



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 353 OF 2016**

**BHAGWANJI DAYALAL RAMJI.....PLAINTIFF**

**-VERSUS-**

**MOMBASA CALIBRATION SERVICES**

**MATHENGE NGIBUNI**

**JOSEPH MWENDA CHEGE**

**JAMES GATURU KIARIE.....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 17<sup>th</sup> May, 2018 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 45 Rule 2 of the Civil Procedure Rules and all other enabling provisions of the law and Inherent jurisdiction of the court, the Defendants/Applicants seek for orders:

**1. Spent**

**2. That the court be pleased to set aside and/or review the interlocutory judgment entered on 27<sup>th</sup> January, 2017 against the defendants herein and the consequential judgment issued on 31<sup>st</sup> January, 2018 after the formal proof.**

**3. That pending the hearing and determination of this application inter partes, an order of stay of execution be issued to stay the execution of the decree issued herein on 31<sup>st</sup> January, 2018. For the avoidance of any doubt, the plaintiff and/or its agents be restrained from distressing the 1<sup>st</sup> defendant's goods or in any other way interfering with the 1<sup>st</sup> defendant's quiet possession and enjoyment of the suit premises which is a premises standing on PLOT NO.265/I/MN.**

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

2. The application is based on the grounds set out in the motion, namely:

**1. That the defendants herein were served with the plaint together with the summons to enter appearance dated 5<sup>th</sup> December, 2016 on 7<sup>th</sup> December, 2016.**

**2. That the defendants entered appearance on 16<sup>th</sup> December, 2016 which was duly filed in the court.**

**3. That on 23<sup>rd</sup> January, 2017 the defendants filed their statement of defence which was served upon the plaintiffs advocate on the same date.**

**4. That via a request of judgment dated 12<sup>th</sup> January, 2017 and filed in the court on 13<sup>th</sup> January, 2017 the plaintiff requested for interlocutory judgment against the defendants on the basis that the defendants had failed to enter appearance and/or file defence within the stipulated period of time or at all; a statement which was clearly erroneous in light of the contents of paragraphs 2 and 3 above.**

**5. That from the face of the record this court entered an interlocutory judgment against the defendants on 27<sup>th</sup> January, 2017 on the basis that the defendants failed to enter appearance within the stipulated period of time or at all.**

**6. That thereafter the matter was set down for formal proof whereby on 31<sup>st</sup> January, 2018 the court issued a judgment in favour of the plaintiff.**

**7. That it is apparent therefore that there is an error on the face of the record leading to the interlocutory judgment and/or the plaintiff misled the court to enter the aforesaid judgment.**

**8. That the plain reading of the defence filed, it is patently clear that there are bona fide triable issues thereby making it proper for the suit filed herein to be heard on the merit.**

**9. That should the interlocutory judgment delivered herein be executed in its current form, the defendants shall suffer irreparable loss, injustice, prejudice and miscarriage of justice.**

**10. That in light of the above, there are sufficient reasons to warrant the setting aside of the ruling which was delivered herein.**

**11. That this court has the inherent power to set aside and/or review its own orders and/or judgment.**

**12. That it is only in the interest of justice and for justice to be seen to be done that the interlocutory judgment entered herein be set aside and the matter be fixed for full hearing.**

**13. That unless this court issues urgent appropriate protective orders as herein prayed for the defendants stand to suffer irreparable harm as the plaintiff is in the process of executing the same.**

3. The application is further supported by the grounds contained in the supporting affidavit of Mathenge Ngibuini, the 2<sup>nd</sup> defendant sworn on 17<sup>th</sup> May, 2017 in which he reiterated the grounds in support of the application. In addition, he deposed that on 26<sup>th</sup> March, 2018 the 1<sup>st</sup> Defendant filed a complaint before the Business Premises Rent Tribunal at Mombasa, to wit, Tribunal Case No.27 of 2018 challenging the manner in which the plaintiff is treating the 1<sup>st</sup> defendant. A copy of the complaint is annexed and marked "MN -4". The defendants aver that they were not aware of the aforesaid judgment issued by the court. That it was as a result of the replying affidavit sworn by the plaintiff and filed in Tribunal Case No.27 of 2018 on 8<sup>th</sup> May, 2018(a copy which has been annexed and marked "MN-5") that the defendants herein learnt the plaintiff had obtained the interlocutory judgment herein. The defendants aver that there has been no delay in filing the current application and that they have a constitutional right to be heard before any adverse orders are issued against them. As such, the defendants state that it is only fair that the interlocutory judgment issued herein be set aside so that the defendants are given a chance to be heard on their defence. The defendants further pray for stay of execution pending hearing and determination of this application so as to prevent the defendants from suffering irreparable harm.

4. The application is opposed by the plaintiff through a replying affidavit sworn by himself on 18<sup>th</sup> July 2018. The plaintiff has deposed that the applicants failed to file defence within the stipulated time and therefore the plaintiff's advocate requested for judgment in default of filing of the defence. The plaintiff stated that the memorandum of appearance dated 15<sup>th</sup> December 2016 was filed on 16<sup>th</sup> December 2016 but the receipt for payment is dated 19<sup>th</sup> December 2016 which is an indication that the memorandum of appearance was filed without having been paid for. That the memorandum of appearance was served on the plaintiff's advocates on 1<sup>st</sup> February 2017. The plaintiff further states that the defendant failed to file defence within 14 days after entering appearance as required as the defence was filed on 23<sup>rd</sup> January 2017 which was 10 days after the request for judgment was made and the same endorsed. It is the Plaintiff's contention that the defendants Defence has no triable issue.

5. The plaintiff avers that the complaint filed at the tribunal has no bearing on the matter herein and his advocates have contested the jurisdiction of Business Premises Rent Tribunal. The Plaintiff states that prior to the expiry of the lease, he informed the 1<sup>st</sup> defendant of certain conditions to be met in the event they wished to renew the lease but there was no response till the lease expired. That having failed to renew the lease, then the defendants ought to handover vacant possession and their refusal to vacate the premises does not create a new lease or a controlled tenancy as the 1<sup>st</sup> defendant became a trespasser. The plaintiff states that he has been prejudiced because the 1<sup>st</sup> defendant is wrongfully clinging unto the property and has not paid mesne profits since 2016. The plaintiff further stated that should the court be inclined to grant the application, then the same should be on condition that the 1<sup>st</sup> defendant pays the full decretal sum being unpaid mesne profits and be ordered to continue the same on monthly basis since it is undisputed that the plaintiff is entitled to the same as proprietor of the property whether the case is allowed or dismissed.

6. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties who also relied on decided cases which I have read. I have considered the application. The issue to determine is whether I should set aside the ex-parte judgment herein. It is not in dispute that pursuant to request for judgment filed on 13<sup>th</sup> January, 2017, interlocutory judgment was entered for the plaintiff against the defendants on 31<sup>st</sup> January, 2018.

7. Whereas the defendants state that they were served on 7<sup>th</sup> December, 2016, in the affidavit of service attached to the request for judgment, it is stated that the defendants were served on 6<sup>th</sup> December 2016. The summons to enter appearance required the defendants to enter an appearance in the suit within 15 days from the date of service. The defendants have annexed a memorandum of appearance filed on 16<sup>th</sup> December, 2016 though the receipt for payment is dated 19<sup>th</sup> December 2016. Whichever the case, the said memorandum of appearance was still filed within 15 days from 6<sup>th</sup> or 7<sup>th</sup> December 2016. Order 7 Rule 1 of the Civil Procedures Rules required the defendants to file their

defence within 14 days after they have entered an appearance in the suit. The defendants filed their defence on 23<sup>rd</sup> January, 2017. According to the plaintiff, the defendants failed to file their defence within 14 days as required by law.

8. Order 50 Rule 4 of the Civil Procedure Rules provides as follows:

**“When time does not run.**

**4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:**

**Provided that this rule shall not apply to any application in respect of a temporary injunction.”**

9. When the above provision of the law is taken into account, the defendants were required to file their defence by 26<sup>th</sup> January, 2017. However, in this case, the defendants filed their defence on 23<sup>rd</sup> January, 2017. It is clear therefore that the defence was filed within the time stipulated in law.

10. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

**“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon terms as are just.”**

11. In the case of **James Kanyiita Nderitu & Another (2016) eKLR**, the Court of Appeal stated thus:

**“From the outset, it cannot be gain said that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –v- Shah (1968) EA 98, Patel –v- E.A Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another –v- Kubende (1986) KLR 492 and CMC Holdings –v- Nziaka (2004) 1 KLR 173. In an irregular default judgment, on the other hand; judgment will have been entered against the defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment own its own motion. In addition, the court will not venture into consideration of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”**

12. In the instant case, apparently there is no dispute that the defendants/applicants entered appearance and filed appearance and filed defence within stipulated time. Despite this, the plaintiff requested for interlocutory judgment against the defendants on 13<sup>th</sup> January, 2017. The said interlocutory judgment was entered on 27<sup>th</sup> January 2017. Later the matter proceeded for formal proof and judgment entered on 31<sup>st</sup> January 2018 against the defendants. From the material placed before me it is clear that the interlocutory judgment was entered by mistake and the formal proof hearing proceeded when the defendants had entered appearance and filed defence within the stipulated time.

13. In my considered view, and taking into account all the circumstances of this case, I find that there is an irregular default judgment entered by the court. An irregular judgment is liable to be set aside by the court *ex debito justiae* as a matter of judicial duty to remedy the situation.

14. In the result, I find merit in the Notice of Motion dated 17<sup>th</sup> May, 2018 and the same is allowed in terms of prayers 2 and 3 thereof. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 21<sup>st</sup> day of November 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Katisya for Plaintiffs/Respondents

Ms. Murage for Defendants/Respondents

Esther Court Assistant

**C.K. YANO**

**JUDGE**