REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 57 OF 2017

(FORMERLY NYERI HCCC NO. 62 OF 2012)

KAMAU MWANGI ………………………PLAINTIFF

-VERSUS-

PETER GITHII KAMAU……….........DEFENDANT

RULING

1. By the notice of motion dated **3rd April 2017**, filed under **Order 10 Rule 11** of the Civil Procedure Rules, the defendant, **Peter Githii Kamau** (sued in his capacity as administrator of the estate of Julius Kamau Mwangi) brought this application seeking among other orders, that this court be pleased to set aside the judgment dated 25th October, 2016 and set down the matter for hearing.

2. The application is supported by the affidavit of the applicant sworn on **3rd April, 2017** and is premised on the grounds that the applicant/defendant has never been served with summons to enter appearance or any pleadings in this suit; that the defendant came to learn of the judgment in this suit in February 2017, when a penal notice was affixed on premises situated in Loc 14/Kiru/1965/28; that the defendant has been condemned without been given an opportunity to be heard and is willing and able to defend his suit. The applicant depones that the signature which he allegedly signed on 26th March, 2012 is a forgery and he has lodged a complaint with the police vide OB No. 14/22/03/2017.

3. The application is opposed through grounds of opposition dated **24th May, 2017**. The grounds are that the application is made after an inexplicable delay, it is incompetent and based on bare grounds and is an afterthought and an attempt to deny the respondent the fruits of his judgment.

4. The application was urged before me orally on 31st May, 2017.

5. Counsel for the applicant, **Mr. Kagwe** submitted that the applicant was not served with summons to enter appearance and that the Penal notice although drawn by the respondent, was addressed to Stephen Kihia Kamau, not the applicant. It was his submission, that if the originating summons had been served upon the applicant then the penal notice would also have been served upon him as he and the plaintiff know each other well and are related by blood. He further submitted that there was no delay in filing the instant motion as the applicant only learnt of the judgment in February, 2017 and no prejudice would be suffered by the respondent if the orders sought were granted.

6. In reply, counsel for the respondent submitted that no explanation had been given for the delay in

filing the application which he learnt about in January 2017. On the issue of service, he submitted that it is clear from the affidavit of service sworn on 20th May, 2012 that the applicant was properly served. He stated that although the applicant alleged that his signature was forged, he had not applied to have the process server called for questioning. He further submitted that the two affidavits filed on 6th July, 2012 and 15th March, 2012 are not disputed.

7. In a rejoinder, Mr. Kagwe pointed out that in the latter two affidavits, it is deponed that the applicant refused to sign on the process server's copy.

8. The principles that guide the court in exercise of its discretion for setting aside an exparte judgment was discussed in the case of **James Wanyoike & 2 others v. CMC Motors Group Ltd & 4 others (2015) eKLR** thus:-

> **"…The principles and tests for setting aside an *ex-parte* judgment can be summarized as follows:-**
>
> > **1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *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?"**

9. The above determination was arrived at after surveying the provisions of **Order 10 Rule 11 of the Civil Procedure Rules** which provides that:

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

10. The court also surveyed the following cases among others:-

> a) **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75** at page 76 C and E where the court held as follows:-
>
> '**There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment 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 conditions on itself to fetter the wide discretion given it by the rules.'**
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> The court further held as follows:-
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> '**Where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.**'
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> **b) Shah -vs- Mbogo [1967] EA166** at page 123B where the court stated as follows:-
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> **'this discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to**

obstruct or delay the cause of justice.'

c) **Mohamed & Another –vs- Shoka [1990] KLR 463**, the Court of Appeal held that:-

'**The test for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.'**

d) Tree Shade Motors Ltd -vs- DT Dobie & Anor [1995-1998] 1EA 324 it was held that:-

'Even if service of summons in valid, the judgment will be set aside if defence raises triable issue. 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.'

e) **Sebei District Administration -vs- Gasyali & Others (1968) E.A. 300** the Judge stated as follows:-

"**In my view the court should not solely concentrate on the poverty of the applicant's excuse for not entering appearance or filing a defence within the prescribed time. 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 I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."**

11. It is common ground that this court has unfettered, unlimited and unrestricted jurisdiction to set aside the *ex-parte* judgment hereto. The only rider in exercise of that jurisdiction is that it should be exercised to do justice to the parties and not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

12. In the circumstances of this case, the applicant alleges that he has never been served with any pleadings relating to this case and only learnt of the existence of the suit when a penal notice was affixed on the premises in the suit property. He deposes that he is still keen to have the case re-opened for hearing on its merits.

13. The respondent on the other hand opposes the application on the grounds that there was unexplained delay in filing the application and that the said application is an attempt to deny the respondent fruits of his judgment, thus undeserving of the discretion of the court. In his oral submissions, his counsel stated that although the applicant alleged that his signature had been forged, he had not applied to have the process server called for questioning.

14. The sole issue for determination is whether the defendant/applicant has made up a case for being granted the orders sought.

15. Applying the tests for setting aside an exparte judgment enumerated in the cases cited above, to the circumstances of this case, I am inclined to exercise my discretion in favour of the defendant for the following reasons;

The applicant has annexed a draft replying affidavit sworn on 3rd April, 2017 which raises triable issues that should go to trial for adjudication. Secondly, the application was filed on 4th April, 2017 after the applicant learnt of the penal notice in February, 2017. In my view the delay of two months cannot be said to be excessive. An explanation has also been given for the delay which I find reasonable. Thirdly, the

summons to enter appearance bear a signature which is said to belong to the applicant. This signature has been challenged and the applicant states that he has reported the matter to the police and been given O.B number 14/22/03/2017 (although he has not annexed any evidence to this effect).

16. Under the circumstances, I find and hold that the applicant has made up a case for setting aside the Judgment made on 25th October, 2016 and any other consequential others made pursuant to that judgment.

17. Accordingly, I grant prayer (d) in the notice of motion and direct the defendant to file and pay the requisite fee for the replying affidavit within 30 days of delivery of this ruling failing which the orders granted will lapse.

18. Costs will be in the cause.

Dated, signed and delivered at Nyeri this 3rd day of January, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendant

Court assistant - Esther