



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 200 OF 2015**

**MARY MUNYAO NZEKI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SCHOU FINN OLE.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination is dated 9<sup>th</sup> April 2017 and brought under the provisions of Order 12 & 51 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act. The Plaintiff/Applicant is seeking for orders:-

**1. That this Honourable Court be pleased to set aside Ruling/Order made herein on the 20<sup>th</sup> April, 2017 requiring the rent collected from L.R KWALE/UKUNDA/4377 be paid to the Defendant/Respondent.**

**3. That the costs of this Application be provided for.**

2. The application is based on the grounds listed on its face and mainly that the Defendant/Respondent obtained the orders sought to be set aside by concealing material facts to the Court. Secondly that when the orders were issued, the plaintiff's suit was no longer in existence as it had been withdrawn on 18<sup>th</sup> February 2016. The application is supported by the affidavit of Mary Munyao in which she annexed the order withdrawing the suit as **MMO – 3**.

3. The application is opposed by the Defendant/Respondent (now referred to as plaintiff) via his replying affidavit sworn on 21<sup>st</sup> August 2017 by himself. The Respondent avers that the application is proceeding on the false and misleading premise that there was no statement of defence & counter-claim filed at the time the suit was withdrawn. The Respondent deposes that he filed his defence and counter-claim on 9<sup>th</sup> December 2015 and served the Applicant on 17<sup>th</sup> February 2016 upon the applicant's erstwhile advocates. In support of this averment, the Respondent annexed copies of the defence and affidavit of service as **FSO – 1 & 2** respectively. The Respondent also deposed that the applicant has not offered any substantive reason why she did not attend Court on 20<sup>th</sup> April 2017 when the impugned orders were granted. The Respondent therefore urges the Court to dismiss the present application for lacking merit with costs to him.

4. The advocates were given time to file their written submissions. None was filed. The Court will thus determine the application based on the pleadings before it. Setting aside of orders granted ex parte is a discretionary exercise which serves the purpose of ensuring that no injustice is occasioned to the affected party while the Court takes into account that the setting aside is not used as a delaying tactic or a way for obstructing the cause of justice. These principles to be considered whether or not to grant setting aside orders were enumerated in the case of **Shah vs Mbogo (1967) E A 116 and Municipal Council of Meru vs National Housing Corporation & 54 others**. In the latter case, the Court held that; **"in exercising discretion, the Court usually considers the reason if any given for default and the merits or otherwise of the case against whom the judgement was entered but is not limited only to those considerations."**

5. In the instant application, the applicant pleaded that the matter proceeded in their absence on 20<sup>th</sup> April 2017 and orders affecting them were issued. The orders issued on 20<sup>th</sup> 2017 were in the following terms,

**"1. That pending the hearing and determination of this suit, all the rents collected by the 1<sup>st</sup> & 2<sup>nd</sup> defendants from the tenants occupying the suit property known as Kwale/Ukunda 4377 is hereby ordered to be paid to the applicant.**

**2. That the defendants be and are hereby restrained from selling and or disposing the suit property pending determination of the suit.**

**3. Costs be in the cause."**

6. The applicant before this Court does not deny being aware that the application dated 5.4.2017 was served upon them and that the same was fixed for hearing. The only reason given why her advocate did not attend Court because the application was received “***under protest as their advocate Mr Mogaka was away.***” The engagement keeping the advocate from filing a response to the application from the 12<sup>th</sup> April – 20<sup>th</sup> April when they were served and for not attending Court is not disclosed. Yet the applicant wishes the Court to exercise discretion in her favour.

7. Secondly the Applicant wants the orders set aside because as at 5<sup>th</sup> April when the application was filed, there was no suit. It is not in dispute that the plaintiff withdrew her suit vide the notice filed on 18<sup>th</sup> February 2016. However as at the time of withdrawing her suit, the defendant had filed a memo of appearance on 16<sup>th</sup> September 2015 and a defence and counter-claim on 10<sup>th</sup> December 2015. As per the affidavit of service on record of Tadayo Muyala annexed as ***FSO – 2*** and dated 11<sup>th</sup> March 2016, the defence and counter-claim was served on Musyoki Mogaka & Co Advocates on 17<sup>th</sup> February 2016. There is a receiving stamp of the said advocates signing the pleadings were received by Kemosi on 17.2.2016. Consequently if the plaintiff withdrew her claim against the defendant the following day (18.2.2016), there remained and on record the defendant’s claim as contained in the counter-claim. It is thus not correct for the Applicant to plead that there was no suit existing and hence the orders ought not to have been granted.

8. The defendant must have been alive to the withdrawal of the plaintiff’s claim when he filed his application dated 5<sup>th</sup> April 2017. This is deductible in the heading of that application which presented himself as the plaintiff and the previous plaintiff as the 1<sup>st</sup> defendant alongside two other defendants. Given the scenario where the defendant’s claim was and still is subsisting, the Applicant’s accusations of concealing material facts to the Court have no basis.

9. In conclusion, the present application has not offered any viable reason and or facts upon which the Court can exercise its discretion to set aside the orders of 20<sup>th</sup> April 2017. Since the orders are temporary in nature, the Applicant still has liberty to defend the Respondent’s suit thus no injustice will be occasioned to her. Accordingly, I find no merit in her application dated 9.4.2017 and filed in Court on 10<sup>th</sup> May 2017. The same is hereby dismissed with costs to the Respondent.

**Dated, signed & delivered on 25<sup>th</sup> May 2018**

**A. OMOLLO**

**JUDGE**