



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 203 OF 2015**

**MOHAMED SHABIR KASSAM.....PLAINTIFF**

**VERSUS**

**1. HAFEEZ ABDUL MAJEED**

**ALIAS ADBIL HAFEEZ ALIAS**

**ABDUL MAJID ALIAS ABDUL MAJEED**

**2. ALBERT KUBAI MBOGORI**

**3. COCO APARTMENT LIMITED**

**4. REGISTRAR OF TITLES MOMBASA.....DEFENDANTS**

**RULING**

1. By notice of Motion dated 3<sup>rd</sup> January 2019 brought under Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the Procedures Act, the 3<sup>rd</sup> Defendant/Applicant seeks orders:

**1. Spent**

**2. That there be a stay of execution of the decree flowing from the judgment entered herein on 8<sup>th</sup> day of October 2018 pending the hearing and final determination of this application.**

**3. That the judgment entered herein as against the 3<sup>rd</sup> defendant and all consequential decrees or orders thereto be set aside.**

**4. That the 3<sup>rd</sup> Defendant be granted unconditional leave to defend this suit on its proper merits.**

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

2. The application is premised on the following grounds:

**i. That the summons to enter appearance were not at all served upon the 3<sup>rd</sup> defendant at any material time and the affidavit of Natasha Ali, Advocate is replete with deliberate misrepresentations of facts.**

**ii. That if there were any attempts on personal service at all then the same were not sufficient because the 3<sup>rd</sup> defendant has been in physical occupation of the suit property and thus can easily be traced.**

**iii. That the suit property having been charged with Imperial Bank Limited any order for revocation of Title without reference to the bank is irregular and unenforceable.**

**iv. That had the plaintiff enjoined Imperial Bank Limited as a party to the proceedings then the bank would have informed the 3<sup>rd</sup> Defendant of the subsistence of the Suit and the matter would have therefore proceeded and been determined on**

merit.

v. That the judgment entered herein is irregular and ought to be set aside as a matter of course for reason of failure on the part of the Plaintiff to effect service of the summons to enter appearance and court process upon the 3<sup>rd</sup> Defendant.

vi. That the 3<sup>rd</sup> defendant has a defence to the suit herein and which defence raises serious triable issues that can only be properly canvassed in a full trial of this suit on its merits.

vii. That the 3<sup>rd</sup> defendant is a bona fide purchaser for value without notice and as such the orders of the court directing the 4<sup>th</sup> Defendant to dispossess the 3<sup>rd</sup> Defendant will greatly prejudice the 3<sup>rd</sup> Defendant.

viii. That unless the stay of execution is granted the 3<sup>rd</sup> Defendant stands to suffer substantial loss and/or irreparable damage and the application filed herewith shall be rendered nugatory.

3. The Application is further supported by the grounds contained in the supporting affidavit of Ishak Mohamed Kassim Haji Ibrahim sworn on 3<sup>rd</sup> January 2019 in which he depones that he is a director of the 3<sup>rd</sup> Defendant company. He explains how the 3<sup>rd</sup> Defendant Company acquired the suit property and has attached copies of the Sale Agreement, Transfer, stamp duty declaration form, title and certificate of postal search as well Bundle of photographs. It is deponed that the 3<sup>rd</sup> defendant has been in uninterrupted occupation of the suit property and no one has ever laid a claim on it during the construction and the subsequent fencing. Also attached is a charge instrument showing the 3<sup>rd</sup> Defendant charged the property to Imperial Bank Limited.

4. It is deponed that the 3<sup>rd</sup> defendant was not served and only became aware of the suit when the advocate representing the bank was doing due diligence and learnt that the Lands Registry at Mombasa was in the process of cancellation of the title to the suit property pursuant to the court order in these proceedings. It is the 3<sup>rd</sup> defendant's case that it has a viable defence against the suit herein. A draft statement of defence has been annexed and the 3<sup>rd</sup> defendant contends that it is in the interests of justice that it be allowed to defend the suit on its merits.

5. The application is opposed by the plaintiff through a replying affidavit sworn on 21<sup>st</sup> January, 2019. It is the Plaintiff's contention that the application is bad in law and fatally defective and therefore ought to be struck out. The plaintiff avers that he is the bona fide registered proprietor of the suit property and states that the 3<sup>rd</sup> defendant should blame the 2<sup>nd</sup> and 4<sup>th</sup> Defendants who also failed to enter appearance. The plaintiff further avers that he has always been in possession of the suit property. The plaintiff conceded that all attempts to serve the defendants personally were unsuccessful, hence the application for leave to serve by substituted service. The Plaintiff states that the draft defence does not raise any triable issues, and urged the court to dismiss the application with costs.

6. I have considered the application together with the affidavits in support and against as well as the submissions filed and the authorities cited. The law on the setting aside of ex-parte judgment is now settled. However, before considering the principles guiding the setting aside of ex-parte orders, there is need to address the issue raised by the plaintiff regarding the affidavit in support of the application. The Plaintiff avers that the said affidavit is bad in law and fatally defective and therefore ought to be struck out. It is the plaintiff's submission that the said supporting affidavit was sworn by Ishak Mohamed Kassim Haji Ibrahim who alleges to be the director of the 3<sup>rd</sup> defendant company but has however failed to show any proof of authorization from the company. That the deponent has failed to annex a board resolution authorizing him to represent the company.

7. The deponent, Ishak Mohamed Kassim Haji Ibrahim has deponed that he is the director of the 3<sup>rd</sup> defendant company. In my view, there is no requirement that such a resolution must be filed alongside the application. The mere failure to file such authority does not invalidate the application. Such a resolution or authority by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the application. Its absence is, therefore, in my view, not fatal to the application.

8. 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.

9. In the case of **Patel –v- EA Cargo Handling Services Ltd (1974) 1EA 75 at page 76** Sir Duffus P states thus:

*“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.”*

10. In the case of **Shah –v- Mbogoh (1967) EA 116 at page 123**, Harris J 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.”*

11. In this case, the applicant states that it was not personally served with the summons to entered appearance. This is not disputed by the plaintiff. However, the plaintiff avers that he Applicant was served by way of advertisement in the newspaper. It is not disputed that the

Applicant was served by way of an advertisement in the Daily Nation Newspaper. The Applicant maintains that no attempts on personal service were made whatsoever. The advertisement may as well have escaped the attention of the Applicant.

12. I have also looked at the draft statement of defence annexed to the supporting affidavit. The 3<sup>rd</sup> defendant is claiming ownership of the suit property. The 3<sup>rd</sup> Defendant avers that immediately after acquiring ownership of the suit property, it caused it to be fenced and constructed a semi- permanent house therein where its employee is occupying, and thus the Applicant claims to be in actual possession of the property.

13. In my view, the defence raises triable issues which call for trial. The Plaintiff has not demonstrated that he 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.

14. In the result, I find merit in the Notice of Motion dated 3<sup>rd</sup> January, 2019 and the same is allowed in the following terms:

- 1. The application is allowed in terms of prayers 2, 3 and 4 thereof.**
- 2. The 3<sup>rd</sup> defendant to file and serve its defence within 14 days of delivery of this ruling.**
- 3. Costs shall be in the cause.**

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of May 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Hassan holding brief for Plaintiff

Wafula holding brie for 3<sup>rd</sup> Defendant/applicant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**