REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 474 OF 2015

FORMELY HIGH COURT CIVIL CASE NO. 34 OF 2008

CONSOLIDATED WITH

ELC CASE NO. 276 OF 2015

(FORMELY HIGH OCURT CIVIL CASE NO. 33 OF 2008)

KENYA ANTI-CORRUPTION COMMISION..... PLAINTIFF

VERSUS

CHARLES OYOO KANYANGI..... 1ST DEFENDANT

AASHISH VALLABHDAS JETHWA.....2ND DEFENDANT

LALJI KARSAN RAMJI RABADIA.....3RD DEFENDANT

WILSON GACANJA.....4TH DEFENDANT

BANK OF BARODA KENYA LIMITED.....5TH DEFENDANT

MAYHOOD LIMITED.....6TH DEFENDANT

RULING

1. The 5th Judgement Debtor comes to this court for the setting aside, and or review of judgment under the provisions of **Section 1, 1A, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya** and **Order 12 Rule 7 and Order 51 of the Civil Procedure Rules**. **Order 12 Rule 7** provides for the setting aside of Judgment or dismissal under **Order 12**.

2. The application was primarily based on grounds that t**he judgment was delivered in favour of a disbanded commission whose rights were not transferred to the Ethics and Anti-corruption Commission, as not application had been made to that effect.**

3. The 5th Defendant was not served with the application for consolidation of the suits.

4. The 5th Defendant's Counsel made a genuine error for which the 5th Defendant should not be punished.

5. Material non-disclosure was made by the 2nd and 3rd Defendant at the time of recording the consent of 1st November 2018.

6. The 5th Defendant had released the original title deeds and discharge of charge in respect of the disputed properties to the 2nd and 3rd Defendants in 2011.

7. The consent of 1st November 2018 conferred interest in the disputed properties but since the 2nd and 3rd Defendants had settled their liability to the 5th Defendant, the properties will have to be surrendered and transferred by the 5th Defendant to the Judiciary and/or Government of Kenya.

8. The 5th Defendant will be compelled to comply with the orders in respect to costs without a fair and just hearing.

9. If the orders sought are not granted the 5th Defendant stands to suffer irreparable loss which cannot be compensated by damages.

10. The salient facts of the application are that the 5th Defendant's Advocate claims to have discovered that judgment had been delivered against her client through the daily newspaper on 22nd March 2019, yet her files relating to the matter (numbers as Kisumu HCCC No. 33 and 34 of 2008) did not reflect any service from parties. That she later discovered from her clerk that they had been served with documents relating to ELC No. 474 of 2015 which the clerk believed the firm was not acting in and filed them in a folder for documents requiring clarification from the Advocate. Counsel cited several reasons for not immediately attending to the served documents relating to ELC No. 474 of 2012 including not being out of Kisumu at the time of service, being away from the office due to personal medical issues, and the clerk failing to alert her due to pressure of work.

11. The 5th Defendant's Counsel claims not to have been served with notice regarding the assignment of the new case number and regarding the consolidation of the suits, but was instead served with a notice fixing the hearing date. Counsel contends that the 3rd Defendant had failed to disclose the outcome of Kisumu HCCC No. 100 of 2007 which was that the 5th Defendant released to the 3rd Defendant the original title deeds and discharge of charge in respect of the properties. Counsel also submitted that the Plaintiff failed to serve upon the 5th Defendant a notice for filing submissions and notice of date of delivery of judgment, thereby depriving the 5th Defendant of an opportunity to submit.

12. While the 5th Defendant laments the delivery of judgment in favour of a disbanded commission, the Plaintiff contends that Article 79 of the Constitution and Section 33 of the Ethics and Anti-Corruption Commission Act ensures the perpetual existence of the commission. The Plaintiff's Counsel stated that the application contravenes Section 1A (3) of the Civil Procedure Act and Order 36 Rule 1 of the Civil Procedure Rules. He further contended that Kisumu HCCC No. 100 of 2007 was distinct from this suit and the Plaintiff was not a party to it, thus it should not be considered.

13. The Plaintiff's Counsel stated that the 5th Defendant had ample time to respond to the suit and the inefficiencies of the 5th Defendant's Advocate's office should not be a ground for setting aside the judgment. The Plaintiff's Counsel contends that the court took into account all responses and documents filed by the parties and that all issues were captured in the consolidated suit thus the court became *functus officio* on rendering the judgment. That the application was averse to the public interest.

14. The legislative framework is established in **Order 12 Rule 7 of the Civil Procedure Rules** for setting aside and **Section 80 of the Civil Procedure Act along with Order 45 of the Civil Procedure Rules** for review.

15. **Order 12 Rule 7** requires the applicant to demonstrate sufficient cause for setting aside *ex-parte* orders. The court is required to exercise this discretion in a judicious manner as set out in ***CMC Holdings Limited v Nzioki*** **[2004] 1 KLR 173**:

> **"That discretion must be exercised upon reasons and must be exercised judiciously… Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..."**

16. The Court of Appeal in ***Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd*** **[2016] eKLR** also held that the court is:

> **"… obligated to consider in an application to set aside an ex-parte judgment whether the defendant had a defence that was not frivolous, a sham, or shadowy or, put another way, that raised a triable issue. If it did raise such an issue, the defence ought to have been allowed to be ventilated on merit at a trial for it should never be lost sight of that courts exist for the purpose of determining rights and entitlements of parties substantively and on merit upon hearing them and considering such evidence as they may tender."**

17. **Order 45** restricts the grounds for review to:

> **(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;**
>
> **(b) on account of some mistake or error apparent on the face of the record, or**
>
> **(c) any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.**

18. Mativo J. in ***Michael Muriuki Ngubuini v East African Building Society Limited*** **[2015] eKLR** cited with approval the case of ***Zacharia Ogomba Omari and Another vs Otundo Mochache*** thus:

> **"More relevant to the application before me is the decision of Shah, Owuor and Waki JJA delivered on 20.6.2003 in the case of Zacharia Ogomba Omari and Another vs Otundo Mochache where the learned judges of the Court of Appeal had this to say:-**

i. An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the Court for granted.

ii. It must be remembered that even a land dispute must be brought to an end and a land dispute per se is no ground to reopen a case, which is concluded."

Whether mistakes by clerk of Advocate is a sufficient reason for review or setting aside an ex-parte judgment

19. The Overriding Objective in **Section 1A and 1B of the Civil Procedure Ac**t, that is ensuring the expeditious, fair, and just proportionate and economic disposal of cases, must be considered. Where an Advocate's mistake can be remedied with costs and where the respondent stands to suffer no prejudice, the court's orders ought to be set aside. The court's objective is to ensure that the ultimate end of justice is achieved.

20. ***Phillip Chemwolo & Another v Augustine Kubede*** **[1986] eKLR**

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on its merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline" (Apaloo J, as he then was)

21. ***Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others [2013] eKLR***

"It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits … The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice." (Odunga J)

22. The conduct of Counsel and the parties after discovering the mistake should also be considered as was the case in ***Burhani Decorators & Contractors v Morning Foods Ltd & Another*** **[2014] eKLR**

23. In this application, the Advocate has sufficiently demonstrated how the mistakes made on the part of her clerk and the apparent failure to be notified about the consolidation of suits and subsequent change of case number led to the 5th Defendant not participating in the consolidated suit. The prompt filing of the application following the delivery of the *ex-parte* judgment is also an indication that the 5th Defendant was keen on participating in the suit.

Whether 3rd Defendant was obligated to disclose the outcome Kisumu HCCC No. 100 of 2007 and whether the consent order recorded in that case is a sufficient reason for reviewing or setting aside the ex-parte orders

24. Olao J. in ***Gerald Munene Mugo v Muriithi Maganjo & 2 others*** **[2016] eKLR** held:

"A party approaching the Court for an ex-parte order has a duty to make full disclosure of all relevant information in his possession whether or not it will assist his application. This is important in assisting the Court exercise its discretion whether or not to grant the relief sought. If that duty is not observed by the applicant, the Court may exercise its discretion by discharging, varying or setting aside the order so obtained. One of the known grounds for discharging or setting aside such an order is concealment of material facts of material non-disclosure."

25. In the case of ***THE KING VS THE GENERAL COMMISSIONER FOR THE PURPOSE OF INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON: EX-PARTE PRINCESS EDMOND DE PLIGAC (1917) 1 K.B 486, WARRINGON L. J*** said as follows:-

"It is perfectly well settled that a person who makes an exparte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it" **- emphasis added."**

26. Kisumu HCCC No. 100 of 2007 concerned the 3rd Defendant preventing the 5th Defendant from exercising statutory power of sale, the consent order recorded concerned the 3rd Defendant essentially conceding the claims against him and settling the costs due with the Plaintiff's Counsel. The subject matter of these suits are markedly distinguishable, and therefore the existence of the consent order recorded in Kisumu HCCC No. 100 of 2007 cannot be said to be a relevant or material fact that ought to have been disclosed by the 3rd Defendant.

27. The outcome of Kisumu HCCC No. 100 of 2007 and the consent order recorded thereafter would have only been relevant to the substance of the defence mounted by the 5th Defendant had it had the opportunity to fully participate on the consolidated suit. Therefore, this could fit within the description in Order 45 of a "new and important matter or evidence" which could not be produced by the 5th Defendant at

the time the *ex-parte* orders were made.

28. I have considered the rival submissions and do find the fact that the Kenya Anti-corruption Commission was disbanded and in its place the E.A.C.C created and no application has been filed and served upon the 5th Defendant effecting the transfer of rights of the disbanded commission to the current commission is a matter of law that should have been raised at the hearing of the suit.

29. The claim by the 5th Respondent that the proceedings, orders in this matter were a nullity should have been raised in the proceedings and the hearing of the suit but not by application to set aside.

30. The claim that the disbanded commission has filed a decree is frivolous as the E.A.C.C. Act no 22 of 2011 provides for the saving of rights and interest of the disbanded commission.

31. Under the Act, any orders or notices made or issued by the Kenya Anti-Corruption Commission shall be deemed to have been made or issued under the Act and any function ,transaction investigation prosecution carried out by or on behalf of the Kenya Anti-Corruption Commission , civil proceedings or any other process in respect of any matter carried out under the **Anti-Corruption and Economics Crimes Act no 3 of 2003** or any other law , before the commencement of the act is deemed to have been carried out under the Act.

32. In a nutshell, the 5th Defendant is only worried of the costs that were awarded against him. Judgment cannot be set aside to save a party from paying costs.

33. Moreover, I do find that this court is ***functus officio*** after passing judgment in this matter and cannot revisit issues raised by the 5th Judgment Debtor that ought to have been raised in the proceedings. The applicant should have filed an application for review under order 45 of the civil procedure rules on costs which provides for review of judgment.

34. In conclusion, I do find that the application is without merit and the same is dismissed with costs. Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER, 2019.

In the presence of:

Nishi Pandit for Applicant

Mr. Bii for Respondent

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE