



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 204 OF 2014**

**NAKURU AUTOMOBILE HOUSE LTD.....PLAINTIFF**

**VERSUS**

**LAWRENCE MAINA MWANGI .....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR NAKURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The suit herein proceeded for hearing at which the plaintiff and the 1<sup>st</sup> defendant as well as their witnesses were heard. The 2<sup>nd</sup> defendant neither filed memorandum of appearance nor participated in the hearings. At all the hearings, counsel for the plaintiff satisfied the court through affidavits of service that the 2<sup>nd</sup> defendant had been duly served. On that basis, the hearings proceeded, the respective cases were closed and the parties were ordered to file final submissions.

2. By Notice of Motion dated 3<sup>rd</sup> May 2018, the 2<sup>nd</sup> defendant now seeks orders that the plaint herein be heard inter partes and that it be given an opportunity to file its defence; that it be given unconditional leave to tender its arguments so that the case is determined on its merits and that the court gives any other appropriate order and/or directions to meet the ends of justice. The application is supported by an affidavit sworn by Kiprotich Kirui, state counsel having conduct of the matter on behalf of the 2<sup>nd</sup> defendant. He deposed that the applicant was served with expired summons to enter appearance on 15<sup>th</sup> March 2018 and that the applicant will suffer great injustice if it is not given an opportunity to be heard.

3. The 1<sup>st</sup> defendant opposed the application through his replying affidavit in which he deposed that the application is an afterthought and an abuse of the court's process. He added that the applicant was all along aware of the matter having been served with correspondence and several hearing notices. That the applicant and the plaintiff having discovered gaps in their cases, they are now attempting to fill those gaps through the present application.

4. The plaintiff also responded to the application though an affidavit sworn by its counsel, Mr Dominic Mukui Kimatta. He deposed that although the applicant was served with Summons to enter Appearance, he is unable to trace both the return of service and the process server who swore it. He added that during the hearing, he inadvertently failed to serve the applicant with hearing notices and that the evidence of the 2<sup>nd</sup> defendant is very important in the matter in view of the fact that both the plaintiff and the 1<sup>st</sup> defendant hold titles in respect of the suit property.

5. At the request of the parties, the court ordered that the application be canvassed by way of written submissions. Accordingly, both the plaintiff and the 1<sup>st</sup> defendant filed submissions. The applicant did not file any submissions. I have carefully considered the application, the affidavits filed and the submissions on record.

6. As I understand it, the applicant essentially seeks an order of setting aside of the order by which the plaintiff's and defence cases were closed so that he can be heard. The applicant contends that he was never served with summons to enter appearance. He has however not denied being served with hearing notices in respect of the hearing of the suit. Indeed, there are several affidavits on record filed by the plaintiff and indicating that the applicant was served with hearing notices. The court allowed hearing to proceed on the basis of those affidavits of service. Curiously though, the plaintiff's counsel on record now alleges that the applicant was not served with the hearing notices. On the basis of the acknowledged hearing notices, I am persuaded that the applicant had ample notice of the existence of this suit. I will therefore treat the present application as one seeking setting aside where there has been service of summons.

7. The principles that guide the court when considering an application seeking setting aside in such a scenario are well settled and were restated by the Court of Appeal in **James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** as follows:

***From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to***

*enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. ...*

8. In this case, both the plaintiff and the 1<sup>st</sup> defendant claim to have title documents in respect of the suit property. The applicant is the custodian of records regarding proprietorship of land. It is therefore in the interest of justice that the court hears his version of the case to assist the determination of the real issues in dispute before the court. I therefore find that it is in the interest of justice to set aside the order closing the applicant's case. While the 1<sup>st</sup> defendant has protested that granting the orders sought will enable the applicant and the plaintiff to beef up their cases, I will give directions which enable the parties to respond to whatever case the applicant will put before the court. The 1<sup>st</sup> defendant can in the circumstances be compensated by an award of costs. The applicant is partly to blame for the current state of affairs. Having been duly served with hearing notices, he did not take action to participate in the matter. For that reason, I will not wholesomely set aside all past proceedings but will only give the applicant a chance to put forth his case.

9. In the end, I make the following orders:

i. The order of 6<sup>th</sup> March 2018 closing the defence cases and allowing for filing of written submissions is hereby set aside. Costs of Notice of Motion dated 3<sup>rd</sup> May 2018 are awarded to the 1<sup>st</sup> defendant and shall be borne by the 2<sup>nd</sup> defendant.

ii. The 2<sup>nd</sup> defendant to file and serve statement of defence and generally comply with Order 11 of the Civil Procedure Rules within 14 days from the date of delivery of this ruling. In default, order number (i) above shall stand vacated and Notice of Motion dated 3<sup>rd</sup> May 2018 shall stand dismissed with costs to the 1<sup>st</sup> defendant.

iii. Further directions regarding disposal of the matter and whether any of the parties may file further compliance documents will be given in due course depending on the 2<sup>nd</sup> defendant's compliance with (ii) above.

10. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 12<sup>th</sup> day of June 2019**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the 2<sup>nd</sup> defendant/applicant

Mr Kimatta for the plaintiff/respondent

Ms Kinuthia holding brief for Mr L Karanja for the 1<sup>st</sup> defendant/respondent

Court Assistants: Beatrice & Lotkomoi