**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E & L CASE NO.102 OF 2015**

**PETER WAFULA KHAEMBA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARY CHELIMO SIRIMA.....DEFENDANT/APPLICANT**

**KEMBOI.....DEFENDANT**

**SHADHAN KIPTOO.....DEFENDANT**

**KIPCHOGE.....DEFENDANT**

**KIPLETING.....DEFENDANT**

**MARITIM.....DEFENDANT**

**JOEL KIPTOO.....DEFENDANT**

**RULING**

This ruling is in respect of an application dated 8th July 2019 by the 1st defendant/applicant seeking for orders of stay of execution of the Judgment, decree and all consequential orders issued in this suit. The applicant also seeks for the setting aside of the judgment delivered on 29th September 2017 and that the defendant be allowed to file a defence out of time.

Counsel relied on the grounds on the face of the application and the supporting affidavit which indicated that the defendant has a defence with triable issues. It was Counsel's submission that the defendant was never served with summons to enter appearance and that she only came to know of the existence of the case on 4th July, 2019 when a Police Officer Commanding Turbo Police Station called the 1st defendant, informing her that she will be evicted anytime from Monday, 8th July, 2019.

Counsel further submitted that the application has been brought in good faith and in a timely manner. Further that the plaintiff will not suffer any prejudice if the orders sought are granted.

Counsel cited the case of James Wanyoike & 2 others vs- CMC Motors Group Ltd & 4 Others (2015) ekLR as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside and ex-parte judgment.

2. that the tests for setting aside an ex-parte judgment are :-

a) Whether there is a defence on the merits

b) Whether there would be any prejudice to the Plaintiff

c) What is the explanation for any delay

It was therefore Counsel's submission that the defence raises triable issues of ownership and occupation of 5.2 acres out of Land Reference Number Uasin Gishu/Ngenyilel/76. He further cited the case of Patel —vs- E.A Carge handling services Ltd [19741 EA 75, where the court inter alia stated.

> *In this respect, defence on the merits does not mean a defence that must succeed. It means a tribal issue that is an issue which raises a Prima facie defence which should go to trial for adjudication"*

Counsel also relied on the case of Nairobi High Court Civil Appeal No. 318 of 2018 Farmers Choice Company —vs- Dorleen Anyango Wasonga & Another [20151ekLR w here Aburili J. held:

> "*It is time that in exercising the courts discretion to set aside ex-parte judgment, the court should look at the Defence that may be offered and whether it raises triable issue*

It was further held in the above case that;

> "*However, the entry of interlocutory judgment is not cast in store as the court has the unfettered judicial discretionary Powers under Order IxA Rule 10 of the old rules ( now Order 10 Rule 11 of the CPR) to set aside or vay such judgment and consequential decree or Order upon such terms that are just."*

Counsel therefore urged the court to allow the application as the applicant has met the threshold for setting aside judgment.

**Respondent's Submission**

Counsel for the respondent gave a brief background to the case and submitted that this suit was instituted as against the Defendants by the Plaintiff in person on 10th April, 2015. That the Plaintiff subsequently instructed the firm of M/S Mwinamo Lugonzo & Company Advocates to appear for him who amended the pleadings and the reliefs sought for in the Plaint.

Counsel stated that the Defendants, their servants and or agents were duly served in the presence of the Assistant Chief of Ngenyilel sub-location as they were already in occupation and use of the suit land.That this being a land dispute the court could not enter interlocutory judgement in default of appearance and Defence and consequently the Defendants were served.

This matter was fixed for formal proof hearing on 18th September, 2017 and the Defendants/Applicants were duly served with the hearing notice. Counsel submitted that the service is confirmed by the affidavits of service and the hearing notice marked as PK 1 (a) and (b). The Defendants were therefore duly notified of the hearing slated for 18th September, 2017 but neither attended court and nor entered appearance and file Defences. They chose to ignore the suit.

Counsel therefore submitted that no good reason has been advanced to warrant setting aside the judgment. Counsel urged the court to dismiss the applicant's application with costs to the plaintiff/respondent.

**Analysis and Determination**

The issues for determination are whether the applicant has met the threshold for setting aside judgment and whether the court should exercise its discretion in favour of the applicant. Was the applicant served with summons to enter appearance and a hearing notice for the formal proof.

From the perusal of the affidavit of service on record it is clear that the applicant was served with summons to enter appearance but did not bother to file any defence within the stipulated period. There is further evidence that the defendants were served with a hearing notice for the formal proof.

The applicant claims that she has a defence with triable issues. It is trite law that a defence need only raise a *bona fide* triable issue, which *is 'any matter that would require further interrogation by the court during a full trial'*. ***The Black's Law Dictionary*** defines the term *'triable'* as, *'subject or liable to judicial examination and trial*'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. See the case of ***Olympic Escort International Co. Ltd. & 2 Others vs Parminder Singh Sandhu & Another [2009] eKLR***.

It was also held in ***Tree Shade Motors Ltd vs DT Dobie & Anor [1995-1998] 1EA 324*** that:-

> ***'Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.'***

**Order 10 rule 11 of the Civil Procedure Rules, 2010** which gives the court unfettered discretion to set aside interlocutory judgment after satisfying the principles as enunciated in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR; Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-88) KAR 1036.**

However it should be noted that it is trite law that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court. The court has to consider factors mentioned above before it exercises its discretion in favour of the applicant.

In **PATEL v E.A. CARGO HANDLING SERVICES LIMITED (1974) E.A. 75**, this Court held as follows:

> ***"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."***

The court has unfettered discretion in cases of setting aside judgments but the same must be done judiciously. There is no explanation of the delay in bringing this application. The defendant admits that she is in occupation and this Judgement was delivered on 29th September 2017 with subsequent orders being granted on 7th November and 29th January 2019. It cannot be possible that she just came to know of the order on 4th July 2019. This explanation is not adding up. Either she is being economical with the truth about service or she does not stay on the suit land as claimed. The application has been brought after more than 2 years.

Ordinarily the court would set aside judgments if the applicant satisfies the court that he or she has a defence with triable issues, whether there would be prejudice to the Plaintiff and the explanation of the delay. The applicant did not offer any explanation for the delay.

I find that this is not a proper case to exercise my discretion in favour of the applicant and therefore the application is dismissed with costs to the plaintiff.

**DATED and DELIVERED at ELDORET this 20TH DAY OF NOVEMBER, 2019.**

**M. A. ODENY**

**JUDGE**

**RULING** read in open court in the presence of Miss.Nyakundi holding brief for Mr.Kirwa for 1st Defendant.

Mr.Mwelem – Court Assistant