



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 47 OF 2014**

**ALI MWADUNA ..... PLAINTIFF**

**VERSUS**

**MASHA MUKADHA ..... DEFENDANT**

**RULING**

1. By an application dated 26<sup>th</sup> March 2015 and filed herein on 2<sup>nd</sup> April 2015, Masha Mkadha, the Defendant herein prays for Orders:-

**1. Spent**

**2. Spent**

**3. That the *exparte* proceedings of the 11<sup>th</sup> day of September 2014 by the Plaintiff and all consequential orders be stayed pending the hearing and determination of this suit.**

**4. That the defendant be granted leave to file his defence and counterclaim out of time.**

**5. That the Court be pleased to re-open the case and the defendant be allowed to cross-examine the Plaintiff and the defence case be re-opened.**

**6. That the costs of the (application) be provided.**

2. The application is premised on the grounds inter alia, that:-

**a) The Judgment herein emanates from *exparte* proceedings.**

**b) That the defendant was never served with summons to enter appearance and/or the Plaintiff.**

**c) That the Plaintiff misled the Court that the summons were served.**

**d) That the defendant has an arguable and candid defence.**

**e) The Plaintiff has commenced the process of execution and the defendant stands to suffer irreparable loss and damage.**

**f) That the suit property is the only home for the defendant who is old and disabled.**

3. By a Replying Affidavit sworn on 28<sup>th</sup> May 2015, Ali Mwaduna, the Plaintiff herein strenuously opposes the Defendant's application. It is the Plaintiff's case that the Defendant was properly served and the Court was satisfied with the Service before allowing the Plaintiff to proceed *exparte* with the case.

4. The Plaintiff further avers that the application has been overtaken by events as the decree was already executed and there is therefore nothing for the Court to stay.

5. I have considered the application and the response thereto. I have equally considered the submissions filed herein by the Learned

Advocates for the parties.

6. Order 10 Rule 11 of the Civil Procedure Rules provides that:-

***“Where Judgment has been entered under the Order, this Court may set aside or vary such Judgment and any consequential decree or Order upon such terms as are just.”***

7. In *Patel –vs- EA Cargo Handling Services Ltd(1974)EA 75*, the Court stated that:-

***“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.”***

8. However in *Shah –vs- Mbogo (1967) EA 166*, the Court observed that:-

***“.....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.”***

9. From the material placed before me, I note that the Plaintiff is said to be an 80 years old man who is said to be blind and disabled. He still resides in the suit premises even though there was some partial execution of the decree that was issued herein. I have equally perused the Affidavits of Service filed by the Plaintiff in support of the Service of Summons. I think there is a possibility that the Defendant was not served and/or that given his condition, he did not fully comprehend the tenor and purport of the documents he was served with.

10. I have also carefully perused the draft defence annexed to the application and I am equally of the view that it does raise some triable issue. In the circumstances, I think it would be in the interest of justice that the proceedings herein be re-opened and that the Defendant is given a hearing.

11. Accordingly, I will allow the application in terms of Prayers 3, 4 and 5 thereof. The Defendant should accordingly file his Defence within 14 days from today.

12. Given that the Plaintiff must have incurred expenses in execution of the decree the Defendant is hereby condemned to pay the sum of Kshs 30,000/- as thrown away costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of May, 2018.**

**J.O. OLOLA**

**JUDGE**