REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 540 OF 2016

PENINNAH INYANJE KARUNGU (Suing as the Executrix of

the Estate of John Ngige Karungu).........................PLAINTIFF

VERSUS

CHRIS MASIRA...1ST DEFENDANT

MARY WANJIRU KINYANJUI.................2ND DEFENDANT

RULING

1. This ruling is in respect of 2nd defendant's Notice of Motion dated 22nd December 2016, an application pursuant to which the following orders are sought:

> ***1. Spent.***
>
> ***2. The honourable Court be pleased to review the orders issued by this honourable court on 19th December 2016.***
>
> ***3. The honourable court do set aside, vary or discharge the orders issued on 19th December 2016, reinstate the application dated 29th December 2016 for hearing inter partes on merit.***
>
> ***4. The court do issue further orders as may meet the ends of justice in this matter.***
>
> ***5. Costs of this application be borne by the respondent.***

2. The application is supported by an affidavit sworn by the 2nd defendant. She deposed that she was served with Notice of Motion dated 29th November 2016 on 14th December 2016 and that among the documents she received there was an order indicating that inter parte hearing of the application was to be on 16th December 2016. That she did not have adequate time to instruct an advocate and that she attended court on 16th December 2016 only to be told by the registry that the file had been taken to Eldoret for hearing. That she received the information around 10am and that by then it was too late to go to Eldoret for the matter. She also deposed on several other matters that go to the merits of Notice of Motion dated 29th November 2016.

3. The plaintiff opposed the application through her replying affidavit sworn on 7th April 2017. She deposed that Notice of Motion dated 29th November 2016 was heard ex parte on 6th December 2016 when the court gave interim orders and directed that the application be heard inter parte on 16th December 2016. That the respondents were duly served on 8th December 2016 and that the respondents therefore had ample time to file and serve their responses. The respondents did not file any response and as a result, the court considered the application and granted the orders.

4. The application was argued by way of written submissions. The applicant filed her submissions on 17th August 2017 while the plaintiff filed her submissions on 7th November 2017. The 1st defendant neither responded to the application nor filed submissions.

5. I have considered the application, the affidavits, submissions and authorities cited. Though the applicant has included a prayer for review in the application, a reading of the application and the supporting affidavit shows that what the applicant really seeks is setting aside of the orders made on 16th December 2016. I say so because I have not seen any evidence adduced on the traditional grounds of review such as

discovery of new and important matter or evidence, or mistake or error apparent on the face of the record. Instead, the applicant's case is that though she was served, she was not given an adequate opportunity to put forward her case.

6. When dealing with an application application for setting aside of an order made ex parte, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:**

> ***From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).***

7. Though the applicant has included a prayer for review in the application, a reading of the application and the supporting affidavit shows that what the applicant really seeks is setting aside of the orders made on 16th December 2016. I say so because I have not seen any evidence adduced on the traditional grounds of review such as discovery of new and important matter or evidence, or mistake or error apparent on the face of the record. Instead, the applicant's case is that though she was served, she was not given an adequate opportunity to put forward her case.

8. When dealing with an application application for setting aside of an order made ex parte, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:**

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9. Even though her version of events as regards service is somewhat different, the applicant does not dispute that she was served. She maintains that she was served on 14th December 2016. The plaintiff however insists that the applicant was served on 8th December 2016. I have perused the record and I see that an affidavit of service was filed by the applicant on 16th December 2016. It shows that the applicant was served on 8th December 2016. Annexed to it is an extracted copy of the order made by the court on 6th December 2016. The applicant acknowledged service of the order by signing it and her signature is dated 8th December 2016.

10. In the circumstances, I accept the plaintiff's contention that the applicant was served on 8th December 2016 and that the applicant therefore had ample notice to file a response in readiness for the inter parte hearing on 16th December 2016. It is important to note that as at 16th December 2016 the applicant had not filed any response to the application. If she had attended the registry prior to 16th December 2016 to file a response, she would have known that the orders were made at ELC Eldoret and that inter parte hearing would be at the same station.

11. A litigant who seeks an equitable relief is under a duty to make a full and frank disclosure. I am not satisfied that the applicant has satisfied this test. In the circumstances, Notice of Motion dated 22nd December 2016 is dismissed with costs to the plaintiff. Parties are encouraged to move with speed to prepare the main suit for hearing.

Dated, signed and delivered in open court at Nakuru this 20th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs Mwangi for the 2nd defendant/applicant

No appearance for the plaintiff/respondent

No appearance for the 1st defendant/respondent

Court Assistants: Gichaba & Lotkomoi