



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 98 OF 2017

MARGARET OMOROJE.....1ST PLAINTIFF
BONIFACE KATHENGE.....2ND PLAINTIFF
PHILLIP KIOKO KATHENGE.....3RD PLAINTIFF
BENSON MBUVI KATHENGE.....4TH PLAINTIFF
NELSON KIEMA KATHENGE.....5TH PLAINTIFF
FRED MBITHI KATHENGE.....6TH PLAINTIFF
ABDALLAH JUMA KATHENGE.....7TH PLAINTIFF
RACHEL SYONTHI MWATU.....8TH PLAINTIFF

VERSUS

JOHNSON KITHEKA KATHENGE.....1ST DEFENDANT
JACKSON WAMBUA KITHEKA.....2ND DEFENDANT
JAMES KATHENGE KITHEKA.....3RD DEFENDANT
MARGARET MUSUKI KITHEKA.....4TH DEFENDANT
MARTHA KITHEKA.....5TH DEFENDANT
KITHOI MUKUU.....6TH DEFENDANT
CLEOPUS MASILA KINDUI.....7TH DEFENDANT

RULING

1. In the Application dated 18th March, 2019, the Defendants are seeking for the following orders:

a. That the Honourable Court be pleased to set aside and/or vary the interlocutory Judgment/Judgment in default of Defence entered on April 4, 2018 against the Defendants/Applicants and all consequential orders thereto pending the hearing and determination of this Application and the main suit on merit.

b. That the Defendants/Applicants be granted leave to file their statement of Defence out of time and the draft Statement of Defence annexed hereto be deemed as duly filed.

2. The Application is supported by the Affidavit of the Defendants' advocate who has doponed that the suit by the Plaintiffs is in respect to

parcels of land known as Kisasi/Nguuni/342, 1265, 1266, 1267 and 1269 and Kisasi/Kimuuni/81 and 17; that the Defendants were served with Summons to Enter Appearance on 5th January, 2016 and that the Defendants instructed their current advocates to enter appearance in the matter.

3. According to the Defendants' advocate, his law firm entered appearance on behalf of the Defendants; that the advocate who was holding the brief in the firm, Mr. Mugo Advocate, left the firm and that it was only later on that the Applicants became aware that an interlocutory Judgment had been entered against the Defendant.

4. The Defendants' counsel finally deponed that the failure by the Defendants' advocates to file a Defence within the required time was due to an honest and inadvertent mistake of counsel who previously handled the matter and that the mistake of counsel should not be visited on the Defendants.

5. According to the Defendants' counsel, the Defendants have a Defence which raises triable issues; that the Plaintiffs will not suffer any prejudice which cannot be compensated by way of costs and that a litigant should not be unfairly driven away from the seat of justice.

6. The Plaintiffs/Respondents filed Grounds of Opposition in which they averred that having participated in and concluded a trial, the Defendants' right to invoke the court's discretion to set aside the Judgment has lapsed; that the Defendants did not apply for a stay of proceedings from the appellate court and that the draft Defence does not raise any triable issue and is a sham.

7. In his Further Affidavit, the 1st defendant deponed that the mere fact that his advocates participated in the trial is no reason to bar them from challenging the claim by filing of the Defence; that the court's discretion is unfettered and that although they instructed their advocate to file a Defence, the said advocate inadvertently did not file it.

8. The Application was argued by way of oral submissions, which I have considered. I have also considered the authorities on record.

9. The Defendants in this matter have admitted that they were served with Summons to Enter Appearance. Indeed, the current law firm for the Defendants filed a Memorandum of Appearance. The Defendants also participated in the hearing of the Plaintiffs' Application dated 18th December, 2015 for injunctive orders. The Ruling in respect to that Application was delivered by this court on 30th June, 2017.

10. When this matter came up for hearing on 6th February, 2019, the Defendants' advocate addressed the court as follows:

“Let the court exercise its discretion. Let me be allowed to file a Defence. My client is unwell. He is an old man.”

11. The Defendants' oral Application to file a Defence was opposed by the Plaintiffs' advocate whereafter this court made a Ruling as follows:

“This suit was filed in December, 2015. The Defendants entered appearance on 15th January, 2016. Since then, they have not filed a Defence, Witness Statements or Documents. Indeed, there is no Application seeking to file a Defence out of time. In the circumstances, I find that the Defendants have been indolent in preparing the hearing of this suit. No good reason has been given as to why this matter cannot proceed as undefended today. The suit to proceed for hearing at 11.45 a.m.”

12. After this court delivered its Ruling declining to allow the Defendants to file their Defence out of time, the Defendants' counsel applied for a stay of proceedings and for the leave of the court to file an Appeal. Although the court granted to the Defendant leave to Appeal, it declined to stay the proceedings. With those orders in place, the matter proceeded for hearing. The Defendants' counsel participated in the proceedings by cross-examining PW1-PW4.

13. The issue of whether the Defendants should be granted leave to file their Defence out of time was determined by this court on 6th February, 2019. Indeed, the Defendant applied for leave to Appeal against the said Ruling, which leave was granted. The Defendants should have therefore filed their Notice of Appeal in respect of the order of 6th February, 2019.

14. Having declined the Defendants' oral Application to file a Defence, the current Application is not only *res judicata*, but is also an abuse of the court process. Indeed, it is against the doctrine of *res judicata*, which is captured under Section 7 of the Civil Procedure Rules, for this court to deal with an issue that it has already dealt with on merit. Consequently, the Application dated 18th March, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE