



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 203 OF 2017

KARISA CHENGO NGUMA.....PLAINTIFF

VERSUS

KACHE RUWA KALAMA

SHIDA ALI NGUMA.....DEFENDANTS

RULING

1. The application before me for determination is the Notice Motion dated 21st May, 2019 and filed on 25th July 2019 in which the defendants/applicants seek orders to set aside orders of entry of judgment on admission issued on 15th February, 2018 and for leave to file and serve amended defence. The application is brought under Order 12 Rule 7, Order 18 Rule 2 and 3 and Order 51 Rule 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. The application is supported by the affidavit of Shida Ali Nguma sworn on 25th July, 2019 and is premised on the grounds on the face of the motion. The applicants aver that the plaintiff/respondent filed and served an application dated 5th December 2017 seeking for entry of judgment on admission in favour of the plaintiff. That on 15th February, 2018 when the matter came up for hearing of the aforesaid application, Ms Wambani advocate for the applicants herein instructed another advocate to hold her brief and request for more time to put in a reply as she was before another court. The applicants aver that it appears the advocate who was instructed to hold brief left court before addressing the court and therefore the application dated 15th February 2018 was allowed unopposed. The applicants contend that the inadvertent mistake of counsel should not be visited upon the applicants.

3. It is deposed that in order to remedy the situation, the applicants filed an application on 4th May, 2018 but the same was not prosecuted in view of the orders made on 14th May withdrawing the suit. The Applicants aver that the orders made on 15th February 2018 allowing the application dated 5th December 2017 highly prejudices their interests and ought to be set aside. The applicants further pray for leave to amend their defence filed on 22nd August, 2017, adding that the proposed amended defence raises triable issues such as the fact that the applicants together with one Sharifu Ali Nguma (deceased) are the registered co-owners of plot No. Bububu 'A' Settlement Scheme/27. That the suit property was acquired through inheritance as it formed part of the applicant's deceased father, Ali Karisa Wanguma and that the same was distributed to the applicants as joint owners in Kadhi Succession Cause No. 214 of 2011. The applicants aver that the respondent is their cousin and according to Sharia Law, he is not entitled to inherit from the applicants' father. The applicants further aver that they have at all material times been in possession of the suit property and the suit against them is a mere attempt to dispossess the applicants of property that is rightly theirs. The applicants further state that after the respondent withdrew the suit, which he later denied, the applicants sold the plot to a third party who is said to now own the property. The applicants have annexed copies of the application dated 5th December, 2017, copy of affidavit of Wambani Antonette sworn on 25th July, 2019, copy of the draft amended defence, copy of title deed, copy of order dated 22/5/2012 in Kadhi Succession Cause No. 214 of 2011, and copy of a letter from the Chief dated 18/1/18.

4. In opposing the application, the plaintiff/respondent filed grounds of opposition dated 4th February, 2020 on the grounds that the application is misconceived and non-meritorious, is frivolous and/or scandalous and/or an abuse of the process of court, is bad in law and/or incompetent and ought to be dismissed with costs.

5. The application was canvassed by way of written submissions. The plaintiff filed his submissions on 15th July 2020 while the defendants filed theirs on 16th July, 2020. M/s M. K. Mulei & Company Advocates for the defendants submitted that the court has jurisdiction to set aside the order in which judgment on admission was allowed to give parties an opportunity to have the matter heard substantially and on merits. That whereas Order 13 of the Civil Procedure Rules has no provision for setting aside such judgment, Order 51 together with sections 3 and 3A of the Civil Procedure Act together with Articles 48 and 159 of the Constitution of Kenya come into the applicants' rescue in regard to substantive justice. The defendants counsel submitted that the dispute is over land which is emotive and that the applicants have defence on merits. They relied on the case of **Nimrod Nchogu –v- Joseph Momanyi, Civil Appeal No. 35 of 1998 Kenya Bus Services**

(Msa) Ltd –v- Mohamed Ngonia Mkusi Appeal No 68 of 1993, Remco Limited –v- Mistry Jadva & Co. Limited & Others Nairobi (Milimani) HC Civil Suit No.171 of 2001 and Blue Nile EA Ltd –v- Lydia Gode Yusuf & Another (2018)eKLR. It is the applicants submission that the application has been filed without inordinate delay and that they will suffer great prejudice should the orders sought herein not be granted.

6. On their part, the firm of Kenga & Company Advocates for the plaintiff/respondent submitted that the applicants are intending to defeat the ends of justice by reopening a suit which was determined on 15th February, 2018 upon the applicants admission. Counsel pointed out that in paragraph 3 by their statement of defence dated 18th August, 2017 and filed on 22nd August, 2017, the applicants expressly admitted that the plaintiff was a co-owner of the suit property in equal share with the defendants. That it was on the basis of that admission that the plaintiff filed the application dated 5th December, 2017 seeking for judgment on admission which application was served on the applicants' advocates on record but no response was filed and neither the applicants nor their advocate attended court during the hearing on 15th February, 2018. The respondent's submission is that under Order 13 Rule 1 and 2 of the Civil Procedure Rules, there is no room for setting aside of a judgment made on admission. The respondent further submitted that the present application has been filed about one year and a half later and no reasons for the inordinate delay have been tendered.

7. I have considered the application and the submissions made. The application mainly seeks orders to set aside orders of entry of judgment on admission issued on 15th February, 2018 and for the defendants to be granted leave to file and serve an amended defence. The issues for determination are whether the judgment on admission entered herein on 15th February, 2018 should be set aside and the defendants granted leave to amend their defence.

8. From the record, it is evident that in the plaint dated 16th May, 2017 the plaintiff's claim was for an order to have the suit premises being Plot No. Bububu "A" Settlement Scheme/27 subdivided and registered in the names of the defendants, the plaintiff and one Leonard K. Katana. The defendants filed their statement of defence dated 18th August, 2017 and filed in court on 22nd August 2017. In paragraph 3 of the said statement of defence, the defendants pleaded as follows:

"3. The defendants denies (sic) the contents of paragraph 3 and puts the plaintiff to strict proof and in reply states the plaintiff was never a sole owner of suit property Plot No. Bububu 'A' Settlement Scheme/27 but a co-owner in equal shares with the defendants."

9. Following the said defence, on 17th January, 2018, the plaintiff filed the Notice of Motion dated 5th December, 2017 under Order 13 Rules 1 and 2 of the Civil Procedure Rules seeking for orders that judgment on admission be entered in favour of the plaintiff. The application came up for hearing before Komingoi, J on 15th February, 2018. Although the defendants were duly served, they never filed a response to the application and failed to attend court. The court treated the application dated 5th December, 2017 as unopposed and allowed the same. The defendants in the instant application seek to set aside the orders of the court made on 15th February, 2018.

10. The principles guiding the setting aside ex-parte order are trite that the court has wide powers to set aside such orders save that where the discretion is exercised, the court will do so on terms that are just. In the case of **Patel –v- EA Cargo Handling Services Ltd (1974) 1 EA 75** at page 76 Sir Duffus P. stated thus:

"There is 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. 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 the merits. In this respect defence on 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 train for adjudication. "

11. In the case of **SHAH –V- MBOGOH (1967)EA 167 AT PAGE 123**, Harris J, stated:

"This discretion is intended so to be exercised to avoid injustice of hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

12. In this case, the defendants were served with the application dated 5th December, 2017. The defendants did not file a response in opposition to that application. Although served, the defendants advocate also did not attend court during the hearing of the application on 15th February, 2018. In the instant application, the reason given for the non-attendance by the advocate for the defendants is that on 15th February, 2018 when the matter came up for hearing, Ms. Wambani Advocate for the defendants had instructed another advocate to hold her brief because she was before another court. I however note that the name of the advocate who was allegedly instructed to hold brief for Ms. Wambani has not been given. Further, the other court that Ms. Wambani alleged to have been appearing before has not been disclosed. In my view, there is no sufficient reason that has been given by the defendants why the defendants and their advocate failed to attend court on 15th February 2018. Moreover, even as at 15th February, 2018, no response had been filed by the defendants in opposition to the application for judgment to be entered on admission. Furthermore, there was no triable issue disclosed in the statement of defence that was filed. On the contrary, there was admission made by the defendants in the said defence. No doubt, parties are bound by their pleadings. In my view, the application for leave to amend the defence is first an afterthought.

13. In addition, the orders which the defendants seek to set aside were made on 15th February, 2018. The instant application was filed in court on 25th July 2019 which is a period of over one year and five months. There has been no sufficient explanation given for the delay which no doubt is inordinate.

14. In light of all the facts and circumstance of this case, it would be unjust and unreasonable to set aside the orders made herein on 15th February, 2018. The court will therefore not exercise its discretion in favour of the defendants. The upshot is that the Notice of Motion date 21st May, 2019 lacks merit and the same is hereby dismissed with costs to the plaintiff.

15. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 2nd day of November, 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE