



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELC NO. 1412 OF 2013**

**MOUNT PLEASANT LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN KIMELY BIRECH.....DEFENDANT**

**RULING**

The Defendant filed an application dated **24<sup>th</sup> February 2014**, seeking an order that the interlocutory judgment entered on **16<sup>th</sup> January 2014**, be set aside and he granted leave to file his Defence as per the draft defence annexed to the application.

The application is premised on grounds outlined thereunder and supported by an affidavit sworn by the Defendant. He deposes that the Plaint and Summons were served through advertisement in the Daily Nation Newspaper of **16<sup>th</sup> December 2013**, which paper he did not read. It was not until **10<sup>th</sup> February 2014**, that it was brought to his attention that service had been effected through an advertisement on **16<sup>th</sup> December 2013**. The Defendant urged the court to set aside the Judgment deposing that he is desirous of defending the suit.

The Plaintiff filed grounds of opposition dated **9<sup>th</sup> June 2014**. Thereunder, the Plaintiff averred that the Defendant's application is frivolous and an abuse of the Court process as the Judgment sought to be set aside was entered regularly and lawfully after service of summons. Further, that the Defendant does not have a good defence as the assertions therein do not amount to a plausible defence neither does it show that there is a substantial question of law or fact to be tried. It was also averred that the Defendant had not shown any inadvertence or excusable mistake to warrant the Court to exercise its discretion in his favour. The Plaintiff contended that setting aside the Judgment will be a travesty of justice as it will assist the Defendant who merely seeks to obstruct and delay the cause of justice.

The instant application was canvassed by way of written submissions which I have carefully considered. I also appreciate the leading authorities on setting aside an interlocutory judgment cited by counsels. The starting point in determining this application is **Order 10 Rule 11 of the Civil Procedure Rules** which gives this Court discretion to set aside and/or vary an interlocutory judgment and any consequential decree or order upon such terms as are just. In exercising discretion, Courts are required to do so judicially, taking all the factors into consideration. From the leading authorities, the guiding principles in applications of this nature are:-

***a. The Court must do justice to the parties.***

***b. Whether the defence has a triable issue(s) which raises a prima facie defence and which should go to trial for adjudication.***

***c. Whether the Plaintiff can be compensated for the prejudiced caused by way of costs.***

The reason advanced by the Defendant/applicant for failing to enter appearance and file a defence was that he did not read the paper on the date service was advertised. He was however notified of the same on 10<sup>th</sup> February, 2014 and thus this application. The instant application having been filed one month after the entry of Judgment is in my view, brought without delay especially because the matter had not been set down for formal proof. I have perused the Plaintiff's claim outlined in the Plaint juxtaposing it to the holding defence annexed to the Defendant's application. I note that the Defendant has denied being a registered owner of the property and that he has never claimed ownership thereof, contrary to what has been alleged by the Plaintiff. On this basis, I find that it would be prudent to allow the Defence thereby giving the Defendant an opportunity to be heard, noting that whether the right person has been sued is an issue for determination.

In the circumstances, the Defendant's application is hereby allowed, as follows:

- 1. The interlocutory judgment entered on 16<sup>th</sup> January 2014 against the Defendant is hereby set aside.***
- 2. The Defendant is granted leave to file his defence within 7 days of the date hereof.***
- 3. The Plaintiff is granted corresponding leave to file a reply within 14 days of the date of service.***
- 4. Costs of this application shall be borne by the Defendant.***

Dated, Signed and Delivered this 26<sup>th</sup> day of **September, 2016**

**L.GACHERU**

**JUDGE**

In the Presence of:-

M/s Asli for the Plaintiff/Respondent

M/s Musau holding brief Jumba for the Defendant/Applicant

Hilda : Court Clerk

**Court.**

Ruling read in open Court in the presence of the above stated advocates.

**L.GACHERU**

**JUDGE**