



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 539 OF 2012

JOAN SABASTIAN MBAYA.....1ST PLANITIFF/RESPONDENT

MARGARET TEEI MBAYA.....2ND PLAINTIFF/RESPONDENT

=VERSUS=

SAMUEL KOSKEI TOO.....DEFENDANT/APPLICANT

RULING

1. This is the notice of motion dated 11th December 2018 brought under order 40 rule 2 (1), order 45 rule 1(a), order 22 rule 22, order 51 rule 1 of the Civil Procedure Rules 2010. Section 1A, 1B and 1C, 63(e) and 80 of the Civil Procedure Act, the inherent powers of the court and all enabling provisions of law.

2. It seeks orders

1. Spent.

2. Spent.

3. That this honourable court be pleased to vary, review and/or set aside the judgment herein and all subsequent proceedings, orders, decree and the defendant/applicant be granted leave to file his defence and continue with this suit for hearing and determination on its merits.

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

3. The grounds are on the face of the application and are set out in paragraphs (a) to (n).

4. The application is supported by the affidavit of Samuel Koskei Too, the defendant/applicant herein sworn on the 11th December 2018.

5. The application is opposed. There is a replying affidavit sworn by John Sebastian Mbaya the 1st plaintiff/respondent herein sworn on the 15th January 2019.

6. On the 6th February 2019, the court directed that the application be disposed by way of written submissions.

The Defendant's/Applicant's submissions

7. The case of **Bernadette Canute vs Herbert Sore Makatiani [2016] eKLR** the defendant/applicant neither entered appearance nor filed a defence due to the fault on the part of his advocate. The court held that litigants should not suffer because of their advocates oversight.

8. He has also put forward the case of **Maina vs Muriuki [1984] eKLR; Nyati [2002] Kenya Ltd vs Kenya Revenue Authority [2009] eKLR; Eldo City Ltd vs Corn Products Kenya Ltd & Another [2013] eKLR.**

9. The defendant/applicant and the plaintiffs/respondents entered into negotiations for the purchase of the suit property. This is not disputed. There was part payment of the purchase price. The plaintiff/respondents kept on shifting goals as to the purchase price. That the defendant

ought to pull out of the transaction. 1st plaintiff testified that he (defendant) had paid a sum of Kshs.8 million.

10. The defence raises triable issues. He has put forward the case of **Mercy Karimi Njeru & Another vs Kisima Real Estate Limited [2015] eKLR**. A triable issue is said to exist if there is a dispute on the facts which can only be solved after ventilation in a full hearing. The respondents in their replying affidavit allege that the annexures in the form of bank deposits by the defendant are fictitious, a forgery and falsified documents meant to mislead the court. This clearly raises triable issues which can only be determined at a full trial.

11. The defendant/applicant's advocate entered appearance but failed to file a defence resulting on the entry of judgment. The 1st respondent in his own testimony admits there was an agreement of Kshs.18 million then it shifted to Kshs.22 Million and eventually Kshs.375 Million. He admitted that there was part payment of Kshs.8 Million hence the defendant/applicant does not lie when he talks of shifting goal posts and part payment.

12. He has also relied on Article 159(2) (d) of the Constitution. Failure to file defence was a mistake on the part of his advocate. He prays that the application be allowed.

The 1st and 2nd Plaintiffs'/Respondents' submissions

13. Lack of diligence and/or casualness or sloppiness cannot be equated to genuine mistake or error. They are conduct which the counsel and his client should take responsibility and bear the consequences. The exercise of judicial discretion must not only be judicial but must also be judicious. They have put forward the cases of **Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR**; **Osborn vs Bank of the United States, 22 US 738 [1824]**; **Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**.

14. It is trite law that the basis for the discretion has to be laid by the party inviting the court to exercise its discretion. They have put forward the cases of **Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & Another [2015] eKLR**; **Odoyo Osodo vs Rael Obara Ojuok & 4 Others [2017] eKLR**; **Hannah Wairimu Ngethe vs Francis Ng'ang'a and Another [2016] eKLR**. In the instant suit the defendant/applicant had all the time needed to file his defence. No sufficient reason has been advanced for failure to do so.

15. The defendant/applicant and his counsel have been guilty of recklessness and/or negligence and/or casualness in the conduct of their case. His former counsel on record has all along been informed of the hearing dates as per the annexures to the replying affidavit to the extent that the same counsel was in court during the hearing on 16th May 2017.

16. The overriding objectives as espoused under Section 1A, 1B, 3 and 3A of the Civil Procedure Act cannot come to the aid of the defendant/applicant. The application is an abuse of the court process. They have put forward the case of **Muchanga Investments Ltd vs Safaris unlimited (Africa) Ltd & 2 Others [2009] eKLR**. They pray that the application be dismissed with costs to the plaintiffs/respondents.

17. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not this application is brought in good time and is merited.

(ii) Whether or not the defence raises triable issues.

18. It is the defendant's/applicant's contention that his failure to file a defence was due to a mistake of his former counsel. He acknowledges that he instructed his former counsel to enter appearance and file a defence but he did not. He relied on the case of **Maina vs Muriuki [1984] KLR 407**, where the court held that:-

“the discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.....”.

19. There is no doubt that the defendant/applicant was represented by counsel who neglected to file defence within the stipulated period. It is not clear if the said counsel updated the defendant/applicant of the proceedings in this case. The defendant/applicant maintains that he was not aware the defence was not filed.

20. In the case of **Philip Chamwolo vs Augustine Kubende [1986] KLR 890** quoted with approval in **Isaac Moracha Ongwacho vs Dennis Willy & another [2005] eKLR**, the court in deciding whether to set aside expert judgment observed as follows:-

*“...in light of all facts and circumstances both prior and subsequent and of the respective merits of the parties it would be just and reasonable to set aside order of the judgement if necessary upon terms to be imposed... (but the court went on to explain)that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there were triable issues which raised a prima facie defence which should go for trial. The court adopted the view expressed by the House of Lords in the case of **Evans vs Barton [1917] AC473**”.*

21. There is no doubt that the defendant/applicant and the plaintiffs/respondents entered into negotiations for the purchase of the suit property. The plaintiff's/respondents offered to sell to the defendant/applicant, the said portion upon realization of the encroachment. The 1st plaintiff/respondent admitted as much in his evidence when he gave his testimony.

22. I have perused the draft defence and counterclaim and/or set off. I find that the same raises triable issues which ought to go to full trial. The defendant/applicant claims to have made payments to a tune of Kshs.11,500,000. This is an issue that cannot be wished away.

23. I find that the defendant/applicant has made out a good case to warrant the court to exercise its discretion in his favour. I also note that the application was brought without undue delay as judgment was delivered on 22nd October 2018. I find merit in this application and grant the orders sought namely.

(i) That the ex parte judgment dated 17th October 2018, and all subsequent proceedings, orders, decree, be and is hereby reviewed and/or set aside.

(ii) That the defendant/applicant is hereby granted leave to file his statement of defence, counterclaim and/or set off within (21) twenty one days from the date of this ruling. In default the exparte judgment shall take effect.

(iii) The defendant/applicant to pay the plaintiffs/respondents throw away costs of Kshs.20,000 within thirty (30) days from the date hereof.

(iv) The plaintiffs/respondents shall have costs of the application.

It is so ordered.

Dated, signed and delivered in Nairobi on this 26th day of September 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court Assistant