



**REPUBLIC OF KENYA**

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

**ELC CASE 150 OF 2012**

**NYANDO MILLERS LIMITED.....PLAINTIFF**

**VERSUS**

**SBI INTERNATIONAL HOLDINGS AG (KENYA).....DEFENDANT**

**RULING**

1. **SBI International Holdings Ag (Kenya)**, the Defendant, vide notice of motion dated 3<sup>rd</sup> August 2016, brought under **Article 159** of the Constitution, **Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3A and 63 of Civil Procedure Act, Chapter 21 of Laws of Kenya**, seeks for the judgment entered in default of defence on the 18<sup>th</sup> December 2015 be set aside and the defence dated 4<sup>th</sup> May 2016 and filed in court on 23<sup>rd</sup> June 2016 be deemed duly filed. The application is based on the nine grounds on the notice of motion and is supported by the affidavit sworn by Eng. Yazeed Yaghmour, and employee of the Defendant, on the 3<sup>rd</sup> August 2016.

2. The application is opposed by Nyando Millers Limited, the Plaintiff, through the replying affidavit sworn by Eng. Maxwell Otieno Odongo, the Managing Director, on 21<sup>st</sup> October 2016.

3. The matter came up for hearing on the 6<sup>th</sup> December 2016 when Mr. Kamande and Mr. Omay, learned counsel for the Defendant and Plaintiff respectively, agreed on the time lines for filing and serving further affidavit and written submissions. That when the matter came up for mention on 13<sup>th</sup> March 2017, the Defendant's written submission dated 22<sup>nd</sup> February 2017 and filed on 9<sup>th</sup> March 2017 were expunged from the record of the court on application of the Plaintiff's counsel for having been filed outside the time agreed and without leave.

4. The issues for the determination by the court are as follows:

- a. Whether the Defendant has offered a reasonable explanation for the delay in filing the defence.
- b. Whether the defence presented by the Defendant raises triable issues capable of going for trial for determination.
- c. Who pays the costs of the notice of motion.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence and the statement of defence dated 4<sup>th</sup> May 2016 and filed in court on 23<sup>rd</sup> June 2016 that was expunged from the court record on the court's own motion vide paragraph 5 (e) of the ruling dated 28<sup>th</sup> September 2016, and come to the following determinations:

a) That the Plaintiff commenced the suit vide the plaint dated 20<sup>th</sup> December 2012 for aggravated damages for trespass, permanent injunction and costs of the suit on the basis that the Defendant has wrongfully excavated, and continues to excavate, removing the earth and rocks from his land parcel **L.R. NO.17598** and transporting the said materials to their road construction sites.

b) That the Defendant did not file their defence within the time set out in the summons to enter appearance dated 20<sup>th</sup> December 2012 that was served on them. The Defendant only entered appearance through the memo dated 19<sup>th</sup> February 2013 and filed in court on the 21<sup>st</sup> February 2013.

c) The interlocutory judgment pending formal proof was applied for and entered on the 18<sup>th</sup> February 2015 after the Defendant failed to file defence. That is the judgment that the Defendant now seeks to have set aside to allow filing of their defence out of time.

d) Though the Defendant has claimed that they had delayed in filing the defence due to the negotiations for an out of court settlement with the Plaintiff, they have failed to provide documentary evidence that any negotiations had been initiated. The court notes that the Plaintiff has denied the existence of any negotiations through the replying affidavit and under the provisions of **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**, the Defendant had the duty to offer or tender proof of the negotiations but did not.

e) That the findings in (d) above notwithstanding, the court has perused the statement of defence expunged on the 28<sup>th</sup> September 2016 and which the Defendant indicated contains the basis of their response to the Plaintiff claim. The court has noted that the Defendant has denied excavating road construction materials from the Plaintiff's land known as **L.R. NO.17598**, and averred that their road construction materials were excavated from the land of one **Leah Musimbi** identified on plan **No.N 9/92/20** under letter of allotment **Reference No.70156/X1** dated 3<sup>rd</sup> July 1995, pursuant to their agreement dated 20<sup>th</sup> November 2012.

f) That having considered the Plaintiff's claim and the response by the Defendant as contained in the statement of defence referred to in (e) above, the court finds that the Defendant's response raises triable issues and it is just to grant the prayers sought. That however, the Defendant should pay the Plaintiff thrown away costs as it is their failure to act in time that has occasioned this application.

6. That flowing from above, the court finds merit in the Defendant's notice of motion dated 3<sup>rd</sup> august 2016 and the same is allowed in the following terms:

a. That the interlocutory judgment in default of defence entered on 18<sup>th</sup> December 2015 be and is hereby set aside.

b. That the Defendant be and is hereby allowed to file and serve their statement of defence within 30 days.

c. That the Defendant do pay the Plaintiff thrown away costs of Ksh.5,000/= (five thousand) only in 30 days and in default execution to issue.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 21<sup>ST</sup> OF JUNE 2017

In presence of;

Plaintiff        ABSENT

Defendant      ABSENT

Counsel        Mr. Omayya for the Plaintiff

                    Mr Kamanda for Defendant/Applicant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**

21/6/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Omayya for Plaintiff/Respondent

Mr. Kamanda for Defendant/Applicant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**