



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC APPEAL CASE NO.144 OF 2010

DAVID KASAMU MUSEMBI PLAINTIFF/RESPONDENT

VERSUS

NYANGOTO INVESTMENTS DEFENDANT/APPLICANT

R U L I N G

1. The Defendant/Applicant is seeking an order to set aside the interlocutory judgment entered on 2.9.2010 in default of defence. His grounds for the application as summarized from the supporting affidavit and the grounds on the face of the application are to the effect that; the failure to file defence within the prescribed period was due to non-availability of the court file on 27.8.2010.

2. He avers that the unfiled defence was forwarded to the Respondent advocate by the process server, and finally he claims to have a good defence and the counter claim. The Respondent opposes the application via an affidavit sworn by Agnes M. Nzei Advocate sworn on 22.8.2012. The gist of the content of the same affidavit is that the applicant filed memorandum of appearance on time but failed to file defence within the prescribed period. The said affidavit over that the Applicant filed Defence and counter claim on 3.9.2010 outside the prescribed period without leave.

3. The Respondent avers that he is unaware of the alleged unavailability of the file and that material has been put forward to support the allegation. The applicant submits that he has met the conditions obtainable in setting aside interlocutory judgment. He relies on authority of **NIMROD NCHOGU VS. JOSEPH MOMANYI CIVIL APPEAL NO.35/98** which set aside exparte judgment as follows:

“Court has to consider nature of defence even if there is no sufficient cause for nonattendance. A litigant should not be deprived an opportunity of presenting his defence”.

4. This was more or less the same articulated by **ABDALLAH MOHAMMED & ANOTHER VS. MBARAKA SHOKA CIVIL APPEAL NO.163/89** which held that in such cases, the court is to consider nature of defence and satisfy itself. The judgment impunged would lead to hardship to the other side.

5. Further in **SHANZU INVESTMENT LTD. VS. COMMISSIONER OF LAND CIVIL APPEAL NO.100/93** the court stated that 3 tests for setting aside such judgments namely-

- a. Defence on merit
- b. Prejudice

c. Explanation for delay.

Otherwise in absence of the above, the court will not interfere with a regular judgment. The applicant also cited various other authorities on similar point namely; CIVIL APPEAL NO.164/94 SALIM KHAN VS. NBK. KINGSWAY TYRE & AUTO MART VS. RAFIKI ENTERPRISES LTD CIVIL APPEAL 220/95. TREE SHADE MOTORS LTD VS. DT DOBIE LTD. & ANOTHER CIVIL APPEAL NO.10/98.

6. The Respondent submission is that the reason for not complying with timeline of filing defence that the court file could not be traced is not genuine since the file was requested by the Respondent on 30th, 31st August and 1st September, 2010 and it was available but the Applicant alleges unavailability of the same file on 31.5.2010. The Respondent contends that the Defence and counterclaim are not properly filed and should be expunged from the record as they were filed out of time without leave of the court. Further the Respondent argues that in any case the so called defence and counterclaim is not annexed to enable court peruse. Thus the applicant cannot be heard to purport to have good defence.

7. The Respondent cites the authority of **SAMEER AFRICA LTD VS. AGGARWAL & SONS LTD. (2013) e KLR** which held;

“while the court would exercise its discretion to avoid injustice or hardships resulting from inadvertence or excusable mistakes or errors, it would not assist a person who has deliberately sought to obstruct or delay the course of justice..”

8. After perusing the application, supporting affidavit, replying affidavit and the submissions filed by the parties and the cited authorities, I make the following findings:

The Plaintiff claim residential plot at Mavoko Machakos County which the Defendant alleges was fraudulently registered in the Defendant’s names.

In the impugned defence and counterclaim filed on 3.9.2010 the Defendant applicant claim to have been allocated suit plot lawfully paid requisite fees and issued with title documents.

A casual look at the parties contestation discloses a serious dispute which is before the court and thus the applicant’s purported defence and counterclaim plus the attached documents disclose triable issues.

9. On the reason for delay, the Applicant has totally failed to demonstrate by documents or otherwise the cause for his delay in filing defence within the prescribed period. The Applicant should have shown a letter written to complain of non-availability of the file or see Deputy Registrar to authorize his defence to be filed in absence of the file. The excuse does not hold water.

10. However, the court notes that the appearance was entered on 12.8.2010 and defence was to be filed by 27.8.2010 or thereabout. The defence and the counterclaim was filed on 3.9.2010 a span of 6 days delay. The court has to weigh the circumstance of the case vis-a-viz the prejudice which would be inflicted on the Defendant if the orders sought are not granted. In the case of **SAMEER AFRICA LTD. Supra**, the court was of the view that in the setting aside judgment, the court has to consider the hardship or injustice which may result for error or mistake. In the instant suit, the Defendant would lose the suit plot without a hearing or even without testing the Plaintiff’s claim. He will be shut out just because he was late for about 6 days in filing defence.

11. In **TREE SHADE MOTORS LTD. supra**, the court held that even if service was valid, judgment would be set aside if defence raises triable issues.

In **SHANZU INVESTMENT LTD. supra**, the test set to be considered were defence merit, prejudice and reason for delay. The court has already found that there is a defence which discloses triable issues. The court has also found that though delay not consequently explained, the same was for less than a week. On limb of prejudice, the court finds that the Applicant will be seriously prejudiced if he is shut

out of the matter.

12. The court thus makes the following orders:

1. The judgment entered on 2.9.2010 is set aside.
2. The defence and counterclaim are deemed properly filed but to be served within 14 days.
3. The Applicant to pay Respondent KShs.10,000/- throw away costs within 14 days and in default the defence and counterclaim to be struck out.
4. Matter be fixed within 30 days for directions after parties comply.

Dated and Delivered at Machakos this 6th day of February, 2015.

CHARLES KARIUKI

JUDGE