



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

E.L.C. CASE NO. 84 OF 2017

BENJAMIN MWANZIA WAMBUA (Suing as the Legal

Representative of MUKUI WAMBUA MAINGI).....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KIMEU KIMANGA.....DEFENDANT/APPLICANT

RULING

1. What is before this court for ruling is the Defendant's/Applicant's Notice of Motion application expressed to be brought under Order 10 Rule 11, Order 51 Rule 1, of the Civil Procedure Rules 2010, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law for orders: -

1) Spent

2) Spent

3) That the default judgment entered against the Defendant/Applicant herein and all the consequential orders including the final judgment be set aside.

4) That the Defendant/Applicant be granted leave to file a defence in this suit.

5) That the Cost of this application be in the cause.

2. The application is dated 12th October, 2018 and was filed in court on 15th October, 2018. It is predicated on the grounds on the face of its record and is supported by the affidavit of Stephen Kimeu Kimanga, the Defendant/Applicant herein, sworn at Nairobi on 12th October, 2018.

3. The Plaintiff/Respondent has opposed the application vide his replying affidavit sworn at Machakos and filed in court on 31st October, 2018.

4. Both parties filed their submissions pursuant to the court's direction to dispose off the application by way of written submissions.

5. The gist of the application is that the Defendant/Applicant did not enter appearance in the suit as he was never served with summons (to enter appearance) and/or any other pleadings to the suit, that he came to know of the suit herein after he was served with judgement notice, that he fell ill on the day he was to file the application to set aside the proceedings, that if execution is allowed, he will suffer injustice and that he has a good defence and he should be given a chance to present it. That the Plaintiff/Respondent will not suffer undue prejudice and if the orders sought are granted, whatever inconvenience the Plaintiff/Respondent may suffer he can be compensated by an award of costs. Those are the same points that the Defendant/Applicant has raised in his supporting affidavit.

6. The Plaintiff/Respondent has deposed in paragraphs 4 and 5 of his replying affidavit that the Defendant/Applicant is not being candid when he alleges that he was never served with summons to enter appearance since a copy of the affidavit of service annexed as BMW1 shows that the Defendant/Applicant duly received the summons on the 16th May, 2017 (emphasis are mine). That the Defendant/Applicant has not disputed the signature said to be his in the said summons to enter appearance. That the Defendant/Applicant has admitted in paragraph 4 of his supporting affidavit that he was granted leave to file the instant application but refused, ignored and/or neglected to do so within the period granted.

7. The Defendant's/Applicant's Counsel submitted that the fact that the Applicant seeks to have the judgment entered on 04th June, 2018 be

set aside and he be allowed to file his defence does not mean that he has won the case since all he wants is for the matter to be determined on merit. The Counsel cited the case of **Richard Murigi Wamai vs. Attorney General & Another [2018] eKLR** where G. L. Nzioka, J cited the case of **Patel vs. East Africa Cargo Handling Services Ltd. [1974] EA 75, Duffus, P.** as follows: -

“Defence on the merits does not mean in my view, a defence must succeed, it means as SHERIDAN J put it “a triable issue,” that is, an issue which raises a prima facie defence which should go to trial for adjudication.”

Although the Counsel cited **Order 5 Rule 16 of the Civil Procedure Rules, 2010**, no application was made to call the serving officer for examination on oath.

8. The aforementioned **Rule 16** provides as follows: -

“on any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

9. On the other hand, the Counsel for the Plaintiff/Respondent framed four issues for determination. These were: -

(a) Whether there was proper service of the summons to enter appearance and plaint attached therein as gave rise (sic) the judgment dated 04/07/2018.

(b) Whether there was inordinate delay in bringing forth this application.

(c) Whether there is Defence which raises any triable issues.

(d) Whether the Respondent is liable to pay costs.

10. On whether there was proper service of summons to enter appearance, the Counsel cited the case of **Kenya Orient Insurance Ltd vs. Cargo Stars Ltd & 2 Others [2017] eKLR** where the Court quoted the case of **Shadrack arap Baiwo vs. Boch Bach [1987] eKLR** as follows: -

“There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence on the regularity of the proceedings.”

The Counsel pointed out that the Defendant/Applicant was in court when the matter came up for hearing. That the matter was adjourned so as to grant the Defendant/Applicant a chance to file the application but he did not do so.

11. On whether there was inordinate delay in bringing forth this application, the Counsel submitted that even though the Defendant/Applicant has deposed that he was unwell, he did not attach any document to verify that he was indeed sick. It was further submitted that there has been no reason for the delay that has been given by the Defendant/Applicant.

12. On whether or not the defence raises triable issues, the Counsel submitted that the Defendant/Applicant has not attached a draft defence to the application. The Counsel cited the case **Veronica Wangari Kabogo vs. Julius Githome & 3 Others [2018] eKLR** where the Court observed thus: -

“However, no draft Defence was attached to the instant application and this Court cannot hold and find that the Defendants/Applicants herein have a plausible Defence with triable issues.”

13. I have read the application together with the supporting affidavit as well as the replying affidavit. I have also read the submissions that were filed. I do note that whereas, the Defendant/Applicant has deposed in paragraph 5 that he was prevented from filing the instant application on account of illness, he did not file any document to support his deposition. The Defendant/Applicant has admitted that he was in court on the day the matter was scheduled to be heard. He sought and was granted a chance to file this application but chose not to. He has not explained the delay in filing the instant application. In my view, the delay is inordinate. As if that is not enough, the Defendant/Applicant has not annexed a draft defence to the application. The court, therefore, is unable to determine if he has a defence that raises triable issues. Whereas the Defendant/Applicant contends that he was not served with summons to enter appearance and to file his defence, he has not denied the fact that he signed at the back side of the copy of summons. Neither did he apply to examine the process server on oath. He has not discharged the burden to show that the return is incorrect. Whereas, justice demands that a party should not be shut out from the seat of justice, the conduct of the Defendant/Applicant herein paints a picture of a person who is simply out to deny the Plaintiff/Respondent from realizing the fruits of his judgement. The application lacks merit and I hereby proceed to dismiss it with costs to the Plaintiff/Respondent.

Signed, dated and delivered at Makeni this 17th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Muthiani for the Defendant/Applicant

Ms. Muthini for the Plaintiff/Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

17/07/2019.