



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT AT KERICHO

CIVIL SUIT NO. 30 of 2011

JOHNSON CHERUIYOT.....PLAINTIFF/APPLICANT

VERSUS

PETER KOSKE.....1ST DEFENDANT

HEZRA CHERUIYOT.....2ND DEFENDANT

EDWIN KEMBOI.....3RD DEFENDANT

EDWIN KIPKURUI BII.....4TH DEFENDANT

JEREMIAH K. LANAGAT.....5TH DEFENDANT

JOSEPH KIPKURUI KORIR.....6TH DEFENDANT

RULING

This Ruling is in respect of the application dated 1st March, 2017. The said application is brought pursuant to Order 9 (a) Rule 10 (a) and Order 10 Rule 11, Order 22 Rules 22(1) and 25 of the Civil Procedure Rules, and sections 1A, 1B, 3A and 63 of the Civil Procedure Act Cap 21 of the Civil Procedure Act, 2010.

The Defendants/applicants seek to set aside the ex-parte judgment entered against the defendants together with all consequential orders thereof. The defendants also pray that they be granted leave to file their defence within 7 days. They further pray for a stay of execution of the decree and warrants for committal to civil jail herein.

The application is supported by the 1st defendant’s affidavit sworn on his behalf and on behalf of all the defendants in which he explains the events leading to interlocutory judgment being entered against them. In effect he avers that the defendants who were initially acting in person filed letters in response to the Summons to Enter Appearance stating that they were not in occupation of the suit land and believed that these would be considered as defences. It is further averred that the defendants subsequently instructed the firm of Weldon Ngetich Advocate who never filed any documents on their behalf nor informed them of the hearing date. Furthermore, even though the said advocate was present during the hearing of the suit, he did not cross examine the plaintiff and judgment was entered against the defendants.

The application is opposed by the plaintiff through the Grounds of Opposition filed on 6th April 2017, the gist of which is that the applicants have not given sufficient reasons to warrant the judgment being set

aside. Furthermore, it stated that the applicants are guilty of inordinate delay as they filed their application more than eleven months from the time judgment was entered against them.

The main issues for determination are as follows:

1. Whether the applicants have given a satisfactory explanation for failure to attend court at the hearing of the suit.
2. Whether the applicants' defence raises triable issues.
3. Whether the applicants are entitled to the orders sought.

I shall deal with the issues wholesomely in the following paragraphs.

The principles governing the exercise of the court's discretion to set aside interlocutory judgments are laid out in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** as per Duffus P who stated as follows:

“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 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 the merits. In this respect defence on the 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”

Counsel for the Plaintiff has submitted that the defendants have not given a candid and sufficient explanation of their delay of more than eleven months in filing the present application as judgment was delivered on 29th April 2016. I have gleaned through the court record and it is apparent to me that the defendants were let down by their advocate. He did not seek leave to file a proper defence on behalf of his clients. Furthermore, despite the fact that he was present during the hearing of the case, he did not deem it fit to cross-examine the plaintiff. It is also not clear why he did not take immediate remedial action after judgment was entered against the defendants. Be that as it may, it is trite law that the mistakes of an advocate must not be visited on his client, particularly in this new constitutional dispensation when the courts are called upon to administer substantive justice rather than focus on procedural technicalities. I therefore find and hold that the explanation given by the defendants is sufficient.

The second issue is whether the defendants have a defence that raises triable issues. I refer to the case of **CMC Holdings Ltd V Nzioki 2004 KLR 173** in which the court held as follows:

“The law is now well settled that in an application for setting aside an ex-parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date, but also whether the defendant has a reasonable defence... which raises triable issues.”

I have looked at the draft defence attached to the defendant's affidavit and I am of the view that it raises triable issues in that it challenges the existence and ownership of the suit land. These are issues that can only be resolved at a full hearing.

In determining the last issue as to whether the defendants are entitled to the orders sought I must consider that justice cuts both ways and the interests of the plaintiff who has obtained a judgment in his favour must also be taken into account. It is not lost to me that the defendants only moved the court to set aside the judgment when a notice to show cause was taken against them for committal to civil jail more than eleven months after the judgment was delivered. In **Kericho HCCC No. 6 of 2001 Eric Kimutai Mugun V Augustine Mageto Onkoba & 2 Others** Mumbi J held that:

“It would be just if the applicant who sought to stay the Notice to Show Cause deposits the decretal sum in court within the stated period failing which the Notice to Show Cause would proceed.”

I therefore allow the defendants’ application and stay the Notice to Show Cause on condition that the defendants deposit the decretal sum of Kshs. 639,294/= in court within fourteen days from the date hereof failing which the Notice to Show Cause shall proceed.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2017.

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J. M ONYANGO

JUDGE

In the presence of;

1. Mr. Koske for the Applicants.
2. Mr. Migiro for the Respondent.