



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ENVIRONMENT AND LAND CASE NO. 6 OF 2014**

**CHRISTINE ANDREE JOSHI.....1<sup>ST</sup> PLAINTIFF**

**STEPHEN ELKINGTON.....2<sup>ND</sup> PLAINTIFF**

**BARRY JAMES JOSHI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SALLY CHEPWOGEN.....DEFENDANT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 11.2.2019 the Defendant/Applicant seeks the following orders:

1. *Spent*

2. *Spent*

3. *That pending the hearing and determination of this application the plaintiffs/Respondents, their servants and/or agents or otherwise be ordered to reinstate the Defendant/Applicant back to her piece of land registered as Kericho/Chemagel/1401*

4. *That upon granting prayer 3 above, pending the hearing and determination of this application, the plaintiffs/Respondents, their servants and/or agents or otherwise be restrained by injunction from being or remaining on or evicting and/or interfering with the Defendant's quiet possession, enjoyment and occupation of the parcel of land known as Kericho/Chemagel/1401.*

5. *That this honourable court be pleased to call Christopher Omache a process server for purposes of cross-examining him with respect to the averments made pertaining to the affidavits dated 14<sup>th</sup> November 2018 and 14<sup>th</sup> January 2019.*

6. *That the honourable court be pleased to set aside and or/review the judgment entered against the defendant/Applicant on 26.1.2018.*

7. *That the honourable court be pleased to set aside and/or review the eviction orders dated 16<sup>th</sup> January 2019.*

8. *That this honourable court do set aside the proceedings of 10.10.2017 and all consequential orders thereto and allow the defendant/ applicant to defend the suit herein.*

9. *That this honourable court be pleased to make any other or further orders as it deems fit and in the interest of justice.*

10. *That the costs of this application be provided for.*

2. The application is premised on the grounds stated on the Notice of Motion and the Applicant's supporting affidavit sworn on the 11<sup>th</sup> January 2019. In the said affidavit, the Applicant depones that she was never notified of the hearing date nor was she served with a copy of the judgment delivered on 26.1.2018. She challenges the affidavits of service dated 13.11.2018 and 14.1.2019 by one Christopher Omache who alleges to have served her previous advocates with the application for eviction.

3. She depones that her defence and counterclaim were not considered in the judgment. She states that following her eviction from the suit property on 9.2.2019, she has been rendered homeless and unless the orders sought are granted, she will suffer loss and damage.

4. The Plaintiff did not file any Replying affidavit or Grounds of Opposition. The application was argued orally I have considered the submissions of both counsel.

#### **Issues for determination**

5. The issues for determination are as follows:

1. Whether the firm of Makori Karimi & Co Advocates are properly on record
2. Whether the order of eviction ought to be set aside
3. Whether the judgment dated 26.1.2018 ought to be set aside.

#### **Analysis and Determination**

6. Regarding the first issue, Mr. Mugumya learned counsel for the Applicant submitted that the firm of Makori Karimi & Co Advocates are not properly on record as they entered into a consent with the firm of Ransley McVicker & Shaw Advocates who had been replaced by the firm of Virginia Shaw & Company Advocates. He was therefore of the view that at the time of entering into the said consent, the firm of Ransley, McVicker & Shaw Advocates were no longer on record. In his response Mr. Oriku, learned counsel for the Respondent explained that the firms of Ransley, McVicker & Shaw Advocates and Virginia Shaw & Company Advocates are one and the same and the assertion that they were not properly on record is therefore unfounded. It is therefore my finding that the firm of Makori & Co Advocates are properly on record.

7. On the second issue, Counsel for the Applicants submitted that the firm of Khaminwa & Khaminwa who were previously representing the Applicant were not served with the application for eviction. He challenged the affidavit of service sworn by Christopher Omache. He submitted that the Applicant was not aware of the hearing or judgment date as she was not notified of the same by her previous advocates and she should not suffer because of the mistakes of her former advocate. He argued that the fate of the Applicant's counterclaim was not addressed in the judgment. Learned counsel Mr. Mokuia who appeared alongside Mr. Mugumya submitted that the Applicant has a good Defence and Counterclaim and she should be given an opportunity to be heard.

8. In his response Mr. Oriku submitted that the firm of Khaminwa & Khaminwa were served with the application for eviction on 6.11.18. They were subsequently served with the application dated 17.12.18 seeking to have the O.C.S Sotik Police Station oversee the eviction. The Applicant is therefore deemed to have been properly served.

9. It is trite law that the mistakes of an advocate should not be visited on his client. Even though I have seen the affidavits of service indicating that the firm of Khaminwa & Khaminwa & Co Advocates was served with the application for eviction and the subsequent one seeking the intervention of the OCS Sotik Police Station, I have no reason to doubt the Applicant's affidavit in which she has depones that she was not aware of the said applications.

10. The third and last issue I must determine is whether the Applicant has met the conditions for setting aside of the ex- parte judgement. In considering this issue I am guided by the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** where Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

*The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:*

- a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*
- b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116 at 123.***
- c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***
- d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***
- e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30***

11. Furthermore, in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P stated as follows:

*“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 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 the 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”*

12. I have considered the pleadings herein, the application, the Applicant’s affidavit and the rival submissions and I am persuaded that the application is merited. This being a land matter, I am of the view that the same ought to be heard on the merits.

13. I must however consider that justice cuts both ways and the interests of the Plaintiff who has obtained a judgment in his favour must also be taken into account. I therefore allow the Defendants’ application and set aside the ex-parte judgment, eviction order together with all the consequential orders thereto on condition that the Defendant/Applicant pays the Plaintiff/ Respondent thrown away costs of Kshs. 30,000/= within 21 days from the date hereof failing which the orders shall automatically lapse.

14. The costs of this application shall be borne by the Applicant.

**Dated, signed and delivered at Kericho this 22<sup>nd</sup> day of February, 2019.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Mugumya appearing alongside Mr. Mokuu for the Defendant/Applicant.
2. Mr. Nyadimo for Mr. Oriku for the Plaintiffs/Respondents
3. Court Assistant - Rotich