REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 86 OF 2016

SHEICH MOHAMED ALI & 4 OTHERS…….PLAINTIFFS

-VS-

HAMIO MOHAMED ABDULKADIR ……..……...DEFENDANT

RULING

1. By a Notice of Motion dated 28th April, 2017 made under Section 1A, 1B and 63 of the Civil Procedure Act, Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules, the Defendant seeks orders:

1. Spent

2. That pending the hearing of this Application inter-partes there be a stay of execution of the judgment and decree therefrom and all other consequential orders arising from the ex-parte judgment entered against the Defendant/Applicant herein on 10ht April, 2017.

3. That upon inter partes herein Honourable Court be pleased to set aside ex-parte judgment entered herein on 10th April 2010 (sic) against the Defendant and the Defendant be allowed to unconditionally prosecute and be heard in his defence to the Plaintiffs claim in this Suit.

4. Any other further order as the Court may deem fit and just to grant in the circumstances.

5. That costs of this application be provided for.

2. The Application is based on the grounds set out on the face of the motion namely:

i. The Defendant/Applicant was not aware and did not have any knowledge that this (sic) had been fixed for hearing on 20th February 2017.

ii. The hearing date had been taken ex-parte in ELC Civil Case No.86 of 2016 which suit the Defendant was not aware of.

iii. The Suit filed and whose summons had been served upon the Defendant was Mombasa HCC Case No.74 of 2015 where the Defendant had duly entered appearance and filed and served defence.

iv. The Defendant was not notified or in any other manner made aware that Mombasa HCC Case Number 74 of 2015 where he was named as the Defendant had been altered and changed

from the Court it had been filed to a different court where it was assigned a new case number being ELC Case No.86 of 2016.

v. That confusion, mistake and errors arose from the alteration and change of the case numbers and the Defendant's failure to attend Court at the hearing on 20th February 2017 is excusable and pardonable mistake and/or omission.

vi. The Defendant defence filed herein disclose triable issues with a high chance of success to be canvassed in the interest of justice and the right to be heard in defence.

3. The Application is further supported by the grounds contained in the Supporting Affidavit of Hamid Mohamed Abdulkadir, the Defendant sworn on 28th April 2017 in which he reiterates the grounds in support of the Application. In addition, the defendant deposes inter alia that the matter was on several occasions fixed for pre-trial directions ex parte by the Plaintiff without prior invitation to the Defendant's Advocates and with no Notice served. That on 14th July 2016 the Suit, **Mombasa HCCC NO.74 of 2015**, was before Court for pre-trial hearing when the Court ordered the Defendant to comply with pre-trials within 45 days but the order which was extracted and served was in **ELC Case No.86 of 2016** which the Defendant states he was not aware of. The Defendant further deposes that on 27th October 2016 the Plaintiff invited the Defendant's Advocate to attend Court on 27th October 2016 and fixed **Mombasa ELC Case No.86 of 2016** for hearing on 20th February 2017 ex-parte and served a hearing notice which was received by the Defendant's Advocates secretary without prejudice as **Mombasa ELC No.86 of 2016** was unknown to them. That on 20th February 2017 when this Suit came before Court for hearing both the Defendant and his Advocates were absent by reason of not being aware or having prior knowledge of the existence of **Mombasa ELC Case No.86 of 2016**. The Defendant deposes further that the Plaintiff served judgment notice on his Advocates and when his Advocate attended Court on 10th April 2017, he discovered that **Mombasa HCC Case NO.74 of 2015** had been altered and changed to **Mombasa ELC Case No.86 of 2016** without any notice or prior notice or information served upon him or his Advocates.

4. The Application is opposed by the Plaintiffs through a Replying Affidavit sworn by Sheika Mohamend Ali on 9th May 2017. Briefly, the Plaintiffs aver that the Defendant was given a fair opportunity to be heard as mandated by the law and the case was duly conducted legally and fairly. That the Defendant's Advocate was duly invited and served with notices but failed to attend Court. The Plaintiffs aver that the Defendant has all along acted in a non-diligent and negligent manner ever before the case was transferred to this Court and therefore cannot place the blame on the change of case numbers and only became active after judgment had been delivered. The Plaintiffs urged the Court to dismiss the Application or in the alternative allow it on condition that the Defendant deposits the sum of Kshs.1,209,500 awarded in the judgment as mesne profits or part thereof as security to defend the suit.

5. Both Advocates filed Written Submissions in support of their opposing positions and also made oral submissions to highlight the same. Mr. Asige Counsel for the Applicant submitted that the discretionary jurisdiction vested in the Court in an Application to set aside ex-parte judgment is unfettered and is intended to avoid injustice and/or hardship resulting from accident or inadvertence or excusable mistake or error on the part of the Applicant. He relied on the case of **Patel – v- E.A. Cargo Handling Services Ltd (1974)EA 75**. He stated that confusion and misunderstanding arose from the change of the case numbers as the suit was initially filed in the High Court as **HCCC No.74 of 2015** but was later transferred to this Court and given a new number being **ELC Case No.86 of 2016.** He further submitted that the defence on record raises triable issues. Counsel for the Plaintiffs, Mrs. Ali on her part cited the case of **Wachira Karani –v- Bildad Wachira (2016)eKLR** and stated that although the Court's discretion can be exercised in order to avoid injustice or hardship, she submitted that it is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. She reiterated that the Applicant though always served failed to attend court even before the case was transferred and given a new number.

6. I have considered the Application and the submissions made as well as the authorities cited. The Court

has a very wide discretion and there are no limits and restrictions on the discretion of the Court except that if the judgment is set aside or varied it must be done on terms that are just. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship, inadvertence or excusable mistake or error but is not designed to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (see **Shah –v- Mbogo & Another (1967) EA 116 at page 123 by Harris J** and as approved by the Court of Appeal for East Africa in **Mbogo –v- Shah (1968) EA 93).**

In **Patel –v- E.A Cargo Handling Services Ltd (1974)EA 75** at page 76, Sir William Duffus P held:

> **"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. I agree that where is 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 merit. 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".**

7. Besides the above considerations, the reason for failure to attend court should also be considered. In this regard, the Applicant is required to satisfy to the court that he had a good and sufficient cause. In this case, the fact that setting aside is a discretion of the court is not disputed. What is in dispute is whether the Applicant has demonstrated sufficient cause to warrant the exercise of the Court's discretion in his favour. In trying to define the meaning of the phrase "*sufficient cause*", Mativo, J in **Wachira Karani –v- Bildad Wachira (2016)eKLR** cited the Supreme Court of India in the case of **Parimal –vs – Veena,** where the Court observed that *".sufficient cause "* means that a party had no acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or remaining *"inactive"*. The court added that "the test to be applied is whether the Defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficed cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstance in the case at hand. There cannot be a straight-jacket formula of universal Application". Thus the Defendant must demonstrate that he was prevented from attending Court by a sufficient Cause".

8. The Applicant has stated that he did not attend Court because of the confusion arising out of the transfer of the case from the High Court to this Court and the subsequent allocation of a new number. It is the Defendant's contention that notices bearing **Mombasa ELC Case No. 86 of 2016** were received on without prejudice basis because they were not aware or had no prior knowledge of the existence of such a case. I have looked at the notices and letters served upon the Defendant's Advocates when the case was still **Mombasa HCCC No.74 of 2015.** I note that the same were received on a without prejudice basis just as in the subsequent notices issued and served in **ELC Case No.86 of 2016**. The notices served on the Defendant's Advocates whether in **HCCC No 74 of 2015** or in **ELC Case No. 86 of 2016** all bear the same stamp and the remarks "*received without prejudice*". The Replying Affidavit and the record shows that the Defendant's Advocates were served in **HCCC No.74 of 2015**; Letter of Invitation dated 12th September 2015 asking them to send their representative to the Court registry on 16th September 2015 with a view to fix a suitable date for pre- trial; pre-trial notice for a pre-trial hearing on 27th October 2015; letter of invitation dated 22nd January 2016; pre- trial notice for a pre-trial hearing on 19th April 2016. Curiously, all these documents were, upon service, "*received without prejudice"*. *T*he same remarks were also made in the letter of invitation received on 25th October 2016 and the hearing notice dated 2nd November 2016, both in new case number, **ELC Case No.86 of 2016**. The Defendant argues that the documents in respect to **ELC Case No.86 of 2016** were received on a without prejudice basis because they related to a suit which was unknown to them. How comes that the same remarks, "*received without prejudice*" were made in respect to documents relating **to HCCC No. 74 of 2015** which was known to the Defendant and his Advocates?" The Applicant has in my view not given a candid and frank explanation as to why the advocate or the Defendant did not attend Court. It is clear from the notices

served on the Defendant that even before the case was transferred and assigned a new number, the Defendant was not keen to attend Court despite service. The notices served and acknowledged have not been disputed by the Defendant or his Advocate. I find the reason offered to be unreasonable and inexcusable. I hold the view that it would be unjust and indeed a miscarriage of justice to set aside the judgment based on a misleading statement. I find that exercising my discretion to set aside the ex-parte judgment based on what is not factually correct is to assist a person who deliberately seeks to obstruct or delay the course of justice. It would not be proper use of such discretion. I agree with the Plaintiffs submission that the Defendant has only come to court now that he consequences of his constant non-attendance has caught up with him.

9. In the Plaint dated 4th June 2015, the Plaintiffs have sued the Defendant for vacant possession of the suit premises. They also claim rent arrears from 1997 until May 2015 and mesne profits form 1st June 2015 until vacant possession of the Suit Premises is obtained. In the defence filed, the Defendant does not deny that the Plaintiffs were the registered proprietors of the Suit Property. The Defendant however avers that the Suit Property ceased to exist upon sub-division and further avers that he has paid rent totaling Kshs.500,307.00 to the Plaintiffs or their agents and denies being in arrears. In the affidavit in support of the Application, the Defendant has not shown any evidence of payment of the outstanding rent arrears, save for a sum of Kshs.79,500. Although the Defendant now takes an issue about limitation, I note that the same was not raised in the defence and is an afterthought. In my view, the defence raises no bona fide reasonable triable issues and is otherwise a sham and cannot therefore form the basis for setting aside the ex-parte judgment herein.

10. In conclusion, I find that this is not a proper case for this Court to exercise its discretion in favour of the Applicant. Accordingly, the notice of Motion dated 28th April 2017 is hereby dismissed with costs.

Delivered, signed and dated at Mombasa this 6th February, 2018.

C. YANO

JUDGE