REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT AT MAKUENI

ELC NO. 151 OF 2017

FORMERLY MACHAKOS 59 OF 2012

JOSEPH MWANGANGI MUUNDA ---------- PLAINTIFF/RESPONDENT

VERSUS

STEPHEN NDOO MUINDI ----------1ST DEFENDANT/APPLICANT

ANNA MUINDI MUTHAMO ----------2ND DEFENDANT/APPLICANT

RULING

1) There is before me a notice of motion application expressed to be brought under order 10 Rules 9 and 11 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act for orders:-

1. That the interlocutory judgement entered herein against the Defendants be set aside.

2. That this honourable court be pleased to give directions regarding the hearing of this suit.

3. That cost of this application be provided for.

2) The application is predicated on the grounds on its face and is supported by the affidavit of Stephen Ndoo Muindi, the first defendant/applicant, sworn on the 28th June, 2013 and is opposed by the replying affidavit of Joseph Mwangangi Muunda, the plaintiff/applicant. The same was sworn on the 8th October, 2013 and was filed in court on the 23rd October, 2013.

3) By the time of writing this ruling, only the respondents had filed their submissions. Their submissions were that the principles of setting aside interlocutory judgement are well settled. The respondent's counsel referred the court to the case of ***Mwalia Vs Kenya Bureau of Standards [2001] EA at page155*** where Ringera J as he then stated thus;

> ***"I think it is now convenient to state the law applicable to applications to set aside judgment in default of appearance of defence. It is indisputable that the discretion of the court is unfettered except that if the judgement is set aside it must be done on terms that are just. That is what order IXA Rule 10 itself ordains. It reads: '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'"***

4) The counsel further referred the court to the case of ***Patel Vs EA Cargo Handling Service***

[1974]EA 75 where Duffus P held as follows;

> ***"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 to it by the rules. I agree that where it 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, 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."***

5) The counsel went on to state that the aforementioned case was cited with approval in ***Jackson Biegon Vs Charles Too and 3 others [2005] eKLR*** and submitted that the applicant's counsel is not properly on record and as such lacks locus to bring this application. The counsel pointed out that the advocate who is on record is M/S Mwania Mbithi & Company Advocates and that there was no notice of change of advocates. The counsel cited order 9 rule 7 of the Civil Procedure Rules which provide the procedure of change of advocate in instance where judgement has been passed. The counsel submitted that the applicant's counsel having failed to seek court's leave to come on record, the application herein is incompetent and ought to be dismissed.

6) Having read the application, the supporting and the replying affidavits, I am of the view that the issue for determination is whether or not the orders ought in the application should be granted. At the outset, I wish to state that I fully associate myself with the holdings in the authorities that were referred to me by the respondent's counsel.The respondent's contends that the application is incompetent since there is a judgement that has been passed. From the record herein, Mwania Mbithi and Company Advocates are on record for the applicant having obtained leave on the 20th March, 2013. On the 28th May, 2013 Mwania Mbithi's law firm was granted 30 days within which to file the application to set aside the Exparte judgement.

7) On the 24th May, 2013 R.A Onchuru and Company Advocates filed a notice of change of Advocate the same being dated the 23rd May, 2013. This was followed by the application herein. Taking into consideration that the Exparte judgement was yet to be set aside, it was incumbent upon R.A Onchuru & Co. Advocates to seek court's leave to come on record before filing the application as was correctly submitted by the respondents' counsel. I am mindful of the provisions of Article 159(2) (d) of the Constitution that requires justice shall be administered without undue regard to procedural technicalities but in my view, to ignore procedure herein would amount to assisting the applicant who is out to delay the course of justice (*see Shah Vs Mbogo [1967] EA 116)*

8) In a nutshell, I am in agreement with the respondents' counsel that the application lacks merit and in the circumstances, the prayers sought cannot be granted. I hereby proceed to dismiss it with costs to the respondent**.**

Dated, signed and delivered at Makueni **on** 19th **Day of** February, **2018.**

MBOGO C.G

JUDGE

In the presence of;

Ms. Kyalo holding brief for Mr. Mulei for the plaintiff/Respondent

R.A Ochuru & Co. Advocates for the Defendants Absent

1st Defendant present

Mr. Kwemboi Court Assistant

MBOGO C.G

JUDGE

19/2/2018