



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 72 OF 2018

HOLLANDER NED SECURITY.....PLAINTIFF

VERSUS

JACQUELINE WANGUI HILL

MIBO CERAMICS LTD

AHMED HASSAN.....DEFENDANTS

RULING

1. By this Notice of Motion dated 18th May 2020 and filed herein on 5th June 2020, Jacqueline Wangui Hill and Mibo Ceramics Ltd (the 1st and 2nd Defendants/Applicants) urge this Court to set aside the orders issued on 8th October 2019 and to grant them leave to defend the Notice of Motion dated 29th March 2018. In addition, the Applicants urge this Court to deem their Statement of Defence filed herein to have been properly filed *ex debito justiae*.

2. The application which is supported by an affidavit sworn by the 1st Defendant is premised on the grounds that:

a) The Plaintiff has obtained an order herein restraining them from dealing in any manner with all their properties situated in Plot Nos. 4805, 4806 and 4807 Malindi altogether known as Ashok Apartments;

b) During the hearing of the Motion dated 29th March 2018, the Defendants could not participate as the 1st Defendant was in prison and was never notified about the commencement or existence of the case;

c) Upon obtaining the said orders, the Plaintiff willfully and deliberately embarked on a campaign to undermine the 1st and 2nd Defendants rights over their property by proceeding to collect rent over the same and locking several apartments thereby decreasing their value due to inadequate care and maintenance;

d) That the said restraining orders were issued without the Applicants herein being granted an opportunity to be heard;

e) That the Applicants have a good response to the Plaintiff's application which raises several triable issues with a high probability of success;

f) The 1st and 2nd Defendants stand to suffer irreparably if the orders sought are not granted; and

g) It is in the interest of the public that the application be heard expeditiously and the orders sought be allowed.

3. The application is opposed. In a Replying Affidavit sworn on 29th June 2020 by its director David Murunga Robert and filed herein on 10th July 2020 Hollander Ned Security (the Plaintiff) avers that it did file the application dated 29th March 2018 seeking a temporary injunction restraining the 1st and 2nd Defendants from selling and/or transferring the suit properties which orders were granted by the Court.

4. The Plaintiff avers that the Applicants were served twice, first on 6th April 2018 and secondly on 23rd April 2018 with the said application but the 1st and 2nd Defendants failed to enter appearance. The Plaintiff further asserts that the Applicants herein have always been aware of the suit herein but failed to enter a defence and have instead been engaging in delaying tactics by filing numerous applications similar to the present one.

5. The Plaintiff avers that the 1st and 2nd Defendants have not made any serious efforts to settle the matter and that the 1st Defendant who is a director and majority shareholder of the 2nd Defendant has been selling apartments on the suit property without the Plaintiff's knowledge in an effort to evade payment of what is owing to the Plaintiff. The Plaintiff further asserts that the Applicants have failed to adduce any evidence of any injury they have suffered and accuse them of only seeking to access the suit premises to be able to sell the same.

6. I have carefully perused and considered the application and the response thereto. I have also considered the oral submissions made before me by Mr. Bwire, Learned Counsel for the Applicants. The Plaintiff neither filed nor made submissions in respect of the application.

7. The general power to set aside any ex-parte order is donated under Order 10 Rule 11 of the Civil Procedure Rules in the following manner:

“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.”

8. The general principles applicable under this Rule as laid out by the Court of Appeal in *Pithon Waweru Maina –vs- Thuka Mugiria (1982-88) 1 KAR 171*, are that:

“(a) Firstly there are no limits or restrictions on the Judge’s discretion 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. Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75 at page C and E

(b) Secondly, this discretion is intended so to be exercised to avoid injustice, or hardship resulting from accident, inadvertence, or excusable mistake or error, but it not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. Shah –vs- Mbogo (1967) EA 116 at 123B, Shabir Din –vs- Ram Parkash Anand (1955) 22 EACA 48

(c).....”

9. Thus the object of the discretion granted to the Courts to set aside an ex parte Judgment or order is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is however not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

10. In the instant matter, the 1st and 2nd Defendants aver that they were unaware of the Notice of Motion dated 29th March 2018 and hence their failure to participate in the same. The Plaintiffs however swears that the two Defendants were served with the said application and that they failed to appear and or to oppose the application.

11. From her Supporting Affidavit and the annexures thereto, it is evident that the 1st Defendant was imprisoned between the period 2nd April 2018 until 14th August 2019. The Plaintiffs were apparently aware of this fact. It was therefore their case that they served the 1st Defendant while in prison. In this respect the Plaintiff relies on the affidavit of one Samson N Nyangena filed herein on 23rd May 2018 in which he states as follows at paragraphs 3 and 4 thereof:

“3. That on the same date (23rd April 2018), at 11.00 a.m. he proceeded to Malindi G.K Prison purposely to serve the above mentioned Court documents upon the 1st Defendant who is the Managing Director of the 2nd Defendant in this matter and on arrival on main gate and I was attended by Officer in Charge Prison Officer who I introduced my name to and the reason of my visit, the said Police Officer called out to me Madam Jacqueline Wangui Hill, the 1st Defendant herein.

4. That the 1st Defendant while in Malindi G.K. Prison accepted service by receiving the above-mentioned documents, signing and dating on the reverse of my service copies that I had to retain on explaining to her the purpose of my visit.”

12. The 1st Defendant denies that there was such service upon herself and I cannot but grant her the benefit of doubt. I do so because the Process Server does not provide any evidence of a visit to the prison that day or give the identity of the person he invariably refers to as the Officer-in Charge of the Prison and as a Police officer who called out the 1st Defendant for him to serve. He does not also offer any explanation as to how he came to know that the person who was called to him by whoever it was, was the 1st Defendant herein. It is also evident that the 2nd Defendant, a limited liability company separate and distinct from the 1st Defendant was not served with the suit papers.

13. As was stated in *James Kanyita Nderitu & Another –vs- Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKLR*:

“In an irregular default Judgment, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debito justiae, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it has been entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire

justice system.”

14. Arising from the foregoing and having found that the 1st and 2nd Defendants were not properly served with the Motion dated 29th March 2018, I hereby allow this application dated 18th May 2020, set aside the orders issued on 8th October 2019 and direct that the Plaintiff's application dated 29th March 2018 be fixed afresh for hearing in the presence of both parties.

15. The 1st and 2nd Defendants shall have the costs of this application.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE