



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO. 111 OF 2014

VICTOR DENA CHITSWA..... PLAINTIFF/APPLICANT

-VS-

NATHANIEL MUNGA NZAKA..... 1ST DEFENDANT/APPLICANT

ENOS KOMORA.....2ND DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 28th of October, 2016. It is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 10. Rule 2 of the Civil Procedure rules and all enabling provisions of the law. It seeks orders that;

1. The exparte judgement herein be set aside.
2. The defendants be allowed to file the defend and defence the suit herein.
3. The draft defence herein be deemed as duly filed upon payment of the requisite fees.
4. Costs of this application be provided for.

2. The grounds upon which the application is based are on the face of the application;

1. That the plaintiff has obtained judgement.
2. The defendant's failure to file a defence was as a result of failure to instruct counsel in time.
3. The Defendants have a good and reasonable defence and should be allowed to defend the suit.
4. The suit involves land which is a sensitive matter.
5. The plaintiff will suffer no prejudice if the Defendants are allowed to defend the suit.

3. The application is supported by the affidavit of Enos Komora sworn on the 28/10/2016. The application is opposed. There is a replying affidavit sworn by Victor Dena Chitswa the plaintiff/Respondent herein on the 18/1/2017.

4. I have considered the application and the supporting affidavit. I have also considered the replying affidavit and draft defence. I have also considered the written submissions of both counsels.

5. It is the Defendant/Applicants contention that they were served with summons to enter appearance and copies of plaint. That as laymen they did not realize the consequence of failing to enter appearance.

They realized later and instructed an Advocate by which time interlocutory judgment has been entered. They pray for an opportunity to defend this suit as they have a good defence.

6. On the other hand, it is the Plaintiffs/Respondents contention that the Defendants/Applicants slept on their rights.

That the draft defence does not raise triable issues he prays that the application be dismissed with costs.

7. The issues for determination are:

i) Whether or not the application has been brought in good time and is merited.

ii) Whether or not the defence raises triable issues.

The Defendants/Applicants admit that they were served with summons to enter appearance and copies of plaint but could not adequately respond as they are laymen.

That by the time they procured an Advocate the exparte judgement had already been entered.

8. I find that the application herein was brought as soon as the exparte judgement was entered against the Defendants. I find that it has been brought without undue delay.

The Defendants/Applicants put forward the case of **Mbogo & Anor Vs Shah (1968) EA 94** where it was held that, “the court would exercise its discretion to avoid injustice or hardship resulting from advertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the course of justice.”

I find that the Defendants/Applicants have demonstrated that they deserve that this courts discretion be exercised in their favour.

9. They have explained the reasons why they did not file their defence in good time.

Article 50 of the Constitution guarantees that every person has a right to be heard.

I find that the Applicants herein have a right to be heard.

I have looked at the draft defence annexed to the application. The Defendants deny that they have constructed plot no, 134 Uwanja Wa Ndege they claim they have constructed on plot no 27 which they own. I find that these are issues which ought to go to full trial. I find that the defence raises triable issues.

10. I find merit in this application and I grant the following orders;

1. That the exparte judgement herein is hereby set aside.
2. That the Defendants be allowed to file their defence and defend the suit herein.
3. That the draft defence herein be deemed as duly filed upon payment of the requisite fees.
4. That the Defendants do pay the Plaintiffs throw away costs of Kshs 10,000/= within thirty (30) days from the date hereof.

5. That costs of this application be borne by the Defendants. orders accordingly dated and signed at Mombasa this 18th day of July 2017

L. KOMINGOI

JUDGE

18/7/2017

Ruling dated and delivered in open court on the 18th July 2017 in the absence of parties duly informed.

L. KOMINGOI

JUDGE

18/7/2017