REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 165 OF 2018

(FORMERLY NAIROBI ELC NO.503 OF 2015)

JOHN NGACHA NG'ANG'A.....1ST PLAINTIFF/APPLICANT/RESPONDENT

PASTOR CHARLES MUTURI NGANGA....2ND PLAINTIFF/APPLICANT/RESPONDENT

VERSUS

CATHERINE NJERI MARANGA.....1ST DEFENDANT/RESPONDENT/APPLICANT

KENNEDY NGANGA MARANGA.....2ND DEFENDANT/RESPONDENT/APPLICANT

CHIEF REGISTRAR OF TITLES.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

There are two **Notices of Motion** Applications for determination. The First Application for determination is the Application dated **9th October 2018** by the Plaintiffs/Applicants herein seeking for orders that;

> **a. THAT this Honourable Court be pleased to strike out the 1st and 2nd Defendants Memorandum of Appearance filed on 10th July 2015 and the Defence filed on 11th November 2015 and all other subsequent pleadings without leave of this Honourable Court**
>
> **b. THAT this Honourable Court direct that the Plaintiffs do proceed with the hearing of their suit by way of formal proof.**
>
> **c. THAT the costs of this suit be provided for**

The Application is premised on the grounds that the 1st and 2nd Defendants/Respondents were served with Summons to Enter Appearance, but they did not enter appearance nor file defence until **10th July 2015** and **11th November 2015,** respectively without leave of Court. Further that the Plaintiffs requested for Judgment against them on account of failing to enter appearance which Judgment was entered on **21st August 2015.**

However the Defendants have continued to file documents and even filed a **Notice of Preliminary Objection,** and as such the pleadings are an abuse of the Court process.

In his **Supporting Affidavit**, the 1st Plaintiff averred that he purchased the suit land and sold it to members of the public who developed it among them the 2nd Plaintiff. He averred that the parties have developed the said properties and entered into contract with several service providers to provide services.

He further alleged that 1st and 2nd Defendants/Respondents by way of forgery obtained certified copies of Deed Plan, Letter of Allotment and the 1st Defendant procured a title document in the name of her son, a minor(2nd Defendant) which was illegal and unlawful. He further averred that when he learnt of the attempt to grab what was initially his land, he lodged a Criminal complaint and all the Defendants were served with Plaint, Summons to Enter Appearance on the **12th of May 2018,** but the 1st and 2nd Defendants did not enter appearance. The

Applicants then requested for an interlocutory Judgment on **3rd August 2015,** and on **21st August 2015,** the Court entered the said interlocutory Judgment. However the 1st nd 2nd Defendants have not attempted to set aside the said Judgment, but are filing fictitious documents. He averred that the said process are fictitious and an abuse of the Court process and they cannot bend the law as they appear to do so in their pleadings.

The Application is opposed and the 1st and 2nd Defendants/

Respondents filed a Replying Affidavit and averred that the suit was institute by the Plaintiffs on the **8th of June 2015** under a Certificate of Urgency and their then Advocates filed Memorandum of Appearance on the **10th July 2015** and a statement of Defence on **11th November 2015** and they have been participating through the said Firm of **Kuloba & Wangila Advocates,** until when they instructed the firm of **Howard, Nick & Kenneth Advocates** to take over.

He averred that when his Advocates informed them that he had been served with an application to strike out the Defence and was surprised as he was unaware of the interlocutory Judgment as he had participated in the matter including filing of contempt proceedings .He averred that he has been advised by his Advocates that in the event Judgment was entered on the **21st of August 2015**, the Court a month later issued orders allowing them to file response to the Notice of Motion and it is his understanding that the proceedings of the **21st September 2015**,gave them leave to file and serve their pleadings out of time by consent. Further that parties have filed other applications and there has never been contestation on the regularity of the pleadings. He also averred that in the premise the Plaintiffs are estopped from raising objection to their pleadings. He urged the Court to dismiss the Application so that the matter goes to hearing of the main suit for the issues to be determined in the wider interests of Justice.

The 2nd Application for determination is the one dated **7th December 2018** by the 1st and 2nd Defendants seeking for orders that;

1. **THAT the Honourable Court be pleased to review and / or set aside the interlocutory Judgment entered on 21st August , 2015as against the 1st and 2nd Defendants and any other consequential orders.**

2. THAT the Honourable Court be pleased to deem the 1st and 2nd Defendants statement of Defence and Counter claim dated 11th November , 2015 (filed on even date) to be duly filed and / or extend enlarge the time for filing a statement of Defence and Counterclaim in the alternative

3. THAT the Honourable Court be pleased to give such reliefs as may be just in the circumstances

4. THAT costs of this Application be provided for

The Application is premised on the grounds that they have a good Defence and Counter claim with reasonable prospects of success. Further that by dint of Orders given in **21st September 2015,** they have been under the impression that they were given leave to file and serve their pleadings out of time and parties including the Plaintiffs have been operating under the assumption that everything is in order. Further averred that the Plaintiffs have sought to strike out their pleadings on a technicality and their properties are in limbo and it is pertinent that the Court pronounces itself on the issue as Plaintiffs will not suffer any prejudice if the orders are granted.

In his **Supporting Affidavit**, the Counsel for the 1st and 2nd Defendants, **Mr.Kenneth Kamau** averred that he has been able to establish that the Plaintiffs instituted the suit on the **8th of June 2015**. Then the 1st and 2nd Defendants filed the Memorandum of Appearance on **10th July 2015,** and Statement of Defence and Counter claim on the **11th of November 2015**. He further averred that upon perusing the Court file, he found that by dint of orders given on the **21st September 2015,** he was under the impression that the Defendants were given leave to file and serve their pleadings out of time and the interlocutory judgment set aside. He alleged that by reason of further applications prosecuted and defended as between the parties after the interlocutory judgment, he believed that the 1st and 2nd Defendants' pleadings were properly on record.

He alleged that operating on this belief, he sought leave to file **Chamber Summons** to amend the Statement of Defence and filed pre trials questionnaire and a **Notice of Preliminary Objection,** but he was later to be ambushed by the Plaintiffs Advocate on the eve of the hearing with an application to strike out.

It was his contention therefore that the Plaintiffs/Respondents are estopped from raising the objection after they had participated in prior proceedings. He further urged the Court no to penalize the 1st and 2nd Defendants if his interpretation was wrong as they have good Defence and Counter claim and they will be highly prejudiced if their pleadings are struck out. He contended that no prejudice will be suffered by the Plaintiffs that cannot be compensated by way of costs.

The application is opposed and the 1st Plaintiff filed a **Replying Affidavit** and averred that the deponent of the Affidavit is not competent and that the Applicants need to make a comprehensive explanation why they filed their documents out of time. He further averred that the allegations that the Applicants are likely to suffer prejudice has not been properly explained and an argument of ownership is not sufficient reason to counter express provision of the law. It was his allegation that the issue of irregular defence has been raised severally in various other pleadings and the orders being referenced on the **21st of September 2015,** only dealt with the reply to the application dated **8th June 2015,** which they had not responded to. He alleged that ignorance of the law is not defence and that the Applicants have ignored the fact that there is a proper judgment on record. He therefore urged the Court to dismiss the Application.

The 1st and 2nd Defendants filed a further Affidavit which was deponed by **Albert Simiyu Kuloba Advocates,** their previous Counsel. He

averred that on the **16th of December 2015,** together with **Mr. Muriuki**, he appeared before **Hon. Gitumbi J.** wherein he confirmed having filed his pleadings late and sought indulgence of the Court to set aside the interlocutory judgment. The said Mr. Muriuki did not object to his Application and sought time to reply to his pleadings. He averred that his understandings of the said proceedings was that the Applicants had been given time to file and serve their pleadings out of time. Subsequently they filed and prosecuted various other applications and therefore the Plaintiffs are estopped from raising an issue they had abandoned. He urged the Court to dismiss the Plaintiffs' Application and allow the Defendants/

Applicants Application for the wider interests of Justice.

The plaintiffs filed a further Affidavit and averred that the Applicants have not explained sufficiently the reason for filing the Defence out of time and that there is nowhere and nothing on the proceedings of the material date to show that Judge ever gave them leave to file Defence out of time.. He averred that he has been advised by his Advocate that the application seeks leniency and courts exercise of discretion which is not easy to get as the Application is founded on falsehoods and lies.

The two Applications were canvassed by way of written submissions to which the Court has carefully read and considered. The issue for determination is whether the parties are entitled to the orders sought.

This Court notes that the two Applications are in a way connected to each other. That while one Application seeks to strike out the Defence for being filed out of time, the other Application seeks to have a interlocutory Judgment that was entered on the **21st of August 2015** set aside.

The 1st and 2nd Defendants have averred in their pleadings that though the interlocutory Judgment was entered, they have in the subsequent cases been under the impression that the same was set aside and they were allowed to file their pleadings out of time. More specifically they have referred to the proceedings of the **21st of September 2015.**While

the 1st and 2nd Defendants have alleged that the leave to file their documents out of time revolve on the issue of their pleadings being the Defence, this Court has perused the Court file and note that on **21st September 2015**, the Court stated

> **"that the Defendant/ respondent are allowed to file and serve their responses to Notice of Motion dated 8th July 2015 within 14 days from todays date"**

It is this Court opinion therefore that nothing can be clear than the fact that the said leave was specifically with regards to the Notice of Motion Application. However the Court has noted that the Notice of Motion Application dated **8th June 2015,** was the one that was filed together with the Plaint. The Plaintiff has urged the Court to strike out the Memorandum of Appearance and the Defence that was filed by the 1st and 2nd Defendants and further that they have always had a problem with the documents filed. However it is clear that at the time the Plaintiffs were conceding that the 1st and 2nd Defendants be given time to file their responses, it would be construed as giving them an impression that their pleadings are properly before Court.

The Plaintiffs have urged the Court to strike out the pleadings. The guiding principles on whether or not to strike out pleadings have been stated in the case of **Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR,** where the Court quoted with authority the celebrated case of **Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd [2014] eKLR** and held that:

> ***"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should* guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is "demurer of something worse than a demurer" beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHEDRIDAN J Test in PATEL V E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at p. 76 (Duffus P.) that "… a triable issue… is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."**

It is this Court's holding therefore that a court has discretion to strike or not to strike out a pleading and in exercise of this discretion, the court should ensure that the same is exercised sparingly and judiciously and the same should be in a clear case where the Defence raises no triable issue. This Court concurs with the Plaintiffs that the 1st & 2nd Defendants have made no attempt to explain why the Defence was not filed on time. However the plaintiffs have continued to prosecute their Applications and defending other Applications and have brought the instant Application **four** years later after various Applications have continued to be prosecuted. Moreover this Court has perused the Defence and Counter-claim on record and noted that the same raises the issue of fraud and that the same cannot be ignored. It would only be prudent that this Court allows the 1st & 2nd Defendants their day in Court since they have also filed Counter-claim. The matter needs to be heard and determined on merit and both parties should be given an equal chance to ventilate their case. Moreover, this matter has been ongoing and it is the Court's finding that the plaintiffs will not suffer any prejudice as they have continued to prosecute their cases over the years. The Court takes into account that striking out pleadings is a drastic measure that should only be resorted to if there is no hope in the pleadings See the case of **Desbro (Kenya) Limited …Vs… Polypipies Limited & another [2018] eKLR,** where the Court held that:

> **"I am alive to the fact, that striking out of a suit or defence is a jurisdiction, which a court should exercise sparingly and in a clear and obvious case that the defence raised by the Defendant is a mere smoke screen meant to divert the court's attention to the real question in issue and cannot amount to a prima facie defence *warranting judicial examination or trial. That unless the defence is sham, vexatious, frivolous and an abuse of the court process a party to a civil litigation should not be deprived of***

his right to have his day in the court and have the suit determined in full trial. The court should act cautiously and carefully, consider all facts of the case without rushing to embarking on striking out the defence which otherwise raises triable issues in respect of the would-be action of the case"

This Court therefore holds and finds that there is no merit in the Plaintiffs' Application dated **9th October 2018**, seeking to strike out the Memorandum of Appearance and Statement of Defence and Counter-claim filed by the 1st & 2nd Defendants herein. Consequently, the said application is disallowed and dismissed entirely.

Having held that it would be in the interest of justice not to strike out the pleading's, this Court will further evaluate whether it can set aside the interlocutory Judgment. The case **CMC HOLDINGS LTD …vs… NZIOKI (2004) KLR 173** set out the guiding principle the courts should bear in mind when faced by such an application. The Court stated that

"In law the discretion that a court of law has, in deciding whether or not to set aside exparte orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.

…The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which ….raises triable issues."

Further the Court in the case of **Southern Credit Banking Corporation Ltd …Vs… Johah Stephen Nganga (2006) eKLR** held that;

"Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is regular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If judgment entered is found to be irregular it ought to be set aside ex debito justitiae."

This Court has already given the reason why it deems fit not to strike out the 1st and 2nd Defendants Memorandum of Appearance and Defence. In this instant suit what the Judgment in place would do is only to deter the filing of the said pleading's as the Plaintiffs would still have to go through the process of formal proof and this Court already having noted that the Defendants have a reasonable Defence finds no reason as to why it should not set aside the ex parte Judgment. See the case of **Pithon Waweru Maina …V… Thuga Mungiria(1983) KLR 78,** where the Court of Appeal stated that:

"The nature of the action should be considered , the defence if one has been brought to the notice of the court; however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court (Jamnadas V Sodha Gordandas Hemraj [1952] 7 ULR 7)."

Consequently, the Court further finds that no prejudice would be occasioned to the Plaintiffs as the suit has always been active. This Court therefore finds that the Application by the 1st and 2nd Defendants dated **7th December 2018** is merited and the same is allowed entirely.

Section 27 grants this Court discretion to grant costs. In this instant, the Court finds that Costs of both application should in the cause.

Having now carefully considered the two applications dated **9th October 2018** by the Plaintiffs and the other dated **7th December 2018**, by the 1st & 2nd Defendants and the written submissions, cited authorities and the relevant provisions of law, the Court finds the **Notice of Motion** dated **9th October 2018** is not merited and the said application is dismissed entirely with costs being in the cause.

However, the Court finds the **Notice of Motion** dated **7th December 2018** by the 1st & 2nd Defendants/Applicants is merited and the said application is allowed entirely with costs being in the cause.

It is so ordered

Dated, Signed and **Delivered** at ***Thika*** this **25th day of October, 2019**.

L. GACHERU

JUDGE

25/10/2019

In the presence of

Mr. Muriuki for the Plaintiffs/Applicants/Respondents

Mr. Kamau for the 1st & 2nd Defendants/Respondents/Applicants

No appearance for 3rd & 4th Defendants

Lucy - Court Assistant

L. GACHERU

JUDGE

25/10/2019