REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT EMBU

E.L.C. CASE NO. 235 OF 2014

FORMERLY KEROGOYA E.L.C. NO. 91 OF 2013

PIUS MULWA MASAI (Suing as legal representative of the estate of

MASAI KABOLELYA.....PLAINTIFF

VERSUS

NZEMBI MUSILI.....1ST DEFENDANT

GREGORY MAINGI.....2ND DEFENDANT

PATRICK KITAKA.....3RD DEFENDANT

VENDI A.K.A. BAKARI.....4TH DEFENDANT

JOSEPH MBUVA.....5TH DEFENDANT

DOMINIC MBULA MUTIE.....6TH DEFENDANT

RULING

1. I am called upon to rule on a motion on notice dated 5.11.2020 filed in court on the same date. It is expressed to be brought under order 9 Rule 9, order 12 Rules 2 and 7, order 22 Rule 25 and order 52 Rule 1 of the Civil Procedure Rules, 2010 . Also invoked are Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21). The applicants – **NZEMBI MUSILI, GREGORY MAINGI, PATRICK KITAKA, VENDI A.K.A BAKARI, JOSEPH MBUVA** and **DOMINIC MBULA MUTIE-** are the defendants in the suit while the respondent – **PIUS MULWA MASAI**- is the plaintiff.

2. The motion came with five (5) prayers but payers 1 and 2 are now moot as they were meant for an earlier stage. That leaves prayers 3,4 and 5, which are for consideration at the stage. The prayers are as follows:-

> ***Prayer 3.*** *That the Honourable court be pleased to issue a temporary stay of execution of the decree issued by the Honourable court on 12.8.2020 pending the hearing and determination of this application/suit.*
>
> ***Prayer 4:*** *That this Honourable court be pleased to set aside the exparte hearing and resultant exparte judgment entered on 27.2.2020 together with all consequential orders thereto.*
>
> ***Prayer 5:*** *That costs of this application be in the cause.*

3. The application is premised on the grounds, inter alia, that execution of the exparte judgment entered on 24.2.2020 is imminent; that eviction notices have been issued; that the applicants were not adequately informed of the hearing dates by their former advocates; that mistakes of advocates should not be visited on litigants; that there is a good defence with high chances of success; that the applicants were lawfully issued with the disputed land; that there is possibility of suffering loss and damage if stay is not granted; and, finally, that the respondent will suffer no prejudice if the orders are granted.

4. The grounds advanced are explicated in the supporting affidavit that came with the application, with considerable space being devoted to alleged mistakes or shortcomings occasioned by the applicant's former advocates on record.

5. The respondent responded via a replying affidavit filed on 11.2.2021. He deposed, inter alia, that the record shows that the applicants have no interest in the matter; that the records also shows that on 21.2.2018 the applicants were given 30days to comply with pre-trial requirement which they did not; and that the matter proceeded to hearing the first time on 8.7.2019 after the applicants and/or their counsel failed to appear in court despite the hearing date having been taken by consent.

6. It was further deposed that the first hearing that resulted in the entry of the first judgment proceeded without the applicants having complied with pre-trial requirements. That judgment was later set aside by consent and the applicants were granted leave to comply with pre-trial requirements; that they complied but the matter proceeded yet again without them because they failed to appear in court. Their counsel however was present and he sought adjournment for the reason that some of them were untraceable. The court declined the request for adjournment and observed that the applicants were not keen on proceeding with the suit. The respondent asserted that the conduct of the applicants in the entire court process exonerates their advocates from any blameworthy conduct. The court was asked to dismiss the application with costs.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 16.1.2021. They submitted, inter alia, that a mistake on the part of a litigants counsel should not be visited on the litigant. The applicants blamed their former advocates for not informing them of the hearing dates. They then singled out their second counsel and blamed him for not paying the throw away costs ordered by court to be paid. According to them the counsel had received full payment and he ought to have paid the costs. Further blame was cast on both former counsel for not failing to file the applicants bundle of documents and for incompetence. The applicants reiterated that they have a good defence that raise triable issues. To the applicants, failing to set aside the judgment as requested in tantamount to condemning them unheard. For persuasion and guidance, the applicants cited the case of **RICHARD NCHAPI LEIYANGU vs. IEBC & 2 OTHERS [2014] e KLR.**

8. The respondent's submissions were filed on 25.1.2021. It was pointed out that setting aside exparte judgment is discretionary and that the court ought to interrogate the conduct of the applicants. The delay in filing the application under consideration was said to be inordinate, inexcusable, and meant to delay justice. The applicants were also said to have failed to give enough reasons for failure to attend court for hearing. They were faulted for seeking to lay blame on their advocates. The respondent sought to rely on the case of **SHAH Vs. MBOGO [1967] EA 116**.

9. I have considered the application, the response made to it, and the viral submissions by both learned counsel. Two crucial prayers are sought by the applicant viz (a) setting aside the hearing that took place and the judgment that ensued and (b) stay execution of the same judgment.

10. Under order 12 Rule 7 of the Civil Procedure Rules, 2010 the court has discretion to set aside a judgment entered in absence of a party. Such setting aside can be granted on such terms as may seem to court to be just. Like all other discretions, the exercise of discretion in this regard has to be judicious and based on sound reasons, not whims, irrationality, or caprice. In **Wachira Karani Vs. Bildad Wachira [2016] eKLR** the court held, inter alia, that setting aside is a matter of discretion of the court and is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.

11. In the same case, it was further held that the court ought to consider the nature of the action, the defence, if any is made available, and the question whether the plaintiff can be compensated adequately with costs. All this has to be done bearing in mind that denying a hearing to litigant should be the last resort of the court. More importantly, the court has to consider whether the applicant has proffered sufficient cause to warrant setting aside of the exparte judgment.

12. The applicants in this case have averred that at the time of hearing the case, their former advocate on record did not inform them of the hearing date. It however came to light that this is the second time the applicants are seeking to set aside judgment. The applicants therefore have been indulged by both the respondent and the court earlier and I make this observation because the earlier judgment was set aside by consent.

13. It is trite law that a party cannot rely on mistakes of counsel as the sole ground for seeking to set aside a judgment. In the case of **Rajesh Rughani vs Fifty Investments Limited & Another [2016] eKLR,** the court of Appeal observed as follows where a party tried to blame his advocate:

> *"Our re -evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay"*

14. It also settled principle of Law that a case belongs to the litigant and not to his counsel. A litigant therefore has a duty to pursue the prosecution of his case. It is the litigant's duty to constantly or regularly check with his advocate to know or ascertain the progress of the case. In the case of **Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR** the court held, inter alia, as follows:

> *"The question then that arises is whether the plaintiff has offered sufficient reason to persuade the court to exercise its discretion in the favour and reinstate the application. It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by cost ....However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court".*

It was stated further in the same case:

> *"I fully agree with the above holding. It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter".*

15. One would find this same position expressed in the case of Republic vs Teachers Service Commisison, Exparte PATRICK M NJUGUNA [2013] e KLR where the court, while quoting Kimaru J in SAVINGS and LOANS LIMITED vs. SUSAN WANJIRU MURITU HCC NO. 397 OF 2002, NAIROBI (MILLIMANI) expressed itself thus:

> *"It is clear from the foregoing that the basis of this application is that the applicant was let down by his advocate. However, it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the court".*

It was further remarked in the same case:

> *"I am not satisfied that the applicant himself was not guilty of negligence in following up his case. It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter. The decision whether or not to restore such a case is an exercise in discretion and like any other judicial discretion must be exercised upon reason, not like or dislike, caprice or spite".*

16. I think I have said enough of the position of our courts on the issue. The applicants in this matter had another judgment entered against them in broadly similar circumstances. That judgment was later set aside by consent. When that happened, one would have expected that the applicants would act with all due dispatch to expedite the matter. That was not to be. The matter still continued to delay owing largely to the applicants lethargy or inaction. That is what impelled the court to proceed without the applicants, eventually leading to entry of the judgment now being contested. The applicants had been indulged once. They faltered yet again. They now want a second bite at the cherry.

17. It beboved the applicants to show the efforts they made to ensure that their matter proceeded in court. It is not enough to blame the advocates. It is required of them to show that they are diligent litigants who did their best but were nevertheless failed by their advocates. In this particular case, that was not shown. It would even be true to say the blame cast on the advocate is not convincing. It is clear that on the day the matter was heard the second time a counsel was there in court for them trying unsuccessfully to convince the court to adjourn. The applicants themselves were not there. It seems to me to be the correct position that it is the applicants themselves, not their advocates, who are guilty of dilatory conduct.

18. It may be useful to observe that the applicants had their first counsel, who, in their view, failed them. They then had a second one, who, again in their view, also failed them. But what is lacking in all this narrative is the applicants own input towards expeditious conclusion of the matter. The court records shows them as people who were mainly absent whenever their matter came up in court or as slow in complying with pre-trial requirements.

19. When this is the scenario that presents itself to the court, it becomes difficult to exercise discretion in favour of the applying party. If the applicants really feel aggrieved by their advocate, there is body to which they can go and complain. This, in my view, is the way to go and I am fortified in this position by the remarks of Ringera J(as he then was) in Omwoyo vs. African Highlands and produce Co. Ltd [2002] KLR, which were as follows:-

> *"Time has come for the legal practitioners to shoulder the consequences of their negligent acts like other professional do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of negligence of the defendant's advocates. This a proper case where the defendant remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment".* Yes, that is the way. The applicants cannot be allowed to keep on taking the respondent in circles use the court process. This matter should come to rest.

20. The upshot, in light of the foregoing, is that the applicants have not done a good job of convincing the court that their application has merits. I make a finding that the application is unmeritorious and the prayer for setting aside the hearing and judgment (prayer 4) is rejected. So is the prayer for stay of execution (prayer 3) which in my view would be only possible to grant if prayer 4 is successful. The respondent gets the costs of the application.

RULING DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF MAY 2021

In the presence of:-

Respondent - absent

Applicant – absent

Court Assistant – Leadys

Ndorongo for respondent

Miss. Kalii for applicant

A.K.KANIARU

JUDGE