



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 27 OF 2019

JOHNSON M'MANGERA NJUKI & 8 OTHERS.....PLAINTIFFS

-VERSUS-

WELLINGTON SANGA & 13 OTHERS.....DEFENDANTS

RULING

1. The Defendants/Applicants in their Notice of Motion dated 21st March 2019 seek the following substantive orders:

1. Spent

2. That the Honourable Court be pleased to set aside the orders of this Court dated 8th March 2019.

3. That the Plaintiff's Application dated 30th February 2019 be allowed to proceed for full hearing and be determined on merit.

4. That the costs of this Application be provided for.

2. The Application is brought under Order 40 Rule 7, Order 51 Rule 15 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and is premised on the following grounds:

a. That the Plaintiffs Application dated 20th February 2019 had been set done for inter parties hearing on 18th March 2019.

b. That Counsel for the Defendants was misrepresented as to which court the matter would be heard.

c. That at the time the matter was called out before Hon. C. Yano, the Advocate for the Defendants was in Hon. Lady Justice Omollo's Court believing that the matter was before her and by the time he got to the right court, the matter had been called out and orders issued.

d. That in the circumstances the Defendants were condemned unheard and it would only be just and fair if the Defendants are allowed to defend the Application on merit.

e. That it is in the best interest of justice that the Defendants be granted the prayers as sought.

f. That no prejudice will be occasioned to the Plaintiffs should the orders be set aside.

3. The Application is further supported by the grounds contained in the supporting affidavit of George Kithi sworn on 21st March 2019 and the affidavit of Bishop Wellington Sanga sworn on 20th March 2019. It is deponed *inter alia*, that the Defendants' Advocate travelled from Nairobi to Mombasa on 17th March 2019 for purposes of attending this matter. A boarding pass in the name of George Kithi has been annexed. Also annexed are two cause lists for 18th March 2019 with two matters which had almost similar numbers that is **ELC Appl.27/18** and **ELC 27/19**. It is also deponed that the parties have another pending case being **Mariakani PMCC No.8 of 2019**.

4. In reply to the Defendants Notice of Motion, the Plaintiffs filed grounds of opposition dated 26th March 2019. It is the Plaintiffs' case that the Defendants are not keen to defend the case and that the Application lacks merit, made in bad faith and an abuse of the court process.

5. The Advocates for both parties made oral submissions in support of their respective positions.

6. After going through the pleadings, affidavits and grounds of opposition filed and the parties' submission, the court finds that the issue for determination is whether the Application meets the threshold for setting aside ex-parte orders.

7. It is not denied that Defendants were served with the Application dated 20th February 2019 which was scheduled for hearing on 18th March 2019. The Defendants' Advocate has explained that he attended court but sat in a different court due to confusion brought about by another matter which had almost similar numbers.

8. In the case of **Patel –v- E. A. Cargo Handling Services Ltd (1974)EA 75** at page 76C and E, the court held as follows:

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment 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. ”

9. In **Shah –v- Mbogoh (1967)EA 166** the Court of Appeal stated as follows:

“This discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. The court has looked at the reason for failure to attend court by the Defendants and their Advocate. In my considered view, the explanation given is genuine and reasonable. The Plaintiffs will not suffer any prejudice as the Application will be heard and decided on merit. The overriding objective of this court would no doubt come to the aid of the Applicants. The court will therefore exercise its discretion in favour of the Defendants and set aside the orders of this court issued on 18th March 2019. However, the interim orders granted on 26th February 2019 to remain in force until the Application dated 20th February 2019 is heard inter parties.

11. The upshot is that the Notice of Motion dated 21st March is allowed in the following terms:

- 1. The Application is allowed in terms of prayers 2 and 3 thereof.**
- 2. The Defendants to file and serve their response within 14 days of the delivery of this ruling.**
- 3. Interim orders granted on 26th February 2019 to remain in force pending inter parties hearing.**
- 4. Each party to bear their own costs.**

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Siminyu for Plaintiff/Respondent

Githaa holding brief for Kithi for Defendant/Applicant

Yumna Court Assistant

C.K. YANO

JUDGE