



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 15 OF 2017

1. ANDREW MUGANDI NURI
2. PATRICK MUNYAKA CHAMBEYU
3. NYOTA MUGANDI CHAMUSUHUNI.....PLAINTIFFS

VERSUS

CHINA DALIAN INTERNATIONAL GROUP.....DEFENDANT

RULING

1. By a Notice of Motion dated 15th March, 2018 brought under Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya, the Defendant/applicant seeks orders:

1. Spent

2. That there be a stay of execution of the decree issued on 22nd February, 2018 flowing from the judgment dated 5th February, 2018 pending the hearing and determination of this Application.

3. That the Honourable Court be pleased to set aside the proceedings and judgment dated 5th February, 2018 and the decree dated 22nd February, 2018.

4. That the Defendant be granted unconditional leave to defend the suit on its merits.

5. That the costs be provided for.

2. The Application is premised on the grounds premised on the grounds set out in the face of the motion namely:

a. The Defendant/applicant instructed the firm OF M. J. NYAMBURA & COMPANY ADVOCATES who entered appearance but failed to file Defence on our behalf timeously.

b. The Defendant/applicant's failure to file its defence within the prescribed time was solely due to the inability of the advocate to comply with the timelines, which inability was wholly on medical grounds.

c. The said failure to file defence within the prescribed time was inadvertent and is excusable by reason of the foregoing.

d. The Defendant/Applicant's has a plausible and meritorious defence that raises triable issues.

e. The Defendant/applicant shall suffer irreparably if condemned unheard and is bound to lose a colossal amount of money for claim which it has a good defence against.

f. The Plaintiffs/Respondents shall suffer no prejudice if the Application is allowed as the Defendant/Applicant is ready to compensate the Plaintiff/Respondent in costs.

g. The Application is brought in good faith and without undue delay.

3. The Application is supported by the affidavit of Tom Lyu Hao a director of the Defendant sworn on 15th March, 2018. He depones inter alia, that in February, 2018, the Defendant received notification from the Plaintiffs' Advocates of an ex-parte judgment entered against the Defendant for the sum of Kshs.4,500,000/= as special damages and Kshs.50,000/= as general damages plus costs and interest thereon. That they immediately instructed the Defendant's advocate to peruse the court record and establish how judgment was entered without their involvement when they had instructed the said advocate to represent the Defendant in the suit. He avers that it was during the fact-finding exercise that it was established that the advocate the Defendant retained to defend it in the suit had filed a memorandum of Appearance but inadvertently failed to file defence within the time stipulated under the law. He states that the reason for the delay in filing the defence was as a consequence of poor health that befell the advocate who had been instructed by the Defendant.

4. It is stated that the Defendant has a good defence to the plaintiffs' claim that raises weighty triable issues that can only be determined justly upon being canvassed in a full hearing of the suit on merits. Amongst the triable issues is whether the value of the property is indeed Kshs.30,000,000/= as alleged and what the true value of the base material excavated but left on the site is. It is the Defendant's contention that the Application has been brought timeously and without undue delay or malicious intent, and that the court has unfettered discretion to set aside ex-parte judgment even when the same was entered regularly. The Defendant further contends that if the orders are not granted it will suffer irreparable loss and damage and risks being prejudiced twice since it has established that the ownership of the suit property remains contested.

5. The Application is opposed by the plaintiffs who filed grounds of opposition dated 4th May, 2018 in the following grounds:

i. That the Application is incompetent and otherwise a gross abuse of the court process.

ii. That the Defendant had a subsisting advocate on record who never bothered to file its defence within the stipulated legal timelines nor participate in the trial.

iii. That the Defendant is liable to satisfy the valid and regular judgment entered against it.

iv. That the Defendant failed to exercise due diligence subsequent to the engagement of an advocate to represent it in this matter and its allegations against it is hitherto advocate are merely self-serving with no merits whatsoever.

v. That the Defendant was at liberty to appoint another advocate once it was seized with the fact that its advocate on record had ill health to continue to effectively represent it as it alleges which opportunity it failed to utilize.

vi. That this Application is brought with the sole aim to delay the quick and just conclusion of this case and to frustrate the plaintiffs from enjoying the fruits of their proper and lawful judgment.

Consequently, the plaintiff prayed that the Application be dismissed with costs.

6. Both parties filed written submissions in support of their opposing positions and relied on decided cases which I have read.

7. I have considered the Application together with the affidavit in support and the grounds of opposition filed. I have also considered the submissions made and the authorities cited. The law on the setting aside of ex-parte judgment is now settled. The principle guiding the setting aside ex-parte orders are trite that the court has wide powers to set aside such ex-parte orders save that where the discretion is exercised, the court will do so on terms that are just. In the case of **Patel –v- E. A. Cargo Handling Services Ltd (1974)1 EA 75** at page 76 Sir Duffus P states that:

“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. 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 trial for adjudication.”

8. In **Shah –v- Mbogo (1967)EA 116** the court stated as follows:

“This discretion is intended so to be exercised to avoid injustice or 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. ”

9. In this case the Defendant was duly served with summons to enter appearance and filed a memorandum of appearance on 2nd March, 2017 through M/s M.J. Nyambura & Associates Advocates. There was however, no defence filed either within the stipulated time or at all and upon request by the plaintiffs, interlocutory judgment was entered against the Defendant. The matter proceeded for formal proof on 19th October, 2017 in the absence of the Defendant and their advocate who was otherwise duly served but failed to attend. Judgment was entered for the plaintiffs against the Defendant on 5th February, 2018. The judgment was therefore regular.

10. In the Application, the Defendant has explained that it instructed the firm of M. J. Nyambura & Associates Advocates to represent them in this matter. Indeed the said firm filed a memorandum of appearance on 2nd March 2017. However, no defence was filed within the stipulated time or at all. The Defendant has stated that failure to file defence within the prescribed time was solely due to the inability of their advocate because of illness. In their grounds of opposition, the plaintiffs do not dispute the alleged illness of the Defendant's advocate.

Instead, the plaintiffs fault the Defendant for not instructing another advocate to take over the matter once it was seized with the fact that its advocate then on record was unwell.

11. It is my considered view that the Defendant has given a reasonable explanation which caused the failure to file defence in time or at all. I have also perused the draft defence attached to the affidavit in support of the Application. The Defendant has inter alia, denied trespassing on the plaintiffs' land and aver that they leased the three (3) acres from the true owners. In my view, the proposed defence raises various triable issues, including the issue of ownership of the suit premises. The Defendant has intimated that it will bring third party proceedings against the persons who leased it the suit property.

12. The plaintiffs have not demonstrated that they will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit. The overriding objective of the court would no doubt come to the aid of the applicant.

13. In the result, I find merit in the Notice of Motion dated 15th March, 2018 and the same is allowed in the following terms:

- 1. The Application is allowed as prayed in terms of prayers 2, 3 and 4.**
- 2. The Defendant to file and serve its defence within 14 days of the delivery of this ruling.**
- 3. Costs of the Application are awarded to the plaintiffs.**

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wachenje for Defendant/Applicant

Ms. Murage holding brief for Ms. Nzamsa for Plaintiff/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE

28/2/19