REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 172 OF 2016

AIA.....PLAINTIFF

VERSUS

SMH.....DEFENDANT

RULING

1. The defendant in her Notice of Motion dated 23rd May, 2018 seeks the following substantive orders:-

(1) …..spent;

(2) The default judgment entered on 22/92016 together with all consequential orders be and are hereby set aside pending the hearing and determination of this application;

(3) Leave does hereby issue enlarging the time within which the defendant/applicant ought to have entered appearance and filed defence;

(4) The defendant/applicant's memorandum of appearance and defence filed on 15th July,2016 and 23rd August, 2016 respectively be and are hereby deemed to be properly on record ex-post facto; (5) The defendant/applicant be and is hereby granted leave to amend its defence; and

(6) The costs of this application be borne by the plaintiff/respondent.

2. The application is based on the grounds set out in the body of the motion. The application is supported by the affidavit of S M H sworn on 23rd May, 2018 and a further affidavit sworn on 19th June, 2018 and the annextures thereto.

3. In reply to the defendant's notice of motion, the plaintiff filed a replying affidavit sworn by A I A on 8th June, 2018.

4. It is the defendant's case that she was served with summons to enter appearance and she instructed her advocate, Mr. Manwa Mabeya to defend her and the said advocate entered appearance on 13th July, 2016 and filed defence on 23rd August, 2016 but did not serve them upon the plaintiff's advocates. The defendant avers that her said advocate had been struck off the roll of advocates. On 10th April, 2018, the defendant was served with a hearing notice to appear in court on 11th April, 2018 when the matter was due for hearing by way of formal proof. The defendant then instructed her present advocates who unsuccessfully attempted to have the default judgment set aside by consent, hence this application.

5. The defendant avers inter alia, that the plaintiff, through trickery and deceit obtained the irregular default judgment having failed to disclose that there were pending proceedings at the ***Mombasa Chief Kadhi's Court, Divorce Cause No. 144 of 2013*** between the plaintiff and the defendant therein in which the suit property is directly and substantially in issue. The defendant further avers that on 14th May, 2014, the parties agreed that the suit premises be registered in the sole name of the defendant in trust of the children to their marriage and therefore the plaintiff is estopped from claiming any interest over the said property.

6. The plaintiff avers that the defendant was duly served but entered appearance and filed defence out of time. That judgment entered was deserved. The plaintiff further states that the ***Divorce Suit No. 144 of 2013*** was concluded and was limited to divorce proceedings. It is the plaintiff's contention that the application has been filed after inordinate delay and therefore should be disallowed.

7. After going through the pleadings, affidavits filed and parties' submissions, the court finds that the issue for determination is whether the application meets the threshold for setting aside ex-parte judgment.

8. It is not denied that the defendant was served with summons to enter appearance and filed defence after the entry of the interlocutory judgment. The plaintiff is yet to formal proof his case in terms of the entered interlocutory judgment.

9. The defence on record raises various triable issues including an alleged agreement in which the suit property was allegedly given to the defendant. The applicant also wants to amend the defence to bring in new issues.

10. ***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".**

11. In the case of ***Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA 75 at page 76C 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 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".***

The court further held as follows:-

> **"That where there 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 merits. In this respect, defence on merits does not mean a defence that must succeed. It means a 'triable issue' that is an issues which raises a prima facie defence which should go to trial for adjudication".**

12. In ***Shah -vs- Mbogo (1967) EA 166*** the court stated as follows:-

> **"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 has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".**

13. From the foregoing, the principles and tests for setting aside an ex-parte judgment can be summarized as follows: that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment; whether there is a defence on merits; whether there would be any prejudice to the plaintiff, and the explanation for any delay.

14. The court has already noted that the defence filed raises triable issues. The plaintiff will also not suffer any prejudice as the case will be heard and decided on merit. Further, the defendant has explained the delay which according to her was caused by her former advocate. The court will therefore exercise its discretion in favour of the defendant and set aside the ex-parte judgment entered herein.

15. Besides the application to set aside the ex-parte judgment, the defendant has filed a notice of preliminary objection dated 23rd May, 2018 that the plaintiff's suit is bad in law for violating the provisions of ***Section 6 of the Civil Procedure Act, Order 4 Rule 1(2) of the Civil Procedure Rules, Section 120 of the Evidence act*** and ***Article 170 (5) of the Constitution.***

16. A preliminary objection as defined in the case of ***Mukisa Biscuit Company -vs- Westend Distributors Ltd [1969] EA 696*** as follows:-

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop".**

17. In my view, the preliminary objection raised raises matters of evidence which require the court to ascertain certain facts. These matters are for example whether the suit property herein was subject of ***Mombasa Chief Kadhi's court Divorce Cause No. 144 of 2013***. This requires facts to be placed before the court to enable it exercise its discretion. I would need to receive evidence to enable me determine whether or not the matters in issue in the divorce case were the same as this case. Such evidence would include but not limited to copies of the pleadings, proceedings, rulings or judgment in the said case. Not all these evidence has been placed by the defendant in the affidavits filed. If the defendant wishes to have the plea of sub judice and the other issues raised by the preliminary objection properly adjudicated, the defendant may consider bringing an application to that effect with the appropriate supporting evidence. For now I have no hesitation in finding and holding as I hereby do, that the preliminary objection has no merit. I am in the circumstances inclined to dismiss it.

18. The upshot is that the preliminary objection dated **23rd May, 2018** is dismissed. The Notice of Motion dated **23rd May, 2018** is allowed in the following terms:-

> **(1) The application is allowed as prayed in terms of prayers 2, 3, 4 and 5.**
>
> **(2) The defendant to file and serve amended defence within 14 days of the delivery of this ruling.**
>
> **(3) Each party to bear his/her own costs.**

Dated, signed and delivered at Mombasa this **17th** day of **December, 2018.**

C. YANO

JUDGE