



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 74 OF 2016

THOMAS MANTHI MWANIAPLAINTIFF

VERSUS

MWELU MARTIN KITHUKUDEFENDANT

RULING

1. In the Application dated 2nd August, 2017, the Defendant is seeking for the following orders:

a. That the Honourable Court to set aside the Ex-parte Judgment herein.

b. The court do allow the Defendant to defend the matter herein.

c. Costs be paid by the Defendant/Applicant.

2. The Application is supported by the Affidavit of the Defendant who has deponed that this matter proceeded for hearing on 29th March, 2017 in his absence and in the absence of his advocate due to an inadvertent mistake on the part of his advocate.

3. According to the Defendant, his advocate thought the matter was coming up for mention; that he sent his clerk to file a Defence and that the mistake of his advocate should not be visited on him.

4. In response, the Plaintiff deponed that the Defendant failed to file a Defence on time; that the hearing date of 8th February, 2017 was taken with the knowledge of the Defendant's advocate and that in any event the draft Defence is a sham because it relates to Plot No. 20B which is the subject in Kithimani Principal Magistrates Civil Case No. 100 of 2011.

5. Although the Plaintiff's advocate filed submissions, the Defendant's/ Appellant's advocate did not file any submissions.

6. The Plaintiff's counsel submitted that the failure by the Defendant to attend court was not accidental and is not excusable; that in any event, the documents the Defendant is seeking to rely are in respect to Plot No. 20B and not Plot No. 20 and that he does not have a Defence that raises triable issues.

7. The Defendant has not denied that he was served with the Summons to Enter Appearance and the Plaintiff. Indeed, the Defendant instructed the firm of J.T. Nzioki and Company advocates which filed a Memorandum of Appearance on his behalf on 21st September, 2016. However, he says his advocates never filed a Defence within the requisite period of fourteen (14) days from the date of filing the Memorandum of Appearance.

8. The record shows that the matter was fixed for hearing for 8th February, 2017 on which date the Defendant's advocate sent a colleague to hold his brief.
9. On the said date, the court was informed that the Defendant's advocate was indisposed. Nothing was said about the non-filing of the Defence.
10. The court then fixed the matter for hearing on 29th March, 2017 on which date the Defendant's counsel again sent a colleague to hold his brief and prayed for an adjournment. Again, no reason was given as to why a Defence had not been filed.
11. The court proceeded with the hearing on the said date and delivered its Judgment on 30th June, 2017.
12. I have gone through the Defendant's Application and I have not come across a single reason as to why the Defence was not filed within the requisite time.
13. Although the Defendant has annexed a document showing that he is entitled to Plot No. 20B, he has not denied that the issue in respect to Plot No. 20B was determined with finality in Kithimani PMCC No. 100 of 2011 vide a Judgment dated 24th April, 2014.
14. I have also read the draft Defence annexed on the Affidavit and the same is a mere denial. It does not raise any triable issue.
15. In the circumstances, I find the Notice of Motion dated 2nd August, 2017 to be unmeritorious and I dismiss it with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF FEBRUARY, 2018.

O.A. ANGOTE

JUDGE