



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 253 OF 2012**

**KEIYO TEACHERS CO-OPERATIVE**

**SAVINGS AND CREDIT SOCIETY.....PLAINTIFF/APPLICANT**

**VERSUS**

**ANDREW OJAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DISHON NDIMULI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HOSEA BETT.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**KENNEDY TOMNO.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**HON. COMMISSIONER OF PRISONS.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE BOARD OF TRUSTEE, NATIONAL**

**SOCIAL SECURITY FUND.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**MOI TEACHING & REFERRAL HOSPITAL...8<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The application before court is dated 22.12.2017 wherein the applicant seeks the ex-parte judgment entered against the 7<sup>th</sup> defendant be set aside and that the 7<sup>th</sup> defendant be granted leave on such condition as the court deems fit and the applicant to be given leave to file defence out of time. The application is based on grounds that the 7<sup>th</sup> defendant was not served with the amended plaint and that the 7<sup>th</sup> defendant has a good defence and that it is only fair that the 7<sup>th</sup> defendant be allowed to file defence out of time.

The application is based on the affidavit of Austin Ouko who states that he is the acting General Manager Corporate affairs and company secretary of the 7<sup>th</sup> defendant herein. That the plaintiff served the 7<sup>th</sup> defendant with a petition being Eldoret Environment and Land Court Petition number 9 of 2017 where the seventh Defendant is sued as the second Respondent. That upon perusal of the petition, he noticed that there is another matter pending in court being this particular case. The 7<sup>th</sup> respondent then instructed its advocates M/s Kitiwa and Company Advocates to peruse the court file in this matter and advise it accordingly. That upon perusal of the court file, their aforesaid Advocate noted that the seventh Defendant was enjoined in this suit by way of an amended plaint. The 7<sup>th</sup> defendant herein has never been served with the aforesaid amended plaint or any other pleadings herein or at all.

The deponent deposes that if the 7<sup>th</sup> defendant had been served with the amended plaint, it could have filed its defence within the prescribed time. The 7<sup>th</sup> defendant has a good defence that raises triable issues as evidenced in the annexed statement of defence marked AO 1 and that the 7<sup>th</sup> defendant's failure to file a defence herein was not intentional but due to the fact that it has never been served with any pleadings herein and considering that this is a land matter involving a big sum of money, it is only fair and in the interest of natural justice that the 7<sup>th</sup> defendant be allowed to file a defence herein out of time and that the ex-parte proceedings herein be set aside and this matter be heard and

determined on merit.

The applicant believes that this application has been filed timeously and in utmost good faith and that it is only when the orders sought are granted that this Honourable court will be able to understand all the transactions herein and arrive at a just decision. The plaintiff will not suffer any prejudice if the orders sought are granted.

The plaintiff on his part filed a replying affidavit through Mr. Joseph C. K. Cheptarus who states that on 12.3.2018 and 13.3.2018, he received instructions from the plaintiff/applicant to respond to and oppose the 7<sup>th</sup> defendant's/applicant's Notice of Motion under certificate of urgency dated and filed on 22.12.2017 that was served on the plaintiff/applicant in January, 2018.

The plaintiff has read and understood the said Notice of Motion and the supporting affidavit of AUSTIN OUKO dated and filed on 22.12.2017 and that in response to paragraph 1,2,3,4,5,6,7,8,9,10,11,12,13,14 of and the said supporting affidavit dated 22.12.2017, the plaintiff states that the 7<sup>th</sup> defendant was served with the Eldoret E & L Petition No. 9 of 2017 as alleged in paragraph 1 and 2 of the supporting affidavit. On 10.9.2014, however, the plaintiff through a court process server served the 7<sup>th</sup> defendant with this suit and filed the affidavit of service and requested for Judgement in this suit.

The 7<sup>th</sup> defendant/applicant was served with this suit contrary to the allegations contained in paragraph 3,4,5,6,7,8,9 of and the supporting affidavit on notice, instructions to lawyer, perusal of court file, service and defence in this suit. This suit was filed in 2006 before the 7<sup>th</sup> defendant/applicant was on 22.2.2011 enjoined in the suit.

It is admitted that this is a land matter involving a big sum of money but the interests of fairness and natural justice do not favour the 7<sup>th</sup> defendant/applicant who seeks to file a defence out of time, set aside ex parte proceedings, get a hearing on merits, to be believed that the application is in good faith and/or that there shall be no prejudice if the orders sought are granted as alleged in paragraph 10, 11, 12, 13, 14 of the said supporting affidavit.

The 8<sup>th</sup> defendant filed grounds of opposition to the effect that the 7<sup>th</sup> defendant's application is frivolous, vexatious, devoid of merit and an abuse of the court's process.

The 7<sup>th</sup> defendant has no tenable defence to the plaint as per the annexed statement of defence. The application lacks merit and it should be dismissed with costs as no plausible explanation has been given as to why the application is brought belatedly in the proceedings.

The 7<sup>th</sup> defendant has had an ample opportunity to present its application in court and the application is as such an outright afterthought and brought after undue delay to frustrate, delay and compromise the rights of the parties herein. The 7<sup>th</sup> defendant will suffer no prejudice if the application is not allowed as it can always recover damages and the purchase price it paid to the persons who sold the suit parcels to it should the interlocutory judgment not be set aside. The other parties stand to suffer irreparable prejudice should the application be allowed as they have already given a substantial part of their testimony in court and the pleadings relied on by the other parties were closed years ago. The orders sought by the 7<sup>th</sup> defendant is untenable and shall occasion great injustice to the defendants should the application be allowed.

I have considered the application by the 7<sup>th</sup> respondent and do find that the applicant was served with the summons to enter appearance on the 10.9.2014. The letter dated 8.9.2014, served on 10.9.2014 reads;

***“We act for the plaintiff and hereby forward the amended plaint dated 23.2.2011 and filed on 28.2.2011 in which you are the 7<sup>th</sup> defendant and which we hereby serve upon you accordingly.*”**

***TAKE FURTHER NOTICE that this matter was on 21.3.2014 fixed down for mention on the 22.9.2014 at 9.00 O'clock in the forenoon or soon thereafter on which date you, are as one of the defendants, are required to attend court at Eldoret Environment and Land Court without fail for the court shall give directions of this matter on that date.***

***According to our client, you were earlier on served with the summons to enter appearance and the copy of the plaint forwarded herewith on you but it is apparent in court record that you have neither entered appearance nor filed a defence in this matter to date.”***

The affidavit of service of Timothy Kamau Njoroge reads he is a male adult of sound mind and a process server of this Honourable court. That on 9<sup>th</sup> September 2014, he received copies of summons to enter appearance and an amended plaint coupled with a forwarding letter to the chairman Board of Trustees, National Social Security Fund Nairobi with instructions from the plaintiff that he cause service of the same upon the said 7<sup>th</sup> defendant, National Social Security Fund head office in Nairobi.

That on 10<sup>th</sup> September, 2014 at 7.05 a.m., he took a matatu shuttle from Eldoret to Nairobi where he arrived at 3.15 pm and headed to the respective National Social Security Fund office with intention of effecting service of the same upon the said 7<sup>th</sup> defendant. That he was referred to 4<sup>th</sup> floor of the said building, their legal office/manager's office where he met a lady whom upon his introduction and purpose of his visit accepted the service, retained the amended plaint and the summons to enter appearance with a copy of the forwarding letter as stated here above and as well endorse at his return copy of the forwarding letter with a copy of the summons to enter appearance and stamped.

On the 28<sup>th</sup> of November, 2014, the plaintiff requested for judgment in default of Memorandum of Appearance and defence. The said judgment was granted as it was prayed.

The court should be guided by the principles set out by Duffus *P in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E:- Thus*

*“There are no limits or restrictions on the judge’s discretion 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.” Secondly, as Harris J said in Shah v Mbogo [1967] EA 116 at 123B: “This discretion is intended so 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 course of justice.” That judgment was approved by the Court of Appeal in Mbogo v Shah [1968] EA 93. And in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: “I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.” Thirdly:*

*“ ... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”*

I do find that the 7<sup>th</sup> defendant was served with summons to enter appearance and file defence but did not to appear and file defence and therefore, the default judgment entered against him was regular.

However, I have looked at the at the draft defence of the 7<sup>th</sup> defendant and do find that though this matter is advanced in hearing, the same raises weighty issues and this being a public land matter involving property that is alleged to belong to the prisons department, the 7<sup>th</sup> defendant is a necessary party to enable the court make an informed decision. The upshot of the above is that the application is allowed. The 7<sup>th</sup> defendant to file defence within the next 7 days. Costs in the cause.

**Dated and delivered at Eldoret this 26<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**