**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**Civil Suit 13 of 2011**

**SALIM AWADH AHMED.........................................................................................1ST PLAINTIFF**

**FAHIM AWADH AHMED.......................................................................................2ND PLAINTIFF**

**-VS-**

**CHRISTINE NYEVU DHUHA...................................................................................DEFENDANT**

**RULING**

1. Before me is a Notice of Motion filed by the Defendant/Applicant on 17th August, 2011 seeking primarily to set aside the exparte judgment entered herein and leave to the defendant to file her defence. It is expressed and brought primarily under Order 10 rules 11 of the Civil Procedure Rules:

***"11. 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"***

2. The chief grounds upon which the applications is premised are (a) (b) (c) (h) (i) the face of the applications which are reproduced below:

***a) That the defendant/applicant who has lawfully resided upon the suit premises being LR Plot no. 10386 has been evicted from the said premises pursuant to a judgment and decree of this honourable court.***

***b) That the said exparte judgment entered on 20th July, 2011 subsequent decree issued on 4th August 2011 was unprocedurally, irregularly and prematurely obtained.***

***c) That the defendant/applicant was never at any one time served with the summons to enter appearance in this matter***

***h) That unless this application is granted to the defendant stands to suffer irreparable damage and loss as he will lose possession of her own and only abode.***

***i) That in the interests of justice and fairness and rule on natural justice the defendant's/applicant's should be accorded an opportunity to be heard and should not be condemned unheard***.

These grounds are further expanded in the applicant's two affidavits in support of the Notice of Motion, filed on 17th August, 2011 and 13th September, 2011. The applicant annexed a draft defence to the initial affidavit – CND5.

3. The plaintiffs through the 2nd plaintiff swore a replying and further affidavit, and also filed a further affidavit by the process server, Nickson Nyange Rodgers Mabishi, the last of which was filed on 7th December, 2011. The application was heard through written submissions made by the counsel for the parties.

4. On a reading of the submissions in light of the respective affidavits on the record, there is no dispute that a default judgment was entered against the defendant by the Deputy Registrar on 11th May, 2011 and thereafter the matter proceeded to hearing resulting in the judgment issued on 20th July, 2011 in the plaintiffs' favour. This judgment is the subject of the defendant's application. Her contention is that she was never served with summons to enter appearance, and hence the default judgment was irregular for that reason and the non-compliance by the plaintiffs with the provisions of Order 11 and Order 10 rule 9 of the Civil Procedure Rules, which provide for pretrial directions and hearing of suits related to non-liquidated demands. The applicant asserts that she has a good defence.

5. The plaintiffs on their part contend assert that the defendant was duly served with summons and judgment in their favour was entered regularly when she failed to enter appearance or file defence. The plaintiffs say that the decree has been executed and any claim the defendant has should come by way of a suit for damages. That her defence being a mere denial raises no triable issue. With regard to alleged failure to comply with Order 11 of the Civil Procedure Rules, it was the plaintiffs' contention that they were exempted from compliance after due application to the court.

6. There is a long line of authorities governing the exercise of discretion in applications of the nature before us, starting with **Patel vs EA Cargo Handling Services [1974]EA 75**. A passage often quoted from that authority states:

***"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to letter the wide discretion given to it by the rules. I agree that where it 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 the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. Put it "a triable issue", that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

7. In **Sebei District Administration vs Gasyali (1968)EA 300** the court emphasized the need to consider the nature of the action, any defence brought to the court's notice, however irregularly as well as "the question as to whether the plaintiff can reasonably be compensated by costs for any delay". The court also issued the exhortation(s) that to deny the applicant a hearing should be the last resort of a court.

8. Applying these principles to this case, I think that the affidavit of service by the process server has not been challenged in any serious manner. The defendant gave notice of her intention to cross-examine the said process server but did not. The sole point upon which the defendant placed reliance in disputing service was the fact that the affidavit of service stated that she was traced and served at a house in "Majengo Mapya area near Raia Estate, Malindi" which was later explained in the process server's subsequent further affidavit as "Raia Estate near Majengo Mpaya area also known as Mtangani area." The court takes judicial note of the fact that Majengo Mapya is within Mtangani area where the defendant admits to reside (paragraph 9 of the supporting affidavit). It is a notorious fact that the common name of the general area is Mtangani which encompasses Majengo Mapya and Raia Estate or village. That plank does not advance the defendant's case at all and in my view appears half hearted in light of the fact that she abandoned her intentions to cross-examine the process server. I am of the considered view based on

the material before me that the defendant was duly served but failed to enter appearance or file defence. Hence the judgment by Omondi J against her is regular.

9. Regarding the interlocutory judgment on record, two legal points were raised by the defendant's counsel in an effort to show that the plaintiffs failed to comply with the provisions of Order II rule 3 and order 10 rule 9 of the Civil Procedure Rules. With regard to the formER, directions were sought from the trial Judge Omondi J., prior to the hearing. The Judge gave the following directions:

***"I have perused the pleadings, I confirm an interlocutory judgment was entered on 11th May, 2011 as defendants failed to enter appearance or file defence. To require the plaintiff to comply with provisions of Order II rule 3 will not further the expeditious disposal of this matter or will it improve on the case management. In addition to that because of the interlocutory judgment already entered and given the nature of the claim, requiring the plaintiff to file written statement will merely be having replication of what is contained in the pleading and I am satisfied that this suit ought to benefit from the exemption contemplated by Order II rule 1 which empowers this court to order for exemption of this provision in such suits as the court may so order."***

I agree with the Hon. judge that in the circumstances of this case it would not have served any purpose to delay the matter in order to conduct "pre-trial" conferencing with one party only.

10. Secondly, the plaintiff's request for interlocutory judgment was brought under Order 10 rule 2, 6, and 9 of the Civil Procedure Rules. It would appear that of the rules cited only rules 9 and 10 appear relevant to the case before us. The rules provide:

***9. "Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.***

***10. The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence."***

11.It is true that these rules make no provision for the entry of an interlocutory judgment. However, the rules empower the plaintiff to set down the suit for hearing in default of appearance or defence. For that reasons, the interlocutory judgment recorded on 11th May, 2011 may therefore be described as "irregular." However, the suit was set down subsequently for hearing and Omondi J. rendered her final judgment. For whatever it is worth the interlocutory judgment is not the subject matter of the present application. The subject matter of the same is the final judgment delivered by Omondi J. on 20th July, 2011 and with respect, I cannot see how the submission related to the "interlocutory judgment" advances the defendant's cause. More so because as I have found, the defendant was duly served with summons but failed to enter appearance or file defence.

12. What is the "nature of the action" and the defence proposed by the defendant qualifying as a "defence on the merits?" The plaintiffs' action was for the eviction of the defendant from plot number 10386 (original plot No. 131 Malindi) which they allegedly purchased from one Abdulrazak Haji Adam in 2008. They allegedly took possession thereof but they found the defendant squatting on the land and offered to move her to another plot. It is alleged that an agreement was entered into but the defendant later changed her mind.

13. The defendant's defence is that she is the rightful owner of the suit property having brought the same and taken possession from Abdulrazak Haji Adam. In paragraph 10 however, the defendant admits paragraph 10 and 11 of the plaint which stated:

***"9. The plaintiffs established that the defendant was a squatter on the said plot, a fact that she confirmed to be true; and they, the plaintiffs required her to vacate the same forthwith.***

***10. The plaintiffs aver that the matters stated in paragraph 9 notwithstanding, the 2nd plaintiff, out of***

***sheer magnanimity and as an act of pure benevolence, offered to construct a house for the defendant on plot no. 10298 also within the original property number 131 – Malindi and relocate her to that plot so that she could leave plot no. 10386 available to the plaintiffs."***

The agreement dated 28th October, 2010 to which the defendant admits being a party and annexed to the replying affidavit of the plaintiffs states that legal owner of the suit property was the 2nd plaintiff, referred to as donor while the defendant was to benefit from a donation of plot 10298 from the donor and move out of the suit property to occupy a house to be erected for her on the latter plot as "compensation" to her by the 2nd plaintiff.

14. These uncontested paragraphs in the defence appear to contradict the defendant's claim to own the land. The defendant has not attached any document in support of her allegation to have brought the suit property or indeed any evidence of title. Moreover, ground (a) of the application stated that the ***"Defendant/Applicant who has lawfully resided upon the suit premises being LR No. 10386 has been evicted from the said premises pursuant to a judgment and decree of this honourable court."*** This statement is repeated in paragraph 3 of the supporting affidavit.

15. In view of the fact that execution has already been completed, it does appear that the defendant's application has been overtaken by events. And perhaps such a realization prompted the filing of a further affidavit wrongly headed as a supporting affidavit on 13th September, 2011. Therein, the defendant in paragraph 3, 4 and 5 depones that she intends to file a counterclaim for ***"compensation and damages of which at the time of filing this draft defence the material needed for instance the valuation report loose of assets had not been completed by the valuer to enable me approximate the amount...to claim in my counterclaim."*** (sic).

Thus it appears that even the intended counterclaim is not for repossession of the suit property, but compensation.

16. For these reasons, I am inclined to agree with the plaintiffs' submissions that the defendant's recourse in the circumstances of this case is to sue for damages for breach of the contract between her and the plaintiffs and the subsequent alleged illegal eviction. Hence the court's view is that in the circumstances of this case setting aside the judgment appears a futile exercise. Besides, the applicant is not without remedy. She is at liberty to bring an appropriate suit in respect of the alleged breach by the plaintiffs of the agreement dated 28th October, 2010. She will therefore not be denied an opportunity to be heard.

For all the foregoing, I find no merit in the defendants Notice of Motion and will dismiss it. However, I direct that each party bears its own costs.

Delivered and signed at Malindi this **2nd** day of **July, 2012** in the absence of the parties. Court clerk - Evans/Leah.

**C. W. MEOLI**

**JUDGE**