REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

E&L NO. 213 OF 2012

KIBOIT KOSGEI CHEPSAIGUT...PLAINTIFF

VERSUS

CHERUIYOT KIMETO...1ST DEFENDANT

PATRICK KOSGEI..2ND DEFENDANT

RULING

This ruling is in respect of an application dated 23rd September, 2019 brought by the defendant applicants seeking for the following orders:-

a) That there be a stay of execution of ex-parte judgment and/or decree delivered on 24th July, 2019 and all consequential orders.

b) That the honourable court be pleased to set aside the judgment and/or decree delivered on 24th July, 2019 and all consequential orders and reinstate this suit for hearing of the defence case.

Counsel agreed to canvass the application vide written submission which were duly filed.

Applicant's Submission

It was the applicant's submission that the defence raises triable issues which requires the applicant to be heard. That the matter proceeded in the absence of the defendants hence the entry of judgment and issuance of the decree. That it is trite Constitutional and statutory principle that justice shall be administered without undue regard to procedural technicalities as such, the greatest regard should lie with the substantive issues.

The applicants further stated that they learnt on 20/6/2019 that this case proceeded when they were in court waiting for their advocate whom they did not see as he had attended a Judicial Service Commission interview. They therefore urged the court to allow the application as prayed.

Respondent's Submission

The respondent opposed the application through a replying affidavit sworn by KIBOIT KOSGEI CHEPSAIGUT and the grounds that the defendants have not been serious in defending this suit. That the matter came up on 27/2/2018, 21/6/2018, 25/10/2018 and 24/1/2019 and the defendants were never ready to proceed with the hearing as they had not complied with Order 11 of the Civil Procedure Rules.

The respondent submitted that when the matter came up for hearing on 20/5/2019, the defendants and/or their Counsel without any justifiable and/or reasonable cause chose not to appear in court. The plaintiff's case proceeded for hearing and the plaintiff's case was closed. Consequently, the defendant's case was also closed.

That judgment was delivered on 24/7/2019 and a decree was served upon the defendants personally on 5/8/2019 and upon the defence Counsel on 18/9/2019 and it is now over 3 months since the court made its determination on merit yet the applicants and/or their Counsel have neglected to take any necessary steps to follow up on this matter.

Counsel submitted that the pendency of this matter before this honourable court is prejudicial to the plaintiff/respondent as he is sickly and therefore the same ought to be concluded. That the applicant's application is devoid of merit and offends the overriding objective of this honourable court which is to facilitate a just, expeditious, proportionate and affordable resolution of civil disputes.

It was Counsel's further submission that there has been undue and inordinate delay on the part of the defendants/applicants hence they are

guilty of laches and have come to this court with unclean hands. He therefore urged the court to dismiss the application with costs.

Analysis and Determination

This is an application where the applicant wants the court to exercise its discretion to allow the reopening of the case and allowing the defence to present their case. Article 159(2) (b) provides that in exercising judicial authority, the court and tribunals shall be guided by the principle that justice shall not be delayed. This does not mean that this should open abuse of the court process and use delaying tactics to forestall the hearing of cases. The discretion of the court should be exercised judiciously for the advancement of fair administration of justice for all parties. The discretion should not be used to cause prejudice or harm to any party.

The issues for determination are as to whether there was proper service of a hearing notice and whether the applicant is entitled to the orders sought.

Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

> "*Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."*

In the case of ***James Kanyiita Nderitu & Another [2016] eKLR***, the Court of Appeal stated thus:

> "*From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others.*

The court is alive to the fact that where there is proof that there was no proper service then it would in its own motion set aside the irregular judgment without going into the issues of inordinate delay in filing the application for setting aside.But when it is satisfied that there was proper service then it would be an abuse of the court process to allow a person who was served with processes but chose not to attend court.

The court is guided by 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).*
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> *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)'.*

It is alleged by the respondents that they did serve the applicants with a hearing notice for hearing on 20/5/2019. However, a clear look at the annexed affidavit of service marked as KKC1, paragraph 2 does not state the hearing date and the said hearing notice is not attached to the affidavit of service. It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the way they prosecute their cases. I find that the applicants should be given an opportunity to defend their case.

The principles that guide the court in exercise of its discretion was discussed in the case of **James Wanyoike & 2 others v. CMC Motors Group Ltd & 4 others (2015) eKLR** thus:-

> **"…***The principles and tests for setting aside an ex-parte judgment can be summarized as follows:-*

1. *That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment.*

2. *That the tests for setting aside an ex-parte judgment are:-*

    a. *Whether there is a defence on merits?*

    b. *Whether there would be any prejudice to the plaintiff?*

    c. *What is the explanation for any delay?"*

It is trite law that this court has unfettered, unlimited and unrestricted jurisdiction to set aside the *ex-parte* judgment. The only rider in exercise of that jurisdiction is that it should be exercised to do justice to the parties and not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. I order that the applicants pay thrown away costs of Kshs. 25,000/ to the plaintiff within 30 days failure of which the order lapses. The plaintiff to avail himself for cross examination by the defendant when the matter is fixed for hearing. This is an old matter which should be fastracked.

DATED and **DELIVERED** at **ELDORET** this **19TH** DAY OF **DECEMBER, 2019.**

M. A. ODENY

JUDGE

RULING read is open court in the presence of Mr.Misoi holding brief for Dr.Chebii for Defendant/Applicant and in the absence of J.K. Kiplagat for the Plaintiff.

Ms. Christine – Court Assistant