



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 207 OF 2013

ASHBURTON GROVE LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

BRUCE MUTIE T/A DIANI

BUSINESS CENTRE.....1ST DEFENDANT/RESPONDENT

THE BUSINESS PREMISES

RENT TRIBUNAL.....2ND DEFENDANT/RESPONDENT

RULING

1. The notice of motion dated 5.6.2017 brought by the plaintiff/Applicant seeking for orders:

a) Spent

b) Default judgment endorsed by the Deputy Registrar as against the plaintiff on a Counter Claim within a statement of defence purportedly filed by the 1st Defendant in Court on 27.9.2013 and said to have been served upon the Plaintiff/Defendant by Counter Claim's advocates M/s Kinyua Muyaa & Co. Advocates on the same date be set aside as of right.

c) The Counter Claim be struck out with costs and if it is not struck out the Applicant be properly served and then be granted leave to defend the Counter Claim.

d) In the meantime pending the hearing of this application interpartes further proceedings be stayed and the main hearing set for 6.6.2017 be differed to await the outcome of this application.

e) The 1st Defendant/Plaintiff by Counter Claim be ordered to avail the process server Gordon Odhiambo care of Post Office Box Number 41683 – 80100, Mombasa on the basis of whose affidavit default judgment was endorsed as against the Plaintiff/Defendant by Counter Claim in Court on an early date to be allocated by the Court for cross examination by M/s Kinyua Muyaa & Co. Advocates on the allegations made on oath in his affidavit said to have been sworn on 18.4.2017 and filed in Court on 24.4.2017.

f. Costs of this application be borne by the Defendant/Plaintiff by Counter Claim and/or his process server.

2. The application is premised on the grounds on the face of it and the affidavit of the applicant. The application is opposed by the replying affidavit of Bruce Mutie Mutuku who is the 1st defendant.

3. The parties filed written submissions in arguing the application which I have read and considered. This is a simple application seeking to set aside interlocutory judgement entered against the plaintiff on 22.5.2017 for failing to file a defence to the Counter-Claim within the prescribed time.

4. The 1st defendant avers that the plaintiff was duly served with their pleadings. The plaintiff on her part denies the defence & Counter – Claim was either filed as there is no Court receipt in the Court file to show proof of payment nor were they served. At the same time this

application was brought, no hearing has taken place. The 1st defendant cannot therefore say he has been diligent in prosecuting this matter. The record does show that neither party had complied fully with the requirements of Order 11 of the Civil Procedure Rules or taken steps in listing this matter for pre-trial directions. The hearing date of 6th June 2017 in my opinion was therefore prematurely fixed.

5. Given the early stages that this matter is at and the subsequent application dated 5.10.2017 on record made by the 1st defendant seeking to amend their defence and also file their witnesses' statements and documents; it is only proper for interlocutory judgement be set aside under the provisions of Order 10 rule 11 and under exercise of this Court's discretion. This will enable the parties herein to file their respective responses to the pleadings and documents so that the matter is only listed for hearing after all steps have been complied with.

6. Consequently, I shall allow the application in terms of prayer (b) of the motion. I also give directions in terms of prayer (c) in view of the fact that the plaintiff has already seen a copy of the defence and counter-claim, they are given 14 days from the date of this ruling to file their defence if any interlocutory. Prayer (d) and (e) of the motion are overtaken by events since the interlocutory judgement has been set aside. The costs of the motion is ordered in the cause.

Dated, signed & delivered at Mombasa this 16th March 2018

A. OMOLLO

JUDGE