



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 101 OF 2018**

**KENYA REVENUE AUTHORITY.....PLAINTIFF**

**-VERSUS-**

**OSMAN SAID.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MUNGAI KIGONYO T/A**

**GARAM INVESTMENTS AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. For my determination is the notice of motion dated 19<sup>th</sup> June 2018 by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants/applicants seeking orders:

**1. Spent**

**2. That this Honourable Court be pleased to set aside the ex parte proceedings as well as the orders issued by the Court on 13<sup>th</sup> June, 2018.**

**3. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be granted leave to defend the Notice of Motion application dated 26<sup>th</sup> April, 2018 filed by the plaintiff.**

**4. That upon grant of prayers 2 and 3 hereinabove, the Notice of Motion application dated 26<sup>th</sup> April, 2018 filed by the plaintiff be listed for hearing inter partes de novo.**

**5. That the costs of this application be in the suit.**

2. The motion is supported by the grounds listed on the face of it inter alia;

*(i) That on the said 8<sup>th</sup> May, 2018, the matter did not proceed but the Court issued directions, inter alia, that the plaintiff to serve the other parties to the suit and thereafter the Court rescheduled the matter for hearing. Inadvertently and out of honest mistake, Counsel for the applicants heard and therefore diarized the hearing date as the 18<sup>th</sup> June, 2018.*

*(ii) That believing that the matter was coming up before Court on 18<sup>th</sup> June, 2018 for purposes of hearing of the plaintiff's application dated 26<sup>th</sup> April, 2018, and knowing that honourable Justice C. Yano who was then presiding over the matter had proceeded on leave, the Advocates on record for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants contacted the Advocate on record for the plaintiff for purposes of liaising with a view of having the matter availed before the duty Court and thereafter to take directions as well as another hearing date in respect of the plaintiff's Notice of Motion application dated 26<sup>th</sup> April, 2018.*

*(iii) That through telephone conversation, the Advocate on record for the plaintiff informed the Advocates on record for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the matter came up before Court on 13<sup>th</sup> June, 2018 for purposes of hearing the Notice of Motion application*

filed by the plaintiff, which in the absence of the Advocates on record for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants, proceedings were taken and the plaintiff's Notice of Motion application dated 26<sup>th</sup> April, 2018 was allowed ex-parte.

(iv) That the inadvertence in diarizing the matter for 18<sup>th</sup> June, 2018 instead of 13<sup>th</sup> June, 2018 is an honest and innocent mistake on the part of the Advocate on record for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which innocent inadvertence should not be visited upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

(v) That the 2<sup>nd</sup> & 3<sup>rd</sup> defendants have a valid defence to the plaintiff's suit as well as a valid and merited response to the plaintiff's Notice of Motion application dated 26<sup>th</sup> April, 2018.

3. The application is further supported by the affidavit of Austine Omondi advocate sworn on the same date restating the facts contained in the grounds.

4. The application was not opposed by the Attorney General appearing for the 4<sup>th</sup> defendant. There is also no appearance for the 1<sup>st</sup> defendant. However the application is opposed by the plaintiff. In the replying affidavit of Gerishon Thuo counsel appearing for the plaintiff it is deposed that the plaintiff served the pleadings by advertisement in the daily nation of 3<sup>rd</sup> May 2018 pursuant to the orders issued by this Court. That when the matter came up in Court on 8.5.18, Mr Omondi applied for adjournment and leave to file their responses to the application.

5. The plaintiff deposes that since the 1<sup>st</sup> & 4<sup>th</sup> defendants were not present in Court on the 8<sup>th</sup> of May 2018, he proceeded to serve the hearing notice by advertisement again on 4.6.2018 in the Daily Nation newspaper which the 2<sup>nd</sup> & 3<sup>rd</sup> defendants had unhindered access to. Mr Thuo stated that he also made personal calls to the advocates appearing for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants having noted that they had not filed any documents in response to the application and he personally spoke to Mr Omondi. That he later wrote to the said firm on 8<sup>th</sup> June 2018 which letter was served (pages 19 – 20 of annex GNT – 1).

6. The plaintiff went further to state that in preparation for the hearing, they conducted extensive research as evidenced by their bundle of authorities filed in Court on 11<sup>th</sup> June 2018. He therefore came to Mombasa on 12.6.18 ready to proceed for hearing on 13.6.18. That the plaintiff has incurred huge expenses in disbursements for air tickets, train tickets, accommodation & meals e.t.c. during the 3 dates of 30.4.2018, 8.5.18 and 13.6.18 as well as legal and advertisement costs in prosecuting this application which costs the 2<sup>nd</sup> & 3<sup>rd</sup> defendants have not offered to re-imburse as a sign of good faith which is a condition for seeking prayers of setting aside. That if the applicants are prejudiced by the mistake of their advocates then they have remedies outside this suit. The plaintiff thus urged the Court to dismiss the application as the judicial time would be best served in expediting the hearing of the main suit and not going back to the interlocutory application.

7. In support of his arguments, the plaintiff filed the following case laws:

**(i) James Kanyi Nderitu & Another vs Marios Philotas & Another (2016) KLR.**

**(ii) Sameer Africa Ltd vs Aggarwal & sons (2013) eKLR**

**(iii) TARDA vs Jeremiah Kiwigho & 3 others (2015) eKLR.**

8. The parties then rendered oral submissions which I have read and considered. In the case of Sameer Africa Ltd *supra*, the Court of Appeal, reiterated the well-established principles of setting aside interlocutory judgment as were laid out in the case of **Patel vs East Africa Cargo Handling Services Ltd (1974) E A 75** as per Duffus P. thus:

*“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 to it by the rules. I agree that where it 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 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”*

And in **Mbogo vs Shah (1968) E A 93** thus:

*“...the 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

9. These principles have not changed and they are applicable to this case. It is not in dispute that the date of 13.6.18 was given in the presence of counsel appearing for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Applicants. It is also not in dispute that the plaintiff/respondent in exercising diligence went further to call the said advocate to ask them about their failure and or delay in filing of a response to the plaintiff's application due for hearing. The plaintiffs have gone further to show the Court that the date of 13.6.18 was published in the daily nation of 4.6.18 which then would have acted as a reminder to the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/ Applicants and or their advocates of the date of hearing.

10. Was the mistake as deponed by Mr Omondi excusable in the circumstances of this case? Mr Omondi in replying submissions admitted talking to Mr Thuo on phone but stated that the issue of dates was not mentioned in their conversation. That the letter of 8<sup>th</sup> June 2018 did

not also refer to the date and finally they did not see the advertisement placed in the newspaper. He however stated that they were willing to meet the plaintiff's costs of the day (i.e. on 13.6.2018).

11. I have looked at the letter dated 8<sup>th</sup> June 2018 received by the applicants' counsels on 11<sup>th</sup> June 2018. Although it did not mention a hearing date, it did raise the plaintiff's concern and stated that the remaining days of hearing were two (2) working days. Whether the date of hearing was mentioned in the tele-conversation each party gave a different version of events. However on the basis of the letter of 8<sup>th</sup> June 2018 and the advertisement of 4.6.2018, the Plaintiff/Respondent did its best to serve sufficient notice for the applicants to have filed their response to the application which then overrules the issue of misdiarising the dates an excuse for not attending Court or having a replying affidavit on record.

12. This case is still at its preliminary stage. Therefore though I am persuaded that the mistake of counsel appears inexcusable, it is not the only principle the Court takes into account in exercising its discretion whether or not to set aside *ex parte* the orders. To avoid injustice, the Court is mandated to look into the sub heading inadvertence or accident on the part of an applicant as well as analyse if the conduct of a party is designed to obstruct or delay the cause of justice. Inadvertence is defined by Black's Law Dictionary, 10<sup>th</sup> Edition as "an accidental oversight; a result of carelessness."

13. I find that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants' failure to attend Court and or file response to the plaintiff's application as per the directions given by the Judge amount to acts of inadvertence. If the same was intended to delay or obstruct the cause of justice then they are said not to be entitled to the orders of setting aside. However going by the record, this was the first time they did not attend Court after entering appearance in the matter. Secondly the plaintiff was already enjoying orders of interim injunction that were then in force. There is no mention that the said orders have been breached by the applicants herein. For this reason I do find that the applicants' inaction does not amount to obstruction and or delay of the cause of justice as the respondent's status will not be altered even if the orders of 13.6.18 are set aside. Further the applicants have expressed their willingness to meet the plaintiff's costs incurred for the Court attendance of 13.6.2018. The rules of natural justice does provide for a party not to be condemned unheard. Proceeding with the suit on its merits would be ideal but it is equally fair that the applicants be given a hearing on all issues in dispute such as the interlocutory application. Lastly this application was made without undue delay.

14. Consequently for the reasons given, I will allow the motion dated 19.6.2018 on the following terms;

**(a) The *ex parte* proceedings of 13.6.18 together with the orders of the Court issued on the said date be and are hereby set aside except the interim orders issued on 30.4.18 shall remain in force pending determination of the application dated 26.4.2018.**

**(b) The 2<sup>nd</sup> & 3<sup>rd</sup> defendants be and are hereby granted leave to defend the application dated 26<sup>th</sup> April 2018 by filing their response within 7days of the delivery of this ruling.**

**(c) The 2<sup>nd</sup> & 3<sup>rd</sup> defendants shall pay the plaintiff's expenses towards preparation and attendance for hearing on 13.6.18 hereby assessed as thrown away costs to include all the disbursements & expenses in the sum of Kshs 150,000= (one hundred fifty thousand only)**

**(d) The costs assessed in (c) above to be paid within 30 days of this ruling. In default, the plaintiff is at liberty to execute.**

**(e) The costs of this application abide the outcome of the application dated 26.4.18.**

**(f) The date for inter partes hearing of the motion dated 26.4.18 to be agreed in the presence of the advocates for the parties on day of delivery of this ruling.**

Dated, signed & delivered at Mombasa this 2<sup>nd</sup> November 2018

A. OMOLLO

JUDGE