



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 166 OF 2014**

**(FORMERLY HCC EMBU 115 OF 2008)**

**ANNAH MUTHONI IRERI.....PLAINTIFF**

**VERSUS**

**WILLIAM NJERU MBOGO.....DEFENDANT**

**RULING**

1. By a notice of motion dated 4<sup>th</sup> April 2019 filed under certificate of urgency under the provisions of **Order 9, Order 12 Rule 7, Order 22 Rule 25 of the Civil Procedure Rules 2010** (hereafter *the Rules*) and all enabling provisions of the law the Defendant sought the setting aside of the judgement delivered on 19<sup>th</sup> October 2017 and all consequential orders.

2. The said application was based on the grounds that the Defendant was never notified of the hearing date by his advocate; that he was condemned unheard; and that he had extensively developed the suit property. The said application was supported by an affidavit sworn by the Defendant on 4<sup>th</sup> April 2019 which reiterated and expounded upon the grounds set out on the face of the motion. It was contended that the suit proceeded in his absence because of a lapse by one of the clerks in the firm of his previous advocate Eddie Njiru & Co. Advocates to diarise the hearing date.

3. When the said application was listed for hearing on 21<sup>st</sup> May 2019 the advocates for the parties agreed to canvass it through written submissions. It was agreed that the Plaintiff was to file and serve a response to the said application within 14 days. Thereafter, the parties were to file and exchange their written submissions within 28 days. By the time of preparing of this ruling, however, none of the parties had filed their submissions. The Plaintiff had also not filed any response to the application.

4. The provisions of **Order 12 Rule 7** of the **Rules** stipulate as follows:

**“Where under this Order judgement has been entered or the suit dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”**

5. The court has considered the relevant case law on the subject and the principles which are applicable in setting aside an *ex parte* judgement. The court has considered the principles applied in the cases of **Girado V Alam & Sons (U) Ltd [1971] EA 4480, Patel VI E.A. Cargo Handling Services Ltd [1974] EA 75 and Mbogo & Another V Shah [1968] E.A. 93**. All these cases suggest that the court has a wide and unfettered discretion to set aside a default judgement even where it was regularly obtained. In the case of **Patel B V E.A. Cargo Handling Services Ltd (Supra)** it was held that,

**“there are no limits or restrictions on the Judge’s discretion except that if he does vary the judgement he does so on such terms as may be just.”**

6. Similarly, in the case of **Mbogo & Another Vs Shah [1967] EA 116 at p. 123** it was held, *inter alia*, that;

**“...The discretion 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice, the motion should be refused.”**

7. The court has considered the explanation by the Defendant for his absence at the trial of the suit. The reason given has not been challenged by the Plaintiff. The explanation appears to be reasonable on the face of it. There is no material on record to suggest that the

Defendant is deliberately seeking to delay or obstruct the course of justice. The court is thus satisfied that the Defendant ought to be accorded an opportunity of being heard in this suit.

8. The upshot of the foregoing is that the court finds merit in the notice of motion dated 14<sup>th</sup> April 2019. The same is consequently allowed in the following terms:

*a) The ex parte judgement dated 19<sup>th</sup> October 2017 is hereby set aside.*

*b) The parties shall file and exchange their respective trial bundles duly bound and paginated within 21 days from the date hereof.*

*c) The parties shall take a hearing date for hearing of the suit within 30 days.*

*d) The Defendant shall pay the Plaintiff costs in the sum of Kshs. 20,000/- within 30 days from the date hereof.*

9. It is so decided.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 24<sup>TH</sup> DAY of OCTOBER 2019.**

In the presence of Ms. Materi holding brief for Mr. Momanyi for the Defendant and in the absence of the Plaintiff.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**24.10.19**