



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 404 OF 2017(Formerly Nairobi ELC case No. 1223 of 2013)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 37 AND 38**

**OF THE LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ADVERSE**

**POSSESSION OVER TITLE NO. KAJIADO/ LOODARIAK/ 1092**

**BETWEEN**

**NKOYOK OLE KESHENKE.....PLAINTIFF**

**VERSUS**

**PALLE JUEL RUNE.....DEFENDANT**

**RULING**

What is before court for determination is the Defendant's Notice of Motion application dated the 2<sup>nd</sup> September, 2015 brought pursuant to Order 10 rule 11 of the Civil Procedure Rules and Section 1A, B and 3A of the Civil Procedure Act as well as all the other enabling provisions of the law. The Defendant seeks for the following orders:

1. Spent
2. That interlocutory Judgement entered on 10<sup>th</sup> November, 2014 be set aside and Defendant allowed to file his Defence/ Replying affidavit out of time.
3. That costs of this application be provided for.

The application is premised on the grounds that the interlocutory judgement was entered on the 10<sup>th</sup> November, 2014 whilst the Defendant's Counsel had filed a memorandum of appearance and written a letter dated the 5<sup>th</sup> November, 2014 to the Plaintiff's counsel requesting to be furnished with proper pleadings. The Plaintiff's counsel had initially given the Defendant's Advocates a different set of pleadings initiated as a Plaint and not originating summons. The Defendant even used the Plaint format to file his Memorandum of Appearance on 10<sup>th</sup> October, 2014. Further, owing to the Plaintiff's refusal to furnish the Defendant with the Pleadings, the Defendant's Counsel had been searching for the file ELC No. 1233 of 2013 in the registry without success, only to realize much later at the Registry that the correct reference is ELC No. 1233 of 2013 (OS). The Defendant's Advocates only managed to peruse the OS file on the 7<sup>th</sup> July, 2015 and made photocopies of pleadings. The Defendant has all along had intentions to defend the matter and no prejudice will be visited upon the Plaintiff if the interlocutory judgment is set aside and matter heard on its merits. The Plaintiff has concealed material information that he sold the land to the Defendant, was paid consideration in full and he even signed a transfer in favour of the Defendant, who holds a title that has never been challenged.

The application is supported by the affidavit of JOHN W. WANJOHI who is an Advocate, handling the matter on behalf of the Defendant where he has reiterated the Defendant's claim as stated above.

The application is opposed by the Plaintiff whose Advocate LIVINGSTONE SIMEL SANE filed a replying affidavit where he deposed that

the Defendant filed a Memorandum of Appearance on 10<sup>th</sup> October, 2014 but failed to file a Defence and after 15 days, he requested for judgement that was duly entered. He contends that from the notice, the suit filed is an Originating Summons and not a Plaint as alleged by the Defendant. He insists the Defendant's advocates would have therefore used the information provided in the notice to locate the Court file and file his documents. He denies that the documents marked as exhibit 'JWW 2 "2"' were served from his office as they are not signed nor stamped by the Court. He claims the number shown as the civil case could have been inserted by the Counsel as an afterthought and that he has never contemplated suing the Kajiado North District Land Registrar as the claim herein is for adverse possession. He reiterates that the Defendant has failed to demonstrate that he indeed searched for the court file and the application lacks merit and should be dismissed with costs.

Both parties filed their submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion application dated 2<sup>nd</sup> September, 2015 including the supporting and replying affidavits as well as the submissions filed herein, the only issue for determination is whether the interlocutory judgement entered on 10<sup>th</sup> November, 2014 should be set aside.

The Defendant submitted that the delay in filing the Defence was caused by the Plaintiff's advocates' failure to serve them with the correct pleadings as well as the confusion in the heading and description of the suit. He argues that the Defence has merits which raises triable issues. He has relied on the cases of **Patel Vs East Africa Cargo Handling Services Ltd and Shailesh Patel Vs Kessels Engineering Works Ltd, Nzoia Sugar Company & Chemelil Sugar Company** to support his arguments.

The Plaintiff has opposed the application and submitted that the Defendant has not provided evidence to show he tried to trace the court file. He disputed the pleadings which were annexed to the Defendant's supporting affidavit and contended that the same did not emanate from the Advocates' offices. He has submitted that the Defendant has not demonstrated what prejudice he will suffer if the interlocutory judgment is not set aside. He has relied on the cases of **Wayua James Vs Daniel Kipkorong Tarus & Anor (2014) eKLR** and **Sameer Africa Versus Aggarwal & Sons Limited (2013) eKLR** to buttress his arguments.

Section 3A of the Civil Procedure Act provides that: **'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'**

Further Order 10 Rule 11 of the Civil Procedure Rules provides that: **'Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.'**

**In the case of Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P at page 76 stated:**

***"The main concern of the court is to do justice to the parties, and the court will not impose conditions in 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 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".***

I note the Defendant's Advocates sent a letter to the Plaintiff's Counsel dated the 3<sup>rd</sup> November, 2014 to furnish them with the original pleadings to enable them file their Defence but the Plaintiff's counsel has not denied receiving the letter nor indicated whether he responded to it. The said letter was sent before the interlocutory judgment was entered herein. The Defendant has explained that there was a confusion in the tracing of the file and he only got the correct court file much later when the said judgment had already been entered against him. The fulcrum of the suit herein revolves around adverse possession and from a keen perusal of the Defendant's draft replying affidavit annexed to the instant application, he claims to have purchased the suit land from the Plaintiff in 1990, has a valid title; has been in occupation thereon as well as used it. Both the Defendant and the Plaintiff have cited authorities stated above that support their respective arguments, which I do appreciate. However, for the Court, Justice is about doing the right thing and no party should be condemned unheard.

In the circumstances, and in relying on the judicial authority I have cited above, I find that the Defendant has indeed explained the delay in filing the Defence and the draft replying affidavit to the Originating Summons raises triable issues, which should be heard and determined on its merit.

It is against the foregoing that I find the application dated the 2<sup>nd</sup> September, 2015 merited and will allow it. I will direct that the interlocutory judgment entered on 10<sup>th</sup> November, 2014 be and is hereby set aside. The Defendant to file and serve his Defence within 14 days from the date hereof.

Costs will be in the cause

**Dated signed and delivered in open court at Kajiado this 25<sup>th</sup> day of October, 2018**

**CHRISTINE OCHIENG\***

**JUDGE**