



**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL CASE NO. 156 OF 2012**

**(FORMERLY HCCC 297 OF 1993 MERU)**

**M N.....PLAINTIFF/RESPONDENT**

**VERSUS**

**M A.....DEFENDANT/APPLICANT**

**RULING**

This is a ruling on the application dated 8/4/2014 brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 9 Rules 9 & 10, Order 12 Rule 7, Order 22 Rule 25 Order 51 Rules 1, 3, 10 and 13 of the Civil Procedure Rules 2010, 50 and 159(1) of the Constitution of Kenya. It seeks for the following orders.

1. *That pending hearing and determination of this matter the court be pleased to grant a stay of the judgment of 8/3/1994 and any consequential orders and/or decree of 5/4/2012.*
2. *That pending the hearing and determination of this matter the court be pleased to set aside the judgment of 8/3/1994 and any consequential orders and/or decree issued thereafter.*
3. *That the defendant be granted leave to defend this matter and the draft statement of defence be deemed as duly filed and served upon payment of the requisite fees.*
4. *That the honourable court be pleased to grant leave to the defendant/applicant to cross examine K.K. Wa Mulwa Advocate on his return of service dated 14/9/1983.*
5. *That the plaintiff/applicant be condemned to pay costs of this application.*

The application is supported by the affidavit of the applicant M A which contains the grounds upon which the application is based. He states that he was aggrieved by the judgment delivered on 8/3/1994 and is desirous of challenging it. He depones that he married the respondent in 1970 and entrusted her with all his properties including title deeds and other important documents for safe keeping. He denies having been served with any court documents in this matter and only learnt of the judgment in July 2012 after the firm of Ndorongo & Company wrote letters to the tenants in Plot No. 498 Embu. He states that he never met the said J.K. Wa Mulwa who alleges to have served him with summons to enter appearance on 17/6/1983. The applicant denies that the signature on the said summons is his and denies that he was served with any summons for formal proof in this case. It is also denied that the applicant had any mailing address in Meru. It is his humble prayer that the judgment be set aside and that he will be willing to abide with any conditions given by the court.

In her replying affidavit the respondent states that the applicant was properly served and has been fully aware of the suit since its inception. It is the respondent who had been collecting rent from the suit premises until 2012 when the applicant moved to court seeking restraining orders. The respondent states that this application is an afterthought meant to frustrate her and prevent her from enjoying the fruits of

the judgment.

The respondent further argues that the application is *res judicata* since the applicant had filed a similar one which was dismissed by the court. It is within the knowledge of the applicant that the respondent and himself have always jointly owned the property in question. She contends that the applicant has not come to court with clean hands. She argues the court not to grant the prayers sought.

The applicant in his further affidavit states that the rent collected from the premises used to be deposited in a joint account secretly without his knowledge. He states that the application is not an afterthought since he only came to know about the judgment in 2012. He also denies that his application is *res judicata* since he has never filed another application to set aside *ex parte* judgment.

The issues for determination in this application are three fold:-

1. Whether the court should grant stay of execution of the *ex parte* judgment dated 8th March 1994;
2. Whether the court should exercise its discretion in favour of the applicant by setting aside the judgment delivered on 8/3/1994;
3. Whether the applicant should be granted leave to defend this suit.

The law applicable in this case is Order 10 Rule 11 of the Civil Procedure Rules which provides:-

*“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”.*

It is important to look at a few decisions on the relevant issues in this application.

In the case of ***KYEGO MBAI VS KIMANTHI MUSEMBI & NDUVA KIMANTHI [2012] eKLR*** the court held that the principles for setting aside judgment include the consideration whether the judgment entered was regular or irregular. If it was irregular, the court ought not to exercise its discretion. Secondly, where the judgment entered was regular it is imperative that the court determines that the proposed defence raises triable issues and that in exercising the discretion the court must act judiciously.

***MUTHAIGA ROAD TRUST COMPANY LTD VS FIVE STATIONERS LTD & 2 OTHER [2003] eKLR*** the Court of Appeal held that the only reason to set aside a regular judgment is where there is a bona fide defence pursuant to Order IXA Rule 10.

It was also held in the Court of Appeal case of ***AMAYI OKUMU KASIKA & 2 OTHERS VS MOSES OKWARE OPARI & ANTHEA [2013] eKLR*** that it is trite law that once judgment is regular, the applicant ought to show the merits of the defence. This can be demonstrated in an affidavit in support of the application.

In the case of ***MOHAMED & ANOTHER VS SHOKA [1990] KLR*** the appellants applied to court to set aside *ex parte* judgment claiming that service of summons was not properly done. On appeal the Court of Appeal held as follows:-

(a) *The test for the correct approach in an application to set aside default judgment are firstly whether the defence has merit, whether there will be prejudice and what the explanation for delay is.*

(b) *It was for the appellant to establish on a balance of probabilities that even with the irregular return of service, they were never served.*

(c) *Considering the lapse of time and taking into account that the final judgment had been satisfied and in view of the absence of plausible explanation for the inordinate delay, the trial*

*judge could not have exercised his discretion in favour of the appellant without prejudice to the respondent.*

In the present case the applicant alleges that he learned of the judgment in the year 2012. However, the application to set aside the said judgment was filed in 2014 which was about 2 years later. This delay has not been explained in the supporting affidavit. In view of the decision of **MOHAMED & ANOTHER (SUPRA)** the applicant is guilty of unexplained delay and the orders sought may not be granted in the circumstances.

The other issue for determination is whether the defence raises triable issues. In paragraph 3 the applicant denies that the respondent and himself are the proprietors of Plot No. 498 Embu Municipality as tenants in common in equal shares. In paragraph 4 the applicant states that he is the sole proprietor of the said plot and that if the title was changed to reflect otherwise, that was done in fraud.

The respondent in the plaint alleges that the plot was owned by the applicant and herself as tenants in common in equal shares. In the affidavit in support of her application dated 22/6/1993 seeking restraining orders, she annexed a copy of the register. The said copy of register shows that Plot No.498 Embu is owned by both the applicant and the respondent with each owning half share.

The allegation in the defence by the applicant that he is the sole owner of the plot is far from the truth. It was imperative that the applicant tender evidence of proof of ownership of the plot. The applicant pleaded the issue of fraud in his defence but he has not adduced any evidence to that effect. The copy of charge sheet annexed to his application indicate that the alleged fraud was for the application for consent of the land board. There is no evidence to show that the respondent was charged with forging the land register to reflect that the land is owned jointly by herself and the applicant.

In view of the foregoing and relying on the case of **AMAYI OKUMU KASIKA (SUPRA)** the applicant has not demonstrated that he has an arguable or triable defence to warrant the setting aside of judgment delivered on 8/3/1994.

In the case of **YAMKO YADPAX INDUSTRIES LIMITED VS KALKA FLOWERS LIMITED [2013] eKLR** the court allowed an application seeking to stay execution and setting aside judgment on grounds that the defence raised a valid issue. The court cited the Court of Appeal case of **MAINA VS MUGIRIA [1983] KLR 78** which stated the principles governing exercise of judicial to set aside *ex parte* judgment. The court observed that the main concern is to do justice to the parties. Secondly, that the discretion should be exercised to avoid injustice or hardship but should not assist a person who deliberately obstructs or delays the cause of justice. It further stated that the Court of Appeal will only interfere with the discretion of the trial judge if he misdirected himself. It also noted that the discretionary power should be exercised judiciously as well as that facts and circumstances both prior and subsequent should be considered.

On the allegations that the application is *res judicata*, I agree with the applicant that it is not. The record shows that the only other application brought by the applicant is the one dated 11th September 2012 seeking for an order to restrain the plaintiff from executing the judgment delivered on 8th March, 1994. It also sought that a decree dated 2th April 2012 be declared null and void. This application seeks for totally different prayers.

I find no merit in this application and it is therefore dismissed with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Ajiambo for the Applicant/Defendant**

**Mr. Mogusu for Nyamu for the Respondent/Plaintiff**