



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 9 OF 2020

JOHN KAMANDE NGUGI.....PLAINTIFF/RESPONDENT

VERSUS

PETER KARANJA MWANGI.....1ST DEFENDANT/APPLICANT

JOSEPH KAMANDE MWANGI.....2ND DEFENDANT/APPLICANT

RULING

1. The Applicants moved the Court vide Notice of Motion filed on the 28/9/2020 under Order 10 Rule 11 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders;

- a. That the Court be pleased to set aside the interlocutory judgement entered against the Defendant/Applicants on the 11/8/2020 and allow them to file a Replying Affidavit to the respondent's claim.
- b. That the Respondent's Replying Affidavit filed on the 22/9/2020 be deemed properly on record.
- c. Costs be provided for.

2. The application is supported by the grounds adduced thereto and the Supporting Affidavit of J N Kirubi, Counsel for the Applicants who deponed that the Applicants entered appearance on the 2/7/2020 but the delay in filing the Replying Affidavit was brought about by the time taken in obtaining the copy of the death certificate of Njeri Karanja, deceased, the registered owner of the suit land. That the said document was availed to him on the 21/9/2020 and immediately filed the Replying Affidavit on the 22/9/2020 without delay.

3. The Applicants further argued that the interlocutory judgement entered on the 11/8/2020 was irregular because the claim of the Respondents seeks for adverse possession of the suit land which is an unliquidated claim. That the subject matter being land, he urged, the Court must not drive the Applicants away from the seat of justice.

4. The application is opposed by the Respondent vide the Replying Affidavit dated the 14/10/2020. He contends that the Applicants failed to file their response within 15 days from the date of appearance. That the interlocutory judgment was properly entered and the Applicants filed their response way after the judgement had been entered.

5. That no cogent reasons were advanced for the delay. He urged the Court to dismiss the application.

6. The parties argued the application orally before me in Court. I have considered the application, the rival written and oral arguments and the issue for determination is whether the Applicants are deserving of the Court's discretion.

7. It can be discerned from the pleadings that the Respondents claim is for unliquidated claim being premised on a claim of adverse possession of the suit land. It is also true that the Applicant entered appearance on the 2/7/2020 but did not file defence within the stipulated time. Consequently, the Respondent obtained an interlocutory judgement in default. The Respondent was then directed by the court to list the matter for hearing.

8. The Court is satisfied that the Applicant was duly served with the summons in the suit and hence the filing of the Memorandum of Appearance. The Court is also satisfied that the interlocutory judgement entered on the 11/8/2020 was proper and regular in every sense.

9. Order 10 Rule 11 confers on the Court the unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. The duty of the Court is to do justice to the parties. Where a regular judgment has been entered like in this case the Court will not set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go to trial. Secondly the Court will consider the Applicants reasons for failing to file response in time and also the prejudice that the Respondent stands to suffer if the

application is allowed.

10. I have perused the Replying Affidavit on record sworn by the 1st Applicant and am satisfied on the face of it that there are triable issues that should be remitted to trial.

11. Further the Applicant has explained that the delay was caused by the time taken in obtaining the death certificate of the registered owner of the suit land. This cannot be taken to be a frivolous reason.

12. The Respondent has not explained what prejudice he will suffer if the application is allowed beyond what can be compensated with costs. I see none. The overriding objective of the Court is to see to it that substantive justice is done and fortified by Art 159(2) (d) of the Constitution, this Court will allow the application in the interest of justice so that the parties can have their say in Court.

13. The application is allowed as prayed.

14. The Respondents shall have the costs of the application.

15. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 29TH DAY OF OCTOBER 2020

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi for the Defendant/Applicant.

Ms Macharia HB for Njoroge for the Plaintiff/Respondent.

Njeri, Court Assistant.