



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 176 OF 2015

JOSEPH KIPTONUI RUTO.....PLAINTIFF

VERSUS

ANNAH MARITIM.....1ST DEFENDANT

MWALIMU LABOSO.....2ND DEFENDANT

RULING

Introduction

1. By a Notice of Chamber Summons dated 22nd October 2018 the Defendants seeks the following orders:

a) Spent.

b) That this honourable court do grant leave to the firm of M/S Oboso & Company Advocates to come on record on behalf of the Defendants/ Applicants in place of M/S Cherutich & Co Advocates.

c) That the default judgment entered herein and all consequential orders be set aside.

d) That the Defendants/Applicants be granted leave to file and serve their Defence out of time and the suit herein do proceed de novo.

e) That the costs of this application be provided for.

2. The application is anchored on the grounds stated on the face of the Chamber Summons and the supporting affidavit of Anna Wanjiku Kipkurui, the 1st Defendant/ Applicant herein sworn on her own behalf and on behalf of the 2nd Defendant on the 22nd October 2018. In the said affidavit she depones that she was never served with summons to enter appearance or entry of judgment and that she was unaware of the existence of the suit herein until the 26th August 2018 when the 2nd Defendant informed her that they were required to vacate the suit property. She disowns the Memorandum of Appearance and Defence filed by the firm of Cherotich and Company Advocates and claims that the said firm is not known to her. She has annexed an affidavit sworn by Joshua Chepkuyeng Cherutich Advocate in which he depones that he was instructed by her son but he never met her. She also avers that she has good defence that raises triable issues, a draft of which is annexed to her affidavit.

3. The application is strenuously opposed by the Plaintiff through his Replying affidavit sworn on the 22nd January 2019. He depones that the Defendants' application is mischievous and misleading as they were both served with summons to enter appearance and he has annexed a copy of the said summons indicating that the 1st Defendant signed the same while the process server indicated that 2nd Defendant was served but he refused to sign the summons. He further depones that subsequently, the 1st Defendant entered appearance and filed a Defence through the firm of Cherutich and Company Advocates. He argues that the said firm could not have filed a Defence without her instructions and the application is merely intended to delay the suit as the defendants are deriving a benefit from the Plaintiff's land. He maintains that the Defendant have no claim against him.

4. The application was canvassed by way of written submissions and counsel for both parties filed their submissions which I have considered.

Issues for determination

5. From the application, affidavits and rival submissions, the following issues fall for determination:

- i. Whether the firm of Oboso & Co Advocates ought to come on record in place of the firm of Cherutich & Co Advocates
- ii. Whether the ex- parte judgment entered on 19/04/2018 ought to be set aside

Analysis and Determination

6. The first issue is not contested and I hereby grant leave to the firm of Oboso & Co Advocates to come on record for the Defendants in place of the firm of Cherutich & Co Advocates.

7. The second issue the court must determine is whether the applicants have 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.**”*

8. 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”*

9. I have considered the Affidavits and rival submissions and even though I have my reservations about the 1st Defendant’s averments with regard to service of summons and the instructions issued to the firm of Cherutich & Co Advocates, I have taken into account the fact that this is a land matter which ideally ought to be heard on the merits. I am also of the view that the defence raises triable issues which ought to go to trial. I therefore reluctantly exercise my discretion in favour of the applicants.

10. 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. Consequently, I allow the Defendants’ application and set aside the ex-parte judgment together with all the consequential orders thereto on condition that the Defendants/Applicants pay the Plaintiff/Respondent thrown away costs of Kshs. 40,000/= within 21 days from the date hereof failing which the orders shall automatically lapse. The Defendants shall file and serve their Defence and comply with order 11 of the Civil Procedure Rules within 30 days so as to pave way for the expeditious disposal of this suit.

11. The costs of this application shall be borne by the Applicants.

Dated, signed and delivered at Kericho this 29th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of

1. Mr. Oboso for the Applicants

2. Mr. Mwita for Mr. Mutai for the Respondent

3. Courts assistant - Rotich