



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 169 OF 2016

BADAWY MUHUDHARI MOHAMED.....PLAINTIFF/RESPONDENT

VERSUS

MAIMUNA ALI ATHMAN.....DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion application dated 20th March 2017, Maimuna Ali Athman, the Defendant herein prays for an order that the orders granted herein on 3rd February 2017 be discharged and/or set aside. The application is premised on the grounds that:-

i) The said orders were granted pending the hearing of another application dated 25th June 2016;

ii) The Plaintiff is attempting to use the said orders to evict the Defendant from the subject house;

iii) The Defendant had already filed so many documents on record including affidavits, list of documents and Statements of defence and the Court ought not to have declined to consider them as a response; and

iv) The Defendant and her children stand to suffer gravely and irreparable if the Plaintiff proceeds to use the said orders to evict them as threatened.

2. In a Replying Affidavit sworn on behalf of the Plaintiff by Wasunna Kiamba advocate and filed herein on 12th April 2017, the Plaintiff avers that all times material, the Defendant was represented by an advocate. On 15th November 2016, the Court declined to grant a further adjournment to the Defendant of the case as there were no valid grounds.

3. The Plaintiff accuses the Defendant of being dishonest in laying blame on her Advocates. It is the Plaintiff's case that if the Defendant had shown any interest in the matter, she would have known about the position of her application.

4. I have considered the application and the response thereto. I have equally considered the written submissions filed herein by the Advocates for the parties.

5. 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.”

6. In *Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75*, the Court held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte Judgment 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 it by the rules.”

7. As was however stated in *Shah –vs- Mbogo (1967) EA 166*:-

“This discretion to set aside an ex-parte Judgment 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 the person who had deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

8. In the matter before me, I note from the record that the suit herein was filed on 1st July 2016. By an application filed on the same day but dated 25th June 2016, the Plaintiff sought orders of injunction restraining the Respondent from staying in a house constructed in an unregistered Plot situated at Bajuri/Taifa in Lamu. By the time the said application came up for hearing before the Honourable Angote J on 15th November 2016, the Defendant was yet to file a reply to the application.

9. Subsequently on 3rd February 2017, the Learned Judge delivered a brief Ruling in which he allowed the Plaintiff's application. The Defendant is aggrieved by the said decision and blames the failure to file a Replying Affidavit to the application on her previous Advocates Messrs Aboubakar Mwanakitina & Company Advocates. It is her case that she had filed numerous other documents in opposition to the Plaintiff's entire suit and it is not conceivable that she would have willfully sat back and left the application to proceed undefended.

10. I have perused the record herein. It is evident therefrom that the Plaintiff and the Defendant were previously occupying the subject property as husband and wife together with their three children. When the couple divorced before the Kadhi in Lamu in March 2013, it is apparent that the Defendant and her children continued occupying the house which house the Plaintiff claims vacant possession thereof by dint of this suit.

11. It is indeed evident that on 9th August 2016 prior to the hearing of the application dated 25th June 2016 aforesaid, the Defendant had in person filed numerous documents including a Written Statement of Defence, a List of Documents, List of Witnesses, the Defendant's Statement as well as three Affidavits from different people in support of her case. Those are indeed the acts of one who was prepared to defend her case to the tilt.

12. As a result, I am persuaded that the failure to file a Replying Affidavit to the subject application could have resulted from an omission on the part of her then advocates whom she appointed later on 5th October 2016. The effect of the orders granted on 3rd February 2017 would be to evict the Defendant from the house she lived in with her former husband (the Plaintiff) and which she also claims to be her own as a matter of right. I think it would be fair and just to hear her side of the story before such drastic action is taken.

13. In the circumstances, I allow the application dated 20th March 2017 and set aside the Orders of 3rd February 2017.

14. The Defendant shall have 21 days from today to respond to the Plaintiff's application.

15. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 11th day of October, 2018.

J.O. OLOLA

JUDGE