



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 61 OF 2013

TAIB ALI TAIBPLAINTIFF

VERSUS

AHMED FAUD AMIR.....1ST DEFENDANT

OMAR SHARIFF AHMED2ND DEFENDANT

KASSIM ISMAIL JUMA.....3RD DEFENDANT

LEMMY K. MBOGORI4TH DEFENDANT

ABDULHAKIM AMIR.....5TH DEFENDANT

ABDULSHAKUR BADRUDIN.....6TH DEFENDANT

ABDULSHAKUR7TH DEFENDANT

RULING

1. In the Application dated 9th August, 2016, the 3rd Defendant is seeking for the following orders:
 - a. That the Judgment entered herein as against the Applicant/3rd Defendant be set aside unconditionally to file Defence and defend this cause on its merits.*
 - b. That costs of this Application be provided for.*
2. The Application is supported by the Affidavit of the 3rd Defendant who has deponed that when he was served with Summons to enter appearance by advertisement, he forwarded them to his counsel; that the failure of his advocate to file a Defence was not a deliberate act on his part and that his Defence raises triable issues.
3. According to the 3rd Defendant, he bought nine (9) plots (*the suit land*); that some of those plots were charged to Barclays Bank and that he was not served with the mandatory Notice of Judgment pursuant to the provisions of Order 22 Rule 6 of the Civil Procedure Rules prior to the commencement of the execution proceedings.
4. In response, the Plaintiff deponed that on 20th May, 2013, the 3rd Defendant filed his Defence, list of

witnesses and witness statements; that the 3rd Defendant's advocate was served with the hearing notice for the Case Management Conference scheduled for the 5th September, 2013 and that the 3rd Defendant was accommodated despite Judgment having been entered.

5. According to the Plaintiff, he served the Defendants, including the 3rd Defendant, with a mention notice for a mention coming up on 2nd December, 2013 and that the 3rd Defendant's advocate attended court for pre-trial and Case Management on 2nd December, 2013.

6. The Plaintiff counsel finally deponed that a hearing date was then fixed by the consent of the parties, and that when none of the Defendants turned up for hearing on 13th March, 2014, the matter proceeded for hearing.

7. Both the Plaintiff's and the 3rd Defendant's advocates filed their submissions and authorities which I have considered.

8. The Application by the 3rd Defendant is seeking to set aside the Judgment of this court and to allow the 3rd Defendant defend the case on merits. The Application is based on the following ground:

“(C) That the manifest, failure to file Defence and/or defend the suit was occasioned by reasons of mistake of the Applicant's counsel and not at all as a consequence of deliberate act and or omission on the part of the Applicant/3rd Defendant.”

9. The record shows that after this suit was filed, the same was served on the Defendants by way of advertisement in the Standard newspaper of 30th April, 2013.

10. After the said service, the 3rd Defendant entered appearance through his advocate on 3rd May, 2013. A Defence was then filed on 20th May, 2013 on behalf of the 3rd Defendant by the same advocate. On the same day, the 3rd Defendant's advocate filed the list of documents and a Replying Affidavit in respect to the Plaintiff's Application dated 25th March, 2013 which was seeking for injunctive orders.

11. When the matter came up for a pre-trial conference on 5th September, 2013, the 3rd Defendant's advocate was duly served with a mention notice but did not attend court.

12. On 2nd December, 2013, the matter was mentioned in the presence of the 3rd Defendant's advocate. On the said date, the 3rd Defendant's advocate informed the court that his client had complied with Order 11 of the Civil Procedure Rules and was ready to take a date for hearing. The matter was then fixed for hearing by the court for 13th March, 2014.

13. Having fixed the matter for hearing with the consent of the Plaintiff's and the 3rd Defendant's advocate, the matter proceeded for hearing on 13th March, 2014. Neither the 3rd Defendant nor his advocate attended court on the said date.

14. After hearing the Plaintiff's witness, the court reserved its Judgment which it delivered on 9th May, 2014.

15. The 3rd Defendant waited until 9th August, 2016 to file the present Application.

16. As I have stated above, the 3rd Defendant did file a Defence in this matter. Therefore, the issue of the court having delivered an irregular Judgment does not arise.

17. The 3rd Defendant was duly represented in this matter by counsel. Neither the 3rd Defendant nor the advocate who was on record for him has stated why none of them attended court when the matter came up

for hearing on 13th March, 2014.

18. It is trite that a suit always belongs to the parties, and it is the parties that ought to be checking on their advocates to ascertain the position of their cases.

19. In the case of the *Beena K. Khambaita vs. Talvinder Salgoo (2012) eKLR*, the court quoted the decision of the Court of Appeal in *CMC Holdings Limited vs. Nzioki (2004) KLR 173* where it was held as follows:

“The law is now settled that in an Application for setting aside ex-parte Judgment, the court must consider not only the reasons 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 Applicant has reasonable Defence which is usually referred as whether the Defence if filed already or if draft Defence is annexed to the Application, raises triable issues.”

20. As I have stated above, the 3rd Defendant has not given an explanation as to why his advocate or himself did not attend court.

21. Furthermore, the Defence by the Defendant that he purchased the suit land from the 1st Defendant does not explain how the 1st Defendant came into possession of the suit land in the first place.

22. Having found that the 1st Defendant fraudulently acquired the suit land, which he purportedly transferred to the 3rd Defendant, the 3rd Defendant could not have succeeded in his claim on his own. In a nutshell, the 3rd Defendant’s Defence does not raise any triable issue in the absence of a Defence by the 1st Defendant.

23. As was held in the case of *John Onger Mariaria & 2 others vs. Paul Matundura, Civil Application No. Nai. 301 of 2003 (2004) 2 E.A 163*, clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders.

24. If the 3rd Defendant is aggrieved with the manner his advocate handled the brief, let him pursue the advocate for damages and not to re-open a case which, in any event, has no merit in so far as his Defence is concerned.

25. For those reasons, I dismiss the Application dated 9th August, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2017.

O. A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2017.

J. O. OLOLA

JUDGE