



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 26 OF 2016**

**SAMMY INGUUVU ISIGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ALPHONIS SAMUEL MAKOMERE.....DEFENDANT/APPLICANT**

**RULING**

This application is dated 11<sup>th</sup> July 2018 and is brought under order 10 rule 11, order 12 rule 7, order 22 rule 22, order 51 rule 1 of the Civil Procedure Rules 2010, section 1 A & B, 3, 3A of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and heard ex-parte on priority basis, service being dispensed within the first instance.
2. That there be a stay of execution of all orders made herein pending the hearing and final determination of the applicant's application.
3. That the court set aside/discharges and/or vacates all orders issued herein.
4. That the court grants leave to defendant/applicant to file the defence and defend the case.
5. That the process server one Zablon Ochieng' Senge be cross examined on the contents of his affidavit of service dated 10<sup>th</sup> day of October, 2017.
6. That this court grant the applicant any other orders it deems it fit to grant.
7. That cost of the application be provided for.

It is based on the following grounds that, the applicant herein was not served with any summons to enter appearance or any document herein. The applicant herein did not enter appearance or file defence. Thus the matter proceeded ex parte. That case was heard and determined without applicant testifying hence the applicant was not accorded fair hearing. That for justice to be done this matter should be determined on merit. That if the execution of order is carried out the applicant is bound to suffer irreparable loss which cannot be paid in monetary form.

The respondent submitted that, the said application is scandalous, frivolous and vexatious thus ought to be dismissed with costs. That the defendant was served as he personally directed the process server upto his home. That the defendant was first served on 15/3/2016 before he sought to amend the plaint. Annexed herewith and marked SII 1 is a copy of the affidavit of service sworn on 26/4/2016. That upon amendment of the plaint, the defendant/applicant was again served with fresh summons to enter appearance on the 21/6/2017 but opted not to enter appearance. Annexed herewith and marked SII 2 is a copy of the affidavit sworn on 10/10/2017. That but upon failure to enter appearance and file a defence, he fixed the matter for formal proof and the defendant was again served with the hearing notice. Annexed herewith and marked SII 3 is a copy of the affidavit of service sworn on 11/1/2018. That the matter then proceeded for hearing and again the defendant was served with a mention date. That he personally directed the process server upto the defendant's home and he let him get in to serve as he remained near the church where he waited for the process server.

**This court has carefully considered the application and the submissions herein. Order 10 Rule 11 of the Civil Procedure Rules provides that ;**

***'Where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.'***

In Mohamed & Anor –vs- Shoka [1990] KLR 463, the Court of Appeal held that:-

*'The test for the correct approach in an application to set aside a default judgement are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.'*

In Patel -vs- E.A. Carge Handling Services Ltd [1974] EA75 at page 76 C and E the court held as follows:-

*'There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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.'*

The court further held as follows:-

*'That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.'*

In Shabbir Din -vs- Ram Parkash -Anand [1955] 22 EACA 48 Briggs JA said at page 51:-

*'I consider that under Order IX Rule 20 the discretion of the court to set aside an ex-parte judgement is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellants' legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.'*

In Shah -vs- Mbogo [1967] EA166 at page 123B the court stated as follows:-

*'this discretion to set aside an ex-parte judgement 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.'*

The main ground relied on by the applicant for not entering appearance or filing a defence is that he was never served with any papers relating to this case. I have perused the court file and specifically the affidavits of service on record which show that the respondent was served in more than four different occasions. Indeed the applicant submitted that he personally directed the process server to his home. I am satisfied that the defendant was properly served but opted to ignore the court summons. Looking at the draft defence annexed to the application I find that the same is a mere denial and does not raise any triable issues. I find that the application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**