



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 27 OF 2017**

**(Formerly Machakos HCCC No. 18 of 2010)**

**VINCENT MBOROGO WAINAINA.....1<sup>ST</sup> PLAINTIFF**

**MARY NYOKABI MBOGORO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**OL KEJUADO COUNTY COUNCIL.....1<sup>ST</sup> DEFENDANT**

**LAND SURVEYOR OL KEJUADO COUNTY COUNCI.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Defendants' Notice of Motion application dated the 23<sup>rd</sup> April, 2018 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 of the Civil Procedure Rules including Article 159 of the Constitution. The Applicants seek leave to file a Statement of Defence and defend the suit on its merits. The Application is premised on the summarized grounds that the Defendants' failure to file the Defence within the prescribed legal timelines was inadvertent and not willful. The inadvertent omission in filing the Defence on time which is regretted was occasioned by the fact that at the first instance, the suit was filed under certificate of urgency before summons to enter appearance were issued and there was a delay by the Plaintiffs' in serving the said summons upon the Defendants' Advocates. After the Court gave directions on filing the Defence, there was an inadvertent error purely on the part of the Defendants' Advocates who forgot to file the said Defence within the timelines given. The Defendants' have a plausible Defence and are willing to pay the Plaintiffs' reasonable throw away costs for any inconvenience or prejudice suffered.

The application is supported by the affidavit of YABESH NYANDORO who is the Advocate acting on behalf of the Defendants' where he reiterates the averments above and explains that on 16<sup>th</sup> February, 2010 they filed a Notice of Appointment of Advocates dated the 15<sup>th</sup> February, 2010. Further, on 26<sup>th</sup> July, 2010 they filed a replying affidavit on behalf of the 1<sup>st</sup> Defendant and a Preliminary Objection on behalf of the 2<sup>nd</sup> Defendant. He confirms filing a further affidavit on 8<sup>th</sup> December, 2010 and parties engaging in efforts to resolve the matters out of Court though the same was not successful. Further, that on 24<sup>th</sup> April, 2017 the Plaintiffs' Advocates filed their written submissions in relation to the Application dated 2<sup>nd</sup> February, 2010 and they filed their written submissions on 13<sup>th</sup> November, 2017 after which the Court delivered its Ruling on 26<sup>th</sup> February, 2018 whereby it declined to grant the orders sought but directed parties to maintain status quo and comply with pre trial procedures within 30 days. He admits that they failed to file the Statement of Defence and the accompanying documents within the 30 days as directed by the Court. He pleads with the Court not to punish the Defendants or visit their mistakes on them in the interests of justice. He reiterates that the Defendants will suffer irreparable loss and prejudice if they are locked out of these proceedings on account of the Advocates' mistakes.

The Plaintiffs opposed the application by filing Grounds of Opposition including Replying affidavit sworn by DAVID ONYANGO who is an Advocate having the conduct of the matter on their behalf. In the Grounds of Opposition the Plaintiffs contend that the application is incompetent as it has been filed eight (8) years from the time the suit commenced and no good reason has been given. They contend that the 1<sup>st</sup> Defendant's statement of Defence contains mere denials, is frivolous, vexatious and bad in law. Further, that the Application is an abuse of the Court process and the Plaintiffs will suffer prejudice if it is allowed. In the replying affidavit the Advocate avers that the Plaintiffs are the registered owners of the suit lands. He insists despite the Court granting pre trial directions on 27<sup>th</sup> February, 2018 the Defendants failed to file their Defences. Further, leave to file Defence out of time was not granted and the Defendants ought to have filed their Defense sometime in 2010 but they failed to do so. He insists the delay of eight (8) years is inexcusable and the Plaintiff will be highly prejudiced which prejudice cannot be compensated by way of damages. Further, that the Defendants and their Advocates have failed to assist court in the expeditious disposal of the suit herein.

Both parties filed their submissions, which I have considered.

**Analysis and Determination**

Upon consideration of the instant Notice of Motion application, parties' affidavits including submissions, the only issue for determination is whether the Defendants should be granted leave to file their Defences out of time.

The Defendants have sought leave to file their Defences out of time and the main reason is that the Advocates representing them inadvertently failed to do so. In their submissions they have relied on the cases of **Philip Chemwolo & Another V Augustine Kubende (1992 – 88) 1KAR 1036 cited in approval in the case of Stephen Ndichu V Monty's Wine and Spirits Limited (20060 eKLR; Giro Commercial Bank Limited V Jasvinder Singh Dhadialla (2005) eKLR; and Njoroge V Prestige Air Services Limited (1991) eKLR** to support their application.

The Plaintiffs opposed the application and submitted that the delay of eight (8) years is inordinate. Further, that the reasons given are not justifiable. They relied on the cases of **Power Plant Engineer Ltd V Business Partners International (2019) eKLR and Benjamin Kipkulei V Shadrack Kamaamia & 7 Others (2019) eKLR** to oppose the application.

Order 7 Rule 1 of the Civil Procedure Rules provides that: ' **Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.**'

#### **While Order**

In the current scenario, the Defendants who had been participating in the proceedings herein by filing their various affidavits in respect to the interlocutory application failed to file their Defences as required by the provisions of Order 7 Rule 1. They have filed the instant application and annexed a Draft Defence which the Plaintiffs insist contains mere denials. On perusal of the said Draft Defence and relying on the case of **Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfuss P at page 76** where it was stated:-

*“... In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.*

I find that the draft defence indeed raises triable issues.

I wish to distinguish the cases the Respondents' have relied on with the case at hand. In the **Benjamin Kipkulei V Shadrack Kamaamia & 7 Others (2019) Eklr case** the Court declined to allow a matter to be reopened for hearing while in the **Power Plant Engineer Ltd V Business Partners International (2019) eKLR case** the Judge declined to set aside the Judgement. In the instant case, I note the matter has not been set down for hearing nor parties' complied with pre trial directions. I opine that whatever prejudice the Plaintiffs will suffer can be compensated by costs. In exercise of my discretion, I find that it would be pertinent if the Applicants were allowed to file their Defence and the matter heard on merits.

The Defendants' Counsel has admitted that this was an inadvertent error on his part which should not be visited upon the Defendants. Article 50 of the Constitution requires party's to be given right to fair hearing while Article 47 provides for access to justice for all.

In the case of  **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, the Court of Appeal held that :

*“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”*

Further in the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** the Court of Appeal observed that in the interests of justice, a party should not be locked out of pursuing its Defence.

In the circumstance, and relying on the Court of Appeal decisions as well as the Constitutional provisions I have cited above, I will allow the instant application and direct the Defendants to file a and serve Statement of Defence within 14 days from the date hereof. I award the Plaintiffs' thrown away costs assessed at Kshs. 15,000/=

**Dated signed and delivered in open court at Kajiado this 5<sup>th</sup> December, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Both parties absent.

Court assistant-Mpoye