



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 249 OF 2016

LYDIA WAMBUI GITAU

REGINA WAMBUI GITAU..... PLAINTIFFS

VERSUS

SAIDI MWINYIKAI THOMAS.....DEFENDANT

RULING

1. The defendant/applicant moved this court vide his notice of motion dated 20th September 2018 and brought under the provisions of Order 10 rule 1, Order 22 rule 1 and Sections 1A, 1B & 3A of the Civil Procedure Rules and Act. The applicant seeks to be granted the following orders;

(a) Spent;

(b) Spent;

(c) That this Honourable Court be pleased to set aside and/or vary judgment and any consequential decree or order upon such terms as are just;

(d) That the defendant/applicant be granted unconditional leave to witness and defend this matter appropriately;

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

2. The application is supported by the grounds listed on its face i.e

(a) That the judgment, decree and other consequential orders herein were irregularly and improperly obtained as the defendant was not properly served with the hearing notice which came up for hearing on the 13th February 2018.

(b) That the plaintiff misled this Honourable Court to believe that he had duly served the defendant hence Judgment and issue other consequential orders against the defendant, who all along has never known of the existence of the instant hearing date.

(c) That all along they have never known the hearing date of this suit, only to be aware when I perused the Court file through their affidavit of service, accordingly served the hearing notice at Mombasa office and purportedly received by a clerk one Milkah. That this suit is being handled by the Ukunda office whose address is Nyameta, Mogaka & Magiya Advocates, Biashara Plaza, 1ST Floor Room 1, Ukunda Lunga-Lunga Road, P.O Box 339-80400 Ukunda.

(d) That the Defendant should not be condemned unheard since he has a good defence which raises triable issues hence need to be granted leave to testify and defend the suit.

3. The affidavit sworn in support of the motion reiterated the facts set out in the grounds listed on the face of the application which includes the ones stated in paragraph 2 above.

4. The plaintiff is against the application and filed a replying affidavit to challenge the orders sought. The plaintiff deposed that the defendant was duly served with a hearing notice and that the advocate has been duly appearing in court on behalf of the defendant. That the

hearing notice was served in the Ukunda office and the same was duly received. That application has been brought in bad faith and is abuse of the court process. The plaintiffs urged the court to dismiss the application.

5. Parties agreed to argue the application by filing of written submissions. The defendant relied on the findings of **Trans Africa Assurance Co. Ltd –versus- Lincoln Mujuni (2014) UGCOMM 215** where the Ugandan High Court held that the rationale for setting aside *ex parte* judgments is largely on the premise that an *ex parte* judgment is not a judgment on merit. He also quoted the decision of **Shah –versus- Mbogo & Another (1967) E.A 116 at 123** where it was stated that the exercise of discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake but not designed to assist a person who had deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. Lastly the defence also cited the case of **Esther Wamantha Njihia & 2 Others versus – Safaricom LTD (2014) eKLR**.

6. The plaintiff submitted that the judgment entered was not *ex parte* as stated in the application. That the defendant's counsel was served on 1st November 2017 but did not attend court. On 7th March 2017, the defence requested for time to file submissions which request was granted. That the exercise of discretion must be exercised judicially as was stated in the case of **Patel –versus- E. A Cargo Service Ltd, C. A No. 2 of 1924**. That no proper reason has been advanced by the applicant for the judgment to be set aside.

7. I have considered the pleadings as filed together with the arguments presented through the submissions. Is the applicant deserving of the orders sought in light of the prevailing facts? The defendant entered appearance to the suit on 27th September 2016. On 26th October 2016, he filed grounds of opposition contesting the plaintiff's motion dated 5th September 2016. Other than these two documents, I find no statement of defence filed. In the present application, no mention is made of a defence on record neither does the defendant plead that he has a good defence to the case for which he should be given an opportunity to present and be heard.

8. Further the defendant pleaded that they were not served with the hearing notice. The defence has attached an affidavit of service sworn by Bernard Njoroge Mungai to their application. The said affidavit enclosed a hearing notice bearing the stamp of Nyameta Mogaka & Magiya Advocates and is signed as received on 4th December 2017. At paragraph 2 of Mr Mungai's affidavit, he deposed that he served the hearing notice on the advocates at their office situated at Biashara Plaza Building, 1st Floor Room 4 in Ukunda. The notice was received by a clerk called Milkah.

9. In paragraph 3 of the affidavit in support of this application, Ms Prudence Omari has deposed that the hearing notice was served in their Mombasa office yet the case was being handled by their Ukunda office which Ms Omari proceeded to give its address. One wonders whether the drafter of the affidavit in support of the application read the affidavit of service before attaching it as an annexure in support of their application. The defendant thus does not present this court with any justification why they did not attend court for hearing in spite of being properly served.

10. Was the defendant closed from participating in the case before judgment was rendered? The defendant's counsel filed closing written submissions to the case vide their written submissions dated 16th March 2018 filed on the same date. Why would they file submissions instead of an application to be allowed to present their evidence? Equity aids the vigilant and not the indolent. As was clearly stated in the **Shah –versus- Mbogo supra** cited by the defendant, the court's exercise of discretion should not be granted to a person who deliberately seeks whether by evasion or otherwise to obstruct the cause of justice. The defendant is indeed obstructing the plaintiffs from enjoying the fruit of their judgment by wanting to re-open the case for which they have no defence.

11. In the end, I come to the conclusion that the present application is unmerited and is an abuse of the court process. The same is dismissed with costs to the plaintiffs.

Dated, Signed and Delivered at Mombasa this 21st day of June 2019.

A. OMOLLO

JUDGE