

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 125 OF 2016

ESTHER WANJIKU NDERITU.....PLAINTIFF/RESPONDENT

-VS-

ZAINAB ABOUD.....DEFENDANT/APPLICANT

RULING

1. The Application for determination is the Notice of Motion dated 12th February 2018 in which the defendant/applicant is seeking to have the ex-parte judgment entered herein against her set aside and to have the defence filed on 10th March 2017 together with the subsequent list of documents, list of witnesses and witness statements deemed property filed. The Application is based on the grounds on the face of the motion and supported by the affidavit of Zeinab Aboud, the Defendant sworn on 12th February 2018. The Defendant avers that she entered appearance in this matter on 22nd June 2016 and the parties argued various Applications culminating in a ruling delivered by Omolo, J on 10th February 2017. That she filed a statement of defence on 10th March 2017 together with a notice of change of advocate. That on 24th May 2017, the Defendant's advocates were served with a notice of judgment and formal proof dated 19th May 2017, notifying the Defendant of the judgment and hearing of the case slated for 25th May 2017. The Defendant states that she attended Court on 25th May 2017 together with her advocates but the Plaintiff did not attend. The Defendant further states that she was not aware that the Plaintiff had requested for judgment in default and that she had filed her defence in good faith. The Defendant states that she has a good defence and therefore prays that the Application be allowed and the suit be heard and decided on merit.

2. The Application is opposed by the Plaintiff who filed a Replying Affidavit sworn by herself on 27th February 2018. Briefly, the Plaintiff contends that the Application is incompetent and that the defence dated 9th March 2017 was filed out of time and without leave of the Court. Further, the Plaintiff avers that the defence has no merit and is meant to delay this matter. The Plaintiff further avers that granting the orders sought will prejudice her by denying her of her rights to the Suit Land. The Defendant therefore urged the Court to dismiss the Application with costs and fix the matter for formal proof.

3. I have considered the Application together with the affidavits in support and against. The law on the setting aside of ex-parte judgment is now settled. The principles guiding the setting aside ex-parte orders are trite that the Court has wide powers to set aside such ex-parte orders save that where the discretion is exercised, the Court will do so on terms that are just. In the case of **Patel –v-East Africa Cargo Handling Services Ltd (1974) EA 75** at page 76, Duffus P stated thus:

“There is no limit or restriction 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 to it by the rules. I agree that where it is a regular judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view a defence that must succeed, it means as Sheridan J put it “a triable” that is an issue which raises a prima facie defence and which should go to trial for adjudication. ”

4. In **Shah –V- Mbogo (1967) EA 116** at page 123, Harris, J stated

“This discretion 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. ”

5. In this case, the Defendant does not dispute the fact that the summons to enter appearance was served. Indeed the Defendant entered appearance within time but failed to file defence within the prescribed time. The judgment was therefore regularly obtained. The Defendant has stated that upon entering appearance, they argued various interlocutory Applications and later filed defence not knowing that the Plaintiff had sought for and obtained interlocutory judgment. The defence filed is on record. From the supporting affidavit, the applicant has in my view given sufficient reason to persuade this Court to exercise its discretion in her favour. Besides, taking into account the failure of the Defendant to file her defence within time, I also have to consider whether the defence raises triable issues.

6. In the defence filed, the Defendant has denied the Plaintiff's claim and states that she purchased a portion of **PLOT NO.312 SECTION 1 MN** from one Kalume Kazungu Kambu who was a member of Bamburi Self Help Group who are owners of **PLOT NO.312 SEC 1 MN**. She further states that the Plaintiff fraudulently subdivided **PLOT NO.312 SEC MN** to get **PLOT NO. 11811/1/MN** which subdivision did not take into account that the Defendant was already in possession. In my view, the Defendant's defence raises triable issues which call for trial. The Plaintiff has not demonstrated that she will suffer prejudice if the orders sought are granted as its effect would be to allow the Court to hear and determine the case on merit. The overriding objective of the Court would no doubt come to the aid of the Defendant.

7. In the result, I find merit in the Application dated 12th February 2018 and the same is allowed. The statement of defence dated 9th March 2017 and filed on 10th March 2017 is deemed duly filed upon payment of the requisite fees. The Defendant is directed to serve the said defence upon the Plaintiff within 14 days from the date of this ruling. Considering the circumstances of this case, I order that each party to bear their own costs.

Ruling dated, signed and delivered at Mombasa this 19th day of July 2018.

C. YANO

JUDGE