



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 95 OF 2017

**JOSEPH GIVAN MWANGI KIMANI (Suing as Administrator of the estate
of MARY NJOKI KIMANI (Deceased).....PLAINTIFF/RESPONDENT**

VERSUS

SIMON WANYIKA.....DEFENDANT/APPLICANT

R U L I N G

1. The application dated **9/1/2018** sought an order of stay of execution in this suit and that the eviction order issued on **20/12/2017** be set aside. It further sought that this court do set aside its judgment signed and delivered on **20/12/2017**, the proceedings leading to the same and all consequential orders for the suit to be heard on merit and inter partes in any event.
2. The applicant also sought that he be granted leave to file his defence as per draft statement of defence and that the costs of the application be borne by the plaintiff/respondent.
3. The application is brought under the provisions of **Order 10 Rules & Order 11 Rule 7** of the **Civil Procedure Rules 2010 Section 3A** of the **Civil Procedure Act**. The grounds on which the said application is made are as follows:-
 - (a) **The suit proceeded ex-parte and judgment was entered in favour of the plaintiff for failure on the part of the defendant to enter appearance or file defence and for failure to attend court during hearing.**
 - (b) **The defendant/applicant was never served with summons to enter appearance, plant or hearing notice at all.**
 - (c) **The failure by the defendant/applicant to enter appearance and file his defence and failure to attend court during hearing was neither intentional nor deliberate he was never aware of the existence of this suit till when police went to evict him.**
 - (d) **The defendant/applicant has been condemned unheard for omission not of his own making.**
 - (e) **The defendant has a defence raising serious triable issues.**
 - (f) **The judgment unfairly benefits the plaintiff/respondent.**
4. The application is supported by the affidavit of the applicant. The gist of that affidavit is that the plaintiff commenced and finalised succession proceedings in respect of the parties' deceased mother's estate clandestinely and thereafter filed this suit and that the defendant was never served with summons in this suit. He only learnt of this suit on the **6th February 2018** when the Officer Commanding Endeless police station came to evict him whereupon he lodged this application. He terms the affidavit of service as false. He exhibits a draft defence which raises issues of fraud which if proved, are serious in nature. He has also filed a counterclaim.
5. In reply to the application the plaintiff filed a replying affidavit sworn on **13/3/2018**. The defendant filed further affidavit sworn on **13/4/2018** and filed on **20/4/2018**. The defendant/applicant filed his submissions on **20/4/2018** and the plaintiff/respondent on **3/5/2018**
6. I have considered the contents of those affidavits and the submissions.
7. This court has unfettered discretion in determining an application for setting aside judgement. I note that the application herein has been brought expeditiously and that it exhibits a draft defence that raises triable issues. I am inclined to grant the application.
8. Consequently I allow the application dated **9/2/2018** in terms of **prayers (c) and (d)** thereof and order that the costs of the application

shall be in the cause.

Dated, signed and delivered at Kitale on this 24th day of September, 2018.

MWANGI NJOROGE

JUDGE

24/9/2018

Coram: Before Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Nasike for defendant

Plaintiff in person

Defendant present

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/9/2018