



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CASE NO. 157 OF 2007
JIPE MULTIPURPOSE CO-OPERATIVE SOCIETY.....PLAINTIFF
VERSUS
ELIJAH OLE SARONGE & 59 OTHERS..... DEFENDANTS
RULING

1. The Application under consideration is the Notice of Motion dated 25th July 2012 brought by KAPURWA OLE SARUNI sued as ELIJAH OLE SARONGE), BEATRICE MWANJALA, HANNAH KALUNDE MUTUA and VERONICAH NDUNGE KITAKA, the 1st, 5th, 10th and 58th Defendants respectively (“the Applicants”). The application is brought under **Oder 12 Rule 7 and Order 22 Rule of the Civil Procedure Rules** and it seeks stay of execution of the decree herein and the setting aside of the default judgment and that the Applicants be given leave to defend the suit.
2. The Application is premised on the grounds that the Applicants were not served with the summons, that if the judgment is not set aside, the Applicants will suffer irreparable loss yet the Applicants have a good defence which raises triable issues.
3. The Application is supported by the Affidavit of Beatrice Mwanjala sworn on behalf of the other Applicants. The deponent swears that she learnt, on 15th July 2012, that an eviction order had been issued in this case. That the Applicants were not served with summons to enter appearance and only became aware of the matter through information relayed to them by the Taveta O.C.S. That all the Applicants moved into the suit property on various dates the last one being the 58th Defendant’s husband who is claimed to have moved into the property in 1975. The Applicants denied that they moved into the property in 2005 as alleged by the Plaintiff. The deponent also averred that there are numerous social amenities on the suit property including churches, schools, a water pan and agricultural projects . That the plaint is defective since the same was brought in the name of an entity that cannot sue or be sued in its own name. The deponent annexed to her affidavit a draft Statement of Defence to demonstrate that the Applicants have a defence that raises triable issues.
4. The Application was opposed by the Plaintiff through the Replying Affidavit sworn on 15th October 2012 by GEORGE KITAWI MNENE, the Plaintiff’s Treasurer. The deponent averred that the Defendants were served with summonses and they entered appearance and filed defence. That the Applicants are guilty of delay as they filed this Application over three (3) years after the judgment. The deponent reiterated that the Defendants got into the suit property in 2005 and stated that the Plaintiff stand to suffer irreparable damage as the Applicants are wasting and

damaging the suit land.

5. Briefly, the background of this case is that the Plaintiff filed its case on 28th July 2007 seeking vacant possession as against all the 59 Defendants of that property known as **Plot No. LR 1028/3** and the demolition of any structures erected thereon by the Defendants. The Defendants filed their Memorandum of Appearance through the firm of STEPHEN ODDIAGA & COMPANY ADVOCATES on 6th August 2007 and filed their Statement of Defence on 24th August 2007.
6. On 31st October 2007, the Plaintiff filed an Application dated 29th October 2007 seeking summary judgment against the Defendants on the basis that their Statement of Defence consisted of mere denials and did not raise any triable issues. The Defendants filed Grounds of Opposition to the Plaintiff's said application on 7th November 2007. The said application was heard inter partes by Njagi, J. who delivered a ruling on 11th December 2008 by which he agreed with the plaintiff and entered summary judgment against the Defendants jointly and severally. The Applicants then filed the present Application seeking to set aside the said judgment.
7. In arguing this motion the parties filed their rival submissions which I have considered. The principles for setting aside ex parte judgement are enumerated in the renowned cases of **Shah vs Mbogo (1968) EA 93** and **Patel vs E. A Cargo Handling Services Ltd (1974) EA 75**. These principles have been widely quoted with approval in the Court of appeal and the Superior Court decisions. Briefly they are ;

- (i) There is defence on merits
- (ii) The discretion of the Court to set aside is unfettered
- (iii) Explanation for the delay in bringing the application
- (iv) Prejudice if any to be occasioned to the applicants

8. From the submissions of the applicants, they have proceeded as if there was no defence filed and therefore submitted that their draft defence raises triable issues and asked the Court for an opportunity to contest the plaint in full trial. The record however reveals that this line of submission is misplaced. I say so because there is on record a memorandum of appearance and statement of defence filed by the law firm of Stephen Oddiaga & Co advocates on behalf of all the defendants on 3rd August 2007. The applicants have not stated in their pleadings that the said firm of advocates did not have their instructions to represent them. This defence was struck out and summary judgement entered in favour of the plaintiff.

9. As at the time of filing this application, the ruling of Njagi J (as he then was) has not been appealed against or set aside. The present application has also not sought variation of the orders of Njagi J. It is therefore a misnomer for the applicants to aver they have a defence on merit when their defence to the plaintiff's claim had been struck off. This status of the file was brought to the attention of the applicants vide the replying affidavit sworn by the plaintiff to oppose the motion particularly in paragraph 5, 6 and 7. For instance, paragraph 5 reads thus ;

“That I further do state that after the defendants had entered appearances and filed their defence, the plaintiff did apply for summary judgement as witness the annexed application the written submissions and the judgement, of the Court marked 'D', 'E', 'F' and 'G'.

The applicant in seeking to set aside the judgement on record is asking me to sit on appeal on a decision rendered by a Court of concurrent jurisdiction. The principle of defence on merit or a defence raising triable issues is therefore not available to the applicant.

10. On the aspect of explanation for the delay, the applicants averred they were never served with summons to enter appearance and only became aware of existence of this matter through the O.C.S

Taveta. In response thereto, the plaintiff submitted that the issue of non-service is ill-conceived and an after thought quoting **Pragji Bhagwanji & Co Ltd vs Michael Krogs & Others Civil Suit No 338 of 1995 (unreported)** Wambilianga J held *that service of a process becomes effective when a party who is targetted by that service becomes aware of the existence of the matter*. It is the respondent's contention that any irregularity of service was cured by the entry of unconditional appearance and filing of the defence. Again the applicants find themselves in the unfortunate situation that they cannot claim non-service when they already filed appearance and defence in this matter. Judgement was entered in favour of the plaintiff on 24th August 2008. No explanation has been given why this application was not filed from then until 25.7.2012, a difference of 4 years.

11. The last issue I will consider is what is raised by the respondent on the validity of this application vis-a-vi the provisions of Order 9 rule 9 of the Civil Procedure Rules. The advocates who entered appearance for the defendants was Messrs Stephen Oddiaga & Co advocates. Order 9 rule 9 require an order of the Court or by consent of former advocates to let in new advocates into the scene where there is judgement on record. There was no such application made by the firm of Messrs Musinga & Co advocates before the filing of their application seeking to come on record in place of the applicant's previous advocates. Consequently the application before Court is filed by a stranger to the proceedings and must be struck out.

12. In conclusion, for the Court to exercise its discretion while setting aside an exparte judgement (which is not the case here), such discretion is not to be exercised to assist a party who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice as was stated in the case of **Shah vs Mbogo Supra**. Further the Court of Appeal in the case of **Municipal Council of Meru vs National Housing Corporation & 54 Others (2014) eKLR** held that

“In exercising the discretion the Court usually considers the reason, if any given for the default and the merits or otherwise of the case of the party against whom the judgement was entered but is not limited to only those considerations”

In this instance, the merits of the applicants case was already considered. I am therefore unable to exercise discretion in their favour with the nature of the application before Court. Consequently for the reasons contained in the body of this ruling, the application dated 25.7.2012 be and is hereby struck out with costs to the plaintiff.

Ruling dated and delivered at Mombasa this **8th** day of **October, 2015**

A. OMOLLO

JUDGE