



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC CASE NO. 72 B OF 2019

PHILIP KIPROTICH TUITOEK.....PLAINTIFF

VERSUS

EDNA JEBIWOTT KIPLAGAT.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY...2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 15th April 2020 by the 1st defendant applicant seeking for the following orders:

- a) Spent
- b) That there be an order of stay of execution of judgment of this Honourable court delivered on 17th December 2019 and all consequential orders emanating therefrom pending the hearing of this application inter partes.
- c) There be an order setting aside the ex –parte judgment herein and all the consequential orders.
- d) The 1st defendant be granted leave to file a defence to the plaintiff's suit.
- e) Costs of this application be borne by the plaintiff.

The application is based on the annexed supporting affidavit of the applicant and on the ground that she was not served with summons to enter appearance and a hearing notice. The applicant also avers that she has never entered into a sale agreement with the plaintiff and that the documents relied on are forgeries.

It is the applicant's case that she has a good defence and hence it is only fair that she be given an opportunity to be heard. The applicant therefore urged the court to allow the application as prayed with costs.

The respondent filed a replying affidavit in opposition to the application dated 24th April 2020 stating that the 1st defendant was personally served with and summons to enter appearance with a copy of the plaint by a process server known as Sego Kipchirchir Abraham as per the annexed affidavit of service dated 25th June 2019.

The respondent averred that despite the defendant being duly served with the summons to enter appearance she failed to file any response with the stipulated period. He further stated that the hearing notice for the formal proof scheduled for 19th November 2019 was also served on the defendant as per the attached certificate of postage.

The respondent also stated that he has been informed that the applicant has filed another case which is similar to this current case which amounts to an abuse of court process. The respondent further stated that it has taken the applicant more than 6 months to file this application and yet the applicant and her husband have been in communication with the respondent.

On the issue by the applicant that she has an arguable case as per the annexed draft defence, the respondent stated that the same does not meet the threshold of a good defence as it is general denial. Further that if the documents relied on were a forgery then the applicant could have reported the matter to the investigative authorities and no such action has been taken. The respondent therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The principles of setting aside *ex parte* judgments are well established. In the case of **Esther Wamaitha Njihia & two others vs. Safaricom Ltd** the court citing relevant cases on the issue held *inter alia*:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised 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 (see Shah vs. Mbogo. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

The issues for determination are as to whether the defendant was properly served with summons to enter appearance, whether the defendant has shown sufficient cause why she neither filed a defence nor attended court during the hearing of the suit and finally whether the defendant has a defence with triable issues.

From the record, it is clear from the affidavit of service by a Process Server known as Sego Kipchirchir Abraham, who elaborately described the place of service at the applicant's home near Green Valley Academy and further described the applicant's physical features. The affidavit of service also indicates that the applicant accepted the copies and appended her signature which was filed in court as proof of service.

This is proof that the applicant was properly served with summons to enter appearance together with the plaint. The affidavit of service together with the signed copy was filed in court and on 17th July 2019 the Deputy Registrar noted this and ordered that the matter do proceed by way of formal proof. This matter therefore proceeded by way of formal proof on 25th November 2019 whereby the applicant was served with a hearing notice but did not appear in court. What further service did the applicant want in respect of this case. I find that the applicant was duly served with the process.

Order 12 Rule 7 of the Civil Procedure Rules provides that:-

"where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just".

The court has discretion to set aside judgment upon such terms that may be just. The terms must not cause injustice to either the applicant or the respondent. **Mulla, The Code of Civil Procedure** has illuminated the grounds for setting aside an *ex parte* decree and what constitutes sufficient cause for setting aside an *ex parte* judgement/decree. Essentially, setting aside an *ex parte* judgement is a matter of the discretion of the court.

The question is as to whether the applicant has shown any sufficient cause to enable the court exercise its discretion in her favour. The applicant claims that she was not served with summons to enter appearance and that the documents relied on are forgeries. The court record shows that the applicant was properly served but she did not take any action of filing a response within the stipulated period.

In the case of **Mungai —versus Gachuhi & another [20051e KLR** cited with approval in the case of **Signature Tours & Travel Limited —vs- National Bank of Kenya Limited** the court held that:

"a court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity".

The Applicant chose to forego the opportunity to be heard by failing to enter appearance and file defence within the stipulated period. The applicant further neither attended court nor offered any reasonable explanation for the same despite having been duly served with a hearing notice. I find that the applicant does not meet threshold for the setting aside of *ex parte* judgments.

The applicant claims that the documents relied on are forgeries but does not go further to show the court that she has taken any action to report the matter to the investigative agencies. The documents that the respondent has are, sale agreement duly signed by the applicant, title in the name of the applicant, duly signed transfer of land form together with the applicant's photograph, receipt for payment of survey fees, acknowledgment of payment of purchase price. Were all these documents forged by the respondent

The next issue is as to whether the applicant has a defence with triable issues. I have looked at the draft defence which has general denials of having entered into a sale agreement with the respondent. The documents attached speak the opposite of such denials.

In the case of **John Mukuha Mburu —versus- Charles Mwenga Mburu [20191e KLR** the court held that:-

*"it is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of **Mohammed & another —versus Shoka [19901KLR 463"***

The applicant has also not explained the reason for the delay of bringing this application. Judgment in this case was delivered on 17th December 2019 and the application was filed on 15th April 2020 which is more than 5 months. It is also on record that the applicant has filed

a case in this court which is similar to the current one being **ELDORET E & L 16 OF 2020** whereby she is seeking for a declaration that the suit title belongs to her. This is an abuse of court process as the said case would fall under the realm of the doctrine of res judicata.

In the case of **Jaber Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR** the court stated that unreasonable delay depends on the circumstances of the case. The court stated:

*“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of **Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012** the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”*

Five months in this case is unreasonable delay as no explanation was given for not filing the application in good time.

In the case of **James Kanyiita Nderitu & Another =Versus= Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)**, the learned Judges of Appeal had this to say:-

*"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. EA. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173]*.*

*In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango 0100 v. Attorney General [1986-19891 EA 456]*).*

The law and procedure is clear that where a party has failed to enter appearance or filed a defence within the stipulated period, then such a party can move the court to set aside the ex parte proceedings. It is also within the court's discretion to look at each case on its own merits and decide whether such party meets the threshold for setting aside ex parte judgments. A party cannot be allowed to disregard court processes and come to court to set aside what has been done regularly as per the set down procedures. Such party cannot take steps backward to fulfill his or her own omission or commission. The court is cognizant of the fundamental right to be heard which must be guarded but it must also not lose sight of the right to access to justice for all which should be dispensed expeditiously.

On the issue of stay of execution, the court is aware of **E & L CASE NO 16 OF 2020** filed by the applicant as it is also pending for ruling before the court. As I had stated earlier that the applicant cannot be allowed to file a duplicate case with the same prayer to try and circumvent the court processes and the doctrine of res judicata. I notice in the case that a title has already been issued in the name of the respondent in the implementation of the decree and therefore there is nothing to stay. Courts do not grant orders in vain as they are meant to be implemented. That is exactly what the respondent did by enforcing the orders of the court. The court cannot stay what has already happened. I will therefore not go into whether the applicant has met the threshold for grant od stay of execution.

I have considered the application the supporting and replying affidavits and come to the conclusion that the application lacks merit and is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 26th DAY OF MAY, 2020

M. A. ODENY

JUDGE