



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 211 OF 2015

IN THE MATTER OF:

**THE PARCEL OF LAND KNOWN AS PLOT NO.MOMBASA/BLOCK XVI/593 AND MOMBASA/BLOCK XVII/603
MOMBASA MUNICIPALITY AT TOWN IN MAJENGO AREA**

MBARAJ TAISIR MBARAK

ALIS HABSHY NASSIB

LEILA HABSHY NASSIB

ABDALLA HABSHY NASSIB.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. The defendant/applicant in the Notice of Motion dated 21st January 2016 seeks the following orders:

1. That this Honourable Court be pleased to grant leave to the defendant to file and serve its statement of defence out of the prescribed time.

2. That the defendant's statement of defence as attached to this application be deemed as duly filed upon payment of the requisite court fees.

3. That the costs of this application be in the cause

2. The application is based on the grounds set out in the body of the motion supported by the affidavit of Paul Manyala sworn on 21st January 2016.

3. In reply to the defendants' notice of motion, the plaintiff's filed a replying affidavit sworn by Mbarak Taisir Mbarak on 7th June, 2016.

4. The applicant states that it inadvertently delayed in instructing a firm of advocates to defend their interests and that the delay in filing the statement of defence was occasioned by the fact that the defendant needed time to locate some documents that would assist its case as some of them date as early as 1991 and may have been misplaced in the transition operations from the defunct municipal council to the now County Government of Mombasa. The defendant further avers that it has a formidable defence which raises serious and triable issues and will stand to be greatly prejudiced if this application is not allowed because the suit property was and is still meant to be a road for usage by the general public. That it is fair and in the interests of justice that the orders sought herein are granted as no prejudice will be occasioned to any of the parties herein.

5. On their part, the plaintiffs aver that the defendant has failed to indicate the particular documents that is claimed to have caused the delay and that no sufficient reason has been furnished to the court to enable the court grant the orders sought. The plaintiffs state that the defendant has been unjust and unreasonably caused great prejudice to the plaintiffs as all activities at the suit premises have been completely paralyzed.

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

7. I have considered the application together with the affidavit in support and against. I have also considered the submissions filed and the authorities cited. The principles guiding the court in exercising its discretion in applications such as this have been settled. It is trite that the court has wide powers to grant such orders save that where the discretion is exercised, the court will do so on terms that are just.

8. In the case of Shah –v- Mbogoh (1967) EA 116 at page 123, it was stated:

“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 the case of Patel –v- EA Cargo Handling Services Ltd (1974) 1EA 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 trial for adjudication. ”

10. In this case the defendant was served on 18th September 2015 with summons to enter appearance and copy of the plaint. The same was accompanied by notice of motion application under certificate of urgency. The record shows that the firm of Robson Harris & company Advocates filed a notice of appointment of advocates on 5th October 2015. The record further shows that when the matter came up before court on 5th October, 2015, the defendant was granted 21 days to file response to the application dated 10th September, 2015. It is apparent that the defendant did not file defence within the prescribed time or at all. The defendant has explained that it delayed in filing the defence because it needed time to locate some documents that would assist its case, some dating back as 1991.

11. I have looked at the draft statement of defence filed. The defendant has pleaded inter alia that the suit properties have always been road reserves and open spaces set aside for public benefit. Further the defendant has pleaded that the plaintiffs obtained title to the suit properties fraudulently. The defendant has also filed a counter-claim seeking, inter alia rectification of the land registers to restore the defendant as the proprietor of the suit properties. In my view, the defence raises triable issues which call for trial. The plaintiffs have not demonstrated how 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. I have perused the court record and found that no request for interlocutory judgment has been requested and none has been entered. The overriding objective of the court would no doubt come to the aid of the applicant.

12. In the result, I find merit in the Notice of Motion dated 21st January, 2016 and the same is allowed. The defendant is directed to file and serve its defence within 14 days from the date of this ruling. Considering the circumstance of this case, I order that each party to bear own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Makuto holding brief for Ms. Layoo for plaintiff

Egunza holding brief for Obuju for defendant

Yumna Court Assistant

C.K. YANO

JUDGE

14/2/19