

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 1295 OF 2013

JOSEPHAT MAILU NDOLO.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

MARY ASIYO.....2ND DEFENDANT

RULING

The 1st Defendant seeks to have the judgement delivered on 22/5/2015 reviewed or set aside through the application dated 10/2/2017 and to be granted leave to defend the suit. The 1st Defendant claims that that judgement was entered against it through no mistake or negligence on its part. It admits being served with summons to enter appearance but claims that it failed to enter appearance and file defence because its officer who was served misplaced the pleadings. The 1st Defendant's Director of Legal Affairs averred in the supporting affidavit that on perusing the court file, they realised that judgement had been entered on 22/5/2015. He did not give the date the 1st Defendant learnt that judgement had been entered against it.

The Plaintiff opposed the application and averred in the Replying Affidavit that the reasons the 1st Defendant gave for failing to defend the suit after being served were flimsy. Not only was the 1st Defendant served with the summons to enter appearance together with the plaint on 28/11/2013, but it was also served with the Amended Plaint on 4/4/2014.

Parties filed submissions which the court has considered. The 1st Defendant reiterated that the failure to file its defence within time was not intentional and that it is in the best interest of justice to have judgement set aside.

The Plaintiff urged that in exercising its discretion on an application to set aside judgement, the court must do so with caution since if the court sets aside the judgement, it will set back the Plaintiff in prosecuting his case and the applicant must give a plausible explanation as to why he did not file defence within the prescribed period.

The court has looked at the draft defence attached to the application to demonstrate that the 1st Defendant has a good defence to the Plaintiff's claim that raises triable issues. Unfortunately, it merely denies the Plaintiff's claim. The Plaintiff claims in his Amended Plaint that the 1st Defendant allotted him Plot No. D5-436 Kayole on terms and conditions that he duly complied with but that the 1st Defendant later fraudulently repossessed the plot and reallocated it to the 2nd Defendant.

The court is not satisfied that it ought to exercise its discretion in favour of the 1st Defendant and grant the orders sought. The application dated 10/2/2017 is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 30th day of August 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Mapesa holding brief for Ms. Kilonzo for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court