



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENTAL COURT**  
**AT MOMBASA**  
**LAND CASE NO. 24 OF 2012**

**JEREMIAH'S CREEK LIMITED ... ..PLAINTIFF**

**- VERSUS-**

**CHARLES KAMAU .....DEFENDANT**

**RULING**

[1] This application is brought under Order 10 Rules 7,10 and 11 and Order 50 rule 5 of the Civil Procedure Rules. The defendant seeks to have the ex parte judgment entered on 28th March 2012 set aside. The defendant further seeks to have the time within which to file the defence filed on 9th May 2012 extended and that the same be held as properly filed and that the defendant be granted unconditional leave to defend the suit.

The grounds in support of the application are stated on the face of the application. The same is opposed by the plaintiff who has filed grounds of opposition and a replying affidavit sworn by one David Needham on 28th May 2012.

[2] Mr. Wangala Learned Counsel for the applicant argued before me that they sought to set the judgment aside entered on 28th March 2012 to allow the defence filed on 9th May, 2012. And the same to be deemed as filed.

He stated that the reasons for the delay was that, the defendants who had the conduct of this case went out of the country to take his sick daughter to Ghana for medical check up and was due back to the country on 28th March 2012 by which time he could have filed the defence on time. It was argued that the child needed surgery on 30th March 2012 and therefore counsel did not come back until 8th April 2012 by which time the judgment had been entered. Mr. Wangala relied on Order 10 rule 7, 10 and 11 of Civil Procedure Rules and told the court that it had discretion. He further argued that there were triable issues raised in the already filed defence.

Mr. Asige Learned Counsel for the respondent plaintiff opposed the application. He relied on the submissions filed by the plaintiff herein dated 3rd June 2013. He argued the motion dated 23rd February, 2012 was not signed by the applicant. He argued that the relevant and core provisions is an abridgment of

time under Order 50 Rule 5 and the Court does not have those powers. He went on to argue that the application was filed in May 2012 and was not prosecuted until April 2013 and therefore that, the delay is unconsonable further that the motion is supported by affidavit evidence from counsel and that it is trite law that Counsel cannot swear on contestable issues. Further that no leave was sought to file the pleadings out of time. He argued that those pleadings offend the law and are incompetent.

[3] I have very carefully considered the competing submissions made by the parties to this application. I have also read the pleadings filed by the parties to this application. The issue for determination by the Court is whether the applicant/defendant has established a case persuading this court to exercise its unfettered discretion to set aside the interlocutory judgment entered herein. The principles for setting aside an ex parte judgment are well settled. These being that the discretion of the court is unfettered except that if the judgment is set aside it must be done on terms that are just<sup>1</sup>. The Court of Appeal has also held that the main concern of the court is to do justice to the parties and the Court will not compose conditions on itself to fetter the discretion given to it by the rules. The Court must satisfy itself that there is a defence on merits. Defence on merits does not mean a defence that must succeed. It means a defence raising triable issues that should go on trials or adjudication<sup>2</sup>.

It has been held that the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered, The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and it should always be remembered that to deny the subject a hearing should be the last resort of a court<sup>3</sup>.

[4] The dispute herein involves land parcel Kwale/Diani Complex/1069. The plaintiff avers he allowed the defendant to stay on the same to keep intruders away and he thereafter refused to move and vacate therefrom despite several reminders by the plaintiff that he does so.

The defendant in his defence (filed out of time) alleges that the plaintiff registered himself as proprietor fraudulently. He set out the particulars of fraud. He states that there was no land control Boards consent to the alleged irregular transfer of the plaintiff. The defendant sets out a counterclaim claiming the land.

[5] There is no doubt that there are triable issues in the defence filed out of time. Why was the defence filed out of time?

The defendant has explained the circumstances that led to the defence being filed out of time. That his daughter was ill and he had to take her out of the country for medical checkup. He stated that unfortunately his daughter had to be operated on and he delayed in coming back to Kenya and by the time he was back the interlocutory judgment had been entered against the defendant on 28th March 2012.

He thereafter filed the defence out of time on 9th May 2012 and filed this application on 21st May 2012.

[6] The issues in this case concern land. Land is always a sensitive and emotive issue. The issues raised shall be best sorted out if they are ventilated through a full hearing of the case. The delay occasioned herein on filing the defence was not excessive. The reasons given for such delay is understandable. Delay was occasioned by defendant Counsel's daughters illness. To my mind no prejudice shall be suffered by the plaintiff in having this suit set aside. This court has unfettered discretion to set the inter interlocutory judgment aside.

The Court therefore makes the following orders.

(a) The interlocutory judgment entered on 28th March 2011 is set aside.

(b) Time to file and serve the defence is enlarged and the defence filed on 9th May 2012 is deemed as properly filed.

(c) The plaintiff is granted fourteen (14) days to file the reply to the defence and counterclaim.

(d) The costs of this application shall be borne by the applicant, the same to be taxed by the taxing master in favour of the plaintiff.

It is so ordered.

**Dated and delivered at Mombasa in open court this 18th day of October, 2013.**

**S.N. MUKUNYA**

**JUDGE**

**18.10.2013**

**In the presence of:**

**Mbuya Advocate for the plaintiff**

**Umalla Advocate for the defendant**

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1 Per Ringera J in Mwaba v Kenya Bureau of Standards {2001} 1 EA Page 155

2 Ceveast Airlines Ltd v Kenya Shell Ltd [2000] 2 EA Court of Appeal quoting Duffus P in Patel vs EA Cargo

handling Services [1974] EA 75.

3 Per Ainley J Sebei District Administration vs Gasyali [1968] EA 300 quoted with approval by Sheridan J.