



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC CIVIL CASE NO. 1285 OF 2013**

**KARIUKI KAMAU.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**NANCY WANJIRU GICHERU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ANTHONY GICHERU KAMAU.....2<sup>ND</sup> DEFENDANT/ APPLICANT**

**MARY WANGUI KAMAU.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**CKK (MINOR).....4<sup>TH</sup> DEFENDANT/ APPLICANT**

**RULING**

1. By Notice of Motion dated 10<sup>th</sup> May 2018 the 1<sup>st</sup> defendant/applicant seeks orders:-

It seeks order:-

*(1) Spent.*

*(2) That M/S Kittony Maina Karanja & Co. Advocates be granted leave by this Honourable Court to come on record after judgment.*

*(3) That ex parte judgment entered herein be set aside and all consequential orders thereof.*

*(4) Stay of execution of the decree of this court against the 1<sup>st</sup> defendant be granted pending the hearing and determination of this application.*

*(5) Stay of execution of the plaintiff's bill of costs be granted pending the hearing and determination of this application.*

*(6) Leave be granted to the 1<sup>st</sup> defendant to file a statement of defence on such terms as the court may deem necessary.*

*(7) That costs of this application be in the cause..*

2. The grounds are on the face of the application and are set out in paragraph 1 to 8.

3. The application is supported by the affidavit of Nancy Wanjiru Gicheru, the 1<sup>st</sup> defendant/applicant sworn on the 10<sup>th</sup> May 2018.

4. The application is opposed. There is a replying affidavit sworn by Kariuki Kamau the plaintiff/respondent herein sworn on the 25<sup>th</sup> May 2018.

5. On the 11<sup>th</sup> July 2018 the court directed that the application be disposed of by way of written submissions.

6. It is the 1<sup>st</sup> defendant/respondent's submissions that she instructed Advocates to act on her behalf at the time she was served with

summons to enter appearance. The said advocates never communicated to her that the matter had been concluded. The exparte judgment ought to be set aside as mistake of counsel should not be visited on the litigant. He relies cases of **Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd; Wachira Karani vs Bildad Wachira [2016] eKLR**.

7. She stands to lose if the decree is executed as they will have nowhere to go. Her defence raises triable issues as she is the daughter in law of the plaintiff and the 2<sup>nd</sup> – 4<sup>th</sup> defendants are his grandchildren. She also put forward the case of **Mary Karimi Njeru & Another vs Kisima Real Estate Limited [2015] eKLR; Jackson Beigon vs Charles Too & 3 Others HCCC 85/2003; Mwalia vs Kenya Bureau of Standards [2001] 1EA pg 155**. She prays that she be allowed to file their defence and get an opportunity to present their case. She prays that the application be allowed.

8. It is the plaintiff's/applicants submissions that the 1<sup>st</sup> defendant is not the wife of his late son Moses Kamau Clement. That he is the registered proprietor of LR NO. Kiambaa/Thimbugua/1121 hence the 1<sup>st</sup> defendant has no legal right to the same. He prays that the application be dismissed with costs.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited. The issues for determination are:-

**(i) Whether or not this application has been brought without undue delay and/or whether it is merited.**

**(ii) Whether or not the defence raises triable issues.**

10. The 1<sup>st</sup> defendant/applicant does not deny that she was served with summons to enter appearance and copies of plaintiff. That she did instruct Federation of Women Lawyers (FIDA) to act on her behalf. They accepted instructions and filed a notice of appearance on 6<sup>th</sup> December 2013. It appears from then on the 1<sup>st</sup> defendant/applicant forgot all about this case until she was served with a notice of taxation in October 2017. This is when she realized the matter had proceeded exparte. This took a total of four years one wonders why the 1<sup>st</sup> defendant/applicant never went to inquire from the advocates what had become of the case. The exparte judgement herein was delivered on 17<sup>th</sup> March 2017. The 1<sup>st</sup> defendant/applicant was in court when the matter came up for taxation on 17<sup>th</sup> February 2018. This application was filed three months later. I find that the application was brought without undue delay.

11. The principles that guide the court in setting aside an exparte judgment order were laid down in the case of **Shah vs Mbogo & Another [1967] EA 116** as follows:-

**“.....the court's discretion to set aside an exparte judgment is intended 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.”**

The 1<sup>st</sup> defendant/applicant after instructing FIDA in 2013 went to sleep until she was jolted by a notice taxation in 2017. She ought to have followed up on the progress of the case.

12. I have looked at the draft defence annexed to the application. In paragraph 2, the 1<sup>st</sup> defendant/applicant admits that the suit property is registered in the plaintiff's/respondent's name. She also states that the 2<sup>nd</sup> – 4<sup>th</sup> defendants are children of the plaintiff's late son.

13. It is quiet clear that the suit property is registered in the name of the plaintiff/respondent and not in his alleged late son. The plaintiff/respondent being the registered proprietor has a right to do what he wants to do with his parcel of land as per Section 24 of the Registration Act, 2012. The upshot of the matter is that the draft defence does not raise any triable issues. The defence is a mere sham.

14. In the case of **Philip Chemwolo & Another vs Augustine Kubende [1966] KLR 492** quoted with approval in **Isaac Miracha Ongwacho vs Dennis Willy & Another [2005] eKLR**; the court in deciding whether or not to set aside an exparte judgment observed as follows:-

**“.....In light of all facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary, upon terms to be imposed.....(but the court went on to explain).....that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there were triable issues which raised a prima facie defence which should go to trial. The court adopted the view expressed by the House of Lords on the cases of Evans vs Bartam [1917] AC 473”.**

I find that the 1<sup>st</sup> defendant's/applicant's has not demonstrated that she deserves that this court's discretion be exercised in her favour.

15. All in all I find that the 1<sup>st</sup> defendant/applicant has failed to satisfy this court that the exparte judgment ought to be set aside. I find no merit on this application and the same is dismissed. I make no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of FEBRUARY 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant