



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 72 OF 2016

JOYCE MUTETHYA KIMANTHI.....1ST PLAINTIFF

IRENE KATUMBU KIMANTHI.....2ND PLAINTIFF

VERSUS

ISAAC KALUADEFENDANT

RULING

1. In the Notice of Motion dated 9th November, 2016, the Defendant is seeking for the following reliefs:

a. That this Honourable Court be pleased to set aside the exparte default Judgment entered against the Defendant/Applicant and all subsequent orders thereto and allow the suit to be heard on merits.

b. That this Honourable Court be pleased to grant the Defendant/Applicant leave to defend this suit unconditionally.

c. That costs of this Application herein be in the cause.

2. The Application is based on the grounds that the Defendant has a good Defence that raises triable issues; that the Defendant will suffer prejudice if the Judgment is not set aside and that the Plaintiffs will not suffer any prejudice if the orders being sought are granted.

3. In his Affidavit, the Defendant's advocate deponed that before filing a Defence, it was of essence for him to obtain copies of the proceedings and Judgment in Kitui CMCC No. 298 of 2005; that the proceedings were availed to him on 28th September, 2016 and that that is why he delayed in filing a Defence.

4. In response, the 2nd Plaintiff deponed that it is neither a legal requirement nor mandatory for the Applicant to avail court proceedings or any evidence prior to filing a Defence; that the draft Defence does not raise any triable issue and that the Application should be dismissed.

5. In his submissions, the Defendant's advocate submitted that it was crucial for the Defendant to obtain the copies of the proceedings and Judgment in Kitui CMCC No. 298 of 2005 before filing a Defence; that the Defence has high chances of success and that the Plaintiffs have not shown the prejudice they will suffer if the Application is allowed.

6. The Plaintiffs' advocate submitted that subject land had a caution by the time the Defendant was

carrying out demolition of the Plaintiffs' property; that the Defendant does not have title to the land and that the Defendant intends to delay the finalization of this matter.

7. Both counsels relied on authorities which I have considered.

8. In the Plaint dated 2nd August, 2016, the Plaintiffs averred that the Defendant unlawfully demolished a building valued at Kshs. 342,500 which had been constructed on parcel of land known as Kyangwithya/Tungutu/1153. The Plaintiffs claimed for a sum of Kshs. 342,500 being compensation for the value of the demolished building.

9. Upon being served with the Summons and the Plaint, the Defendant, through his advocate entered appearance on 17th August, 2016. The Plaintiff then requested for Judgment which was entered on 28th September, 2016.

10. In the draft Defence, the Defendant has pleaded that the demolition of the Plaintiffs' structure was done in execution of a lawful decree that was issued by the court in Kitui CMCC No. 58 of 2015.

11. Considering that the Defendant's Defence is predicated on Kitui CMCC No. 58 of 2015 and in view of the evidence before me showing that the Defence applied to be supplied with proceedings and Judgment in Kitui CMCC No. 58 of 2015 on 28th July, 2016, I find that the reasons given for not filing the Defence within the requisite period to be plausible.

12. For those reasons, I allow the Application dated 9th November, 2016 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE