise its discretion in favour of the respondents and set aside the ex-parte judgment herein and all consequential orders.

9. The upshot is that the Notice of Motion dated 24<sup>th</sup> April 2019 is allowed in the following terms:

**a. That the judgment and decree given herein on 15<sup>th</sup> March 2018 be and is hereby set aside.**

**b. The Land Registrar be and is hereby directed to cancel the provisional title issued to the applicants pursuant to the said decree.**

**c. The respondents to file and serve their response to the originating summons within 14 days of the delivery of this ruling**

**d. That the costs shall be in the cause.**

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29<sup>th</sup> day of July 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**