



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KERICHO**

**E.L.C. NO. 65 OF 2017**

**SARAH CHEPKEMOI BETT.....RESPONDENT/PLAINTIFF**

**VERSUS**

**RECHO KOECH.....APPLICANT/DEFENDANT**

**RULING**

**Introduction**

1. The Applicant filed an application dated 8th June of 2018 under certificate of urgency seeking the following prayers:

1. **THAT** this Application be certified as urgent and the service thereof, be dispensed with in the first instance.
2. **THAT** the firm of **M/S. J.K.KIRUI & CO.ADVOCATES** be granted leave to come on record for the Applicant/Defendant.
3. **THAT** upon grant of prayer (a) above, the Court be pleased to issue an Order of stay of execution of the judgment delivered herein on the 16<sup>th</sup> March, 2018 pending inter-partes hearing of this Application.
4. **THAT** this Honourable Court be pleased to set aside and/or review the judgment delivered herein on the 16<sup>th</sup> March, 2018 with all consequential orders and the matter be set down for hearing de novo on merit inter-partes.
5. **THAT** the Applicant/ Defendant be granted leave to file defence out of time and the annexed draft defence be deemed duly filed upon payment of the requisite fees.
6. **THAT** the necessary direction be made.
7. **THAT** the costs for this application be in the cause.

**Applicant's case**

2. The application is supported by the defendant/ Applicant's affidavit sworn on the 8<sup>th</sup> June 2018. The application is premised on the following grounds

- (a) **THAT** the Applicant/Defendant has appointed an Advocate to come on record **M/S. J.K.KIRUI & CO.ADVOCATES**.
- (b) **THAT** the Applicant/Defendant was never served with Summons together with the Plaint as per the principles of justice.
- (c) **THAT** the Applicant/ Defendant was not aware of hearing dates and the suit herein did proceed and judgment was entered in favour of the Respondent/ Plaintiff on 16<sup>th</sup> March, 2018.
- (d) **THAT** the Applicant/ Defendant be accorded a fair trial as she has plausible defence with high chance of success.
- (e) **THAT** the Honourable Court is espoused with wide and unfettered discretion to set aside the judgment herein to avoid a miscarriage of justice.

(f) **THAT** the Applicant/ Defendant stands to suffer irreparably unless the judgment herein is set aside as they would be condemned unheard contrary to the rules of natural justice

(g) **THAT** the Plaintiff/Respondent will suffer no prejudice beyond the scope of costs if the matter herein is admitted for hearing inter partes.

(h) **THAT** in the circumstances it is only fair and just and in the accord with the tenets of natural justice that the ex parte judgment herein be set aside and the matter herein be admitted for inter partes hearing.

(i) **THAT** the defendant/Applicant was never served with any court documents.

### **Respondent's case**

3. The application is vehemently opposed by the defendant through her replying affidavit sworn on the 22<sup>nd</sup> June 2018. In the said affidavit she depones that the defendant/respondent was duly served with summons to enter appearance, plaint, verifying affidavit and all other court documents.

4. She depones That the defendant together with her sons harassed the process server and that she should not cry foul that judgment was vested upon an innocent party. She has attached copies of the affidavits of service and hearing notices.

5. She alleges that the defendant has all along known about the suit but has been uncooperative. She states that whenever the process server went to serve the defendant, her sons would harass the process server and force him to drink the local brew before he could be allowed to serve her.

6. She contends that the defendant's defence is a mere denial and a sham and that the application is merely intended to delay the finalization of this matter.

### **Issues for determination**

7. The main issue for determination are as follows:

i) Whether the firm of J.K Kirui ought to be allowed to come on record

ii) Whether a stay of execution ought to be granted

iii) Whether the judgment entered on 16<sup>th</sup> March 2018 together with all consequential orders should be set aside and the case set down for hearing de novo on the merits.

iv) Whether the defendant ought to be granted leave to file his defence

v) Who should bear the costs of this application

### **Analysis and determination**

8. In considering the first issue I am guided by the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** where Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

*“The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:*

*a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*

*b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116 at 123.***

*c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner 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 as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***

*d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***

*e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30.***

10. I further rely on in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** where Duffus P stated as follows:

*“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 the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it “a triable issue”, that is, an issue which raises a prima facie defence and which should go to trial for adjudication”*

11. Similarly, the case of **CMC Holdings Ltd V Nzioki 2004 KLR 173** in the court held as follows:

*“The law is now well settled that in an application for setting aside an ex-parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date, but also whether the defendant has a reasonable defence... which raises triable issues.”*

12. It is the applicant’s contention that she was never served with summons to enter appearance. If this is true, it would have formed a very strong ground for setting aside the ex-parte judgment. The respondent has however attached copies of affidavits of service indicating that the defendant was served not just with Summons to enter appearance but with several hearing notices thereafter.

13. I have looked at the draft Defence and Counterclaim and I do not agree with the plaintiff that it is a mere denial. I am of the view that it raised triable issues which ought to be determined don the merits.

14. I am however mindful of the fact that the plaintiff shall be inconvenienced by the orders sought as she had taken the trouble of having the suit heard. It is therefore only fair and just that she be compensated by way of thrown away costs.

15. In the circumstances, I find merit in the defendant’s application and accordingly I grant it on the following terms:

- a) The firm of J.K Kirui & Co Advocates is granted leave to come on record for the defendant.
- b) The judgment entered herein on 16<sup>th</sup> March 2018 is set aside together with all consequential orders thereto.
- c) A stay of execution is granted
- d) The defendant is granted leave to file his defence within 30 days from the date hereof.
- e) The defendant shall pay the sum of kshs. 30,000 as thrown away costs to the plaintiff within 30 days, time being of the essence. Should the said costs not be paid within the stipulated period, the orders herein granted shall automatically lapse and the judgment entered shall take effect.
- f) The costs of this application shall be borne by the defendant.

**Dated, signed and delivered at Kericho this 11<sup>th</sup> day of July 2018**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Kirui for the Defendant/Applicant
2. Miss Ngetich for the Plaintiff/Respondent
3. Court Assistant - Rotich