



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO. 19 OF 2015**

**FRANCIS ALIGA OKUSO.....PLAINTIFF**

**VERSUS**

**DORCUS OMEGA.....DEFENDANT**

**RULING**

The plaintiff filed this suit claiming that whereas he is the registered proprietor of the land parcel No. **KAKAMEGA/SANGO/1541** having purchased it from one **BEN SIMWA ZABLON**, the defendant had trespassed into it and he sought an order for her eviction.

The record shows that the defendant, having been served, did not enter appearance nor file any defence and interlocutory judgment was entered against her on 19<sup>th</sup> June 2015. The suit was then listed for formal proof before the late **MUKUNYA J** on 24<sup>th</sup> May 2017 and after hearing the plaintiff, the Judge entered judgement for the plaintiff as prayed on 3<sup>rd</sup> October 2017.

On 14<sup>th</sup> November 2017, the defendant filed a Notice of Motion seeking the following prayers:

- 1. Spent.***
- 2. That leave be granted to M/s BIRECH RUTO & COMPANY ADVOCATES to come on record for the defendant.***
- 3. That there be a stay of execution of the judgement delivered on 3<sup>rd</sup> October 2017 pending the hearing and determination of this application.***
- 4. That there be a review and setting aside of the judgement delivered on 3<sup>rd</sup> October 2017.***
- 5. That costs of the application be provided for.***

When that application came up before me on 22<sup>nd</sup> May 2018, there was no appearance by either the defendant or her Counsel and on the application by **MS. NANZUSHI** Counsel for the plaintiff, that application was dismissed with costs.

I now have before me the defendant's Notice of Motion dated 22<sup>nd</sup> May 2018 and which is the subject of this ruling. It seeks the following orders:

- 1. Spent.***
- 2. That there be a review and setting aside of the orders of this Court dated 22<sup>nd</sup> May 2018.***
- 3. That the application dated 14<sup>th</sup> November 2017 be reinstated and heard.***
- 4. That costs of the application be provided for.***

The application is premised by the grounds set out therein and supported by the affidavit of **T. TUM** an advocate of this Court who has contact of this suit on behalf of the defendant.

The gravamen of the application is that Counsel having travelled from Eldoret for this suit arrived in Court on the day the application was heard a few minutes late due to the rainy weather conditions. That if the dispute is not heard on its merits, the defendant will be deprived of

her home yet this suit is infact *res – judicata*.

In opposing the application, the plaintiff filed a replying affidavit in which he deponed inter alia, that he and his Counsel were in Court at 8.30 a.m. and the Court started its sessions at 9a.m. and since the defendant and his Counsel were absent, the application dated 14<sup>th</sup> November 2017 was dismissed.

That the ELDORET – BUNGOMA road is tarmacked and that the plaintiff has an eviction order and this suit is not *res judicata*.

The application has been canvassed by way of written submissions which have been filed both by **MS. TUM** for the defendant and **MS. NANZUSHI** for the plaintiff.

Although I am at this stage not considering the defendant's Notice of Motion dated 14<sup>th</sup> November 2017, I notice that the first prayer is for the firm of **BIRECH RUTO & COMPANY ADVOCATES** to come on record. That application was never canvassed and was instead dismissed on 22<sup>nd</sup> May 2018 for failure to attend by the defendant and her Counsel. I need to point out at this stage that the defendant was never represented by another Counsel and infact the suit was heard in her absence. The firm of **BIRECH RUTO & COMPANY ADVOCATES** only filed a notice of appointment on 17<sup>th</sup> October 2017 two weeks after the *ex-parte* judgement had been entered against her. There is therefore no need for Counsel for the defendant to seek leave to come on record as required under **Order 9 Rule 9 of the Civil Procedure Rules** since there has been no "*change of advocate*". I have found it important to address this issue although Counsel did not address me on it in their submissions and because, if the firm of **BIRECH RUTO & COMPANY ADVOCATES** are not properly on record, the application stands the risk of being struck out.

Having said so, the defendant's case is that she and her Counsel arrived in Court a few minutes after the application dated 14<sup>th</sup> November 2017 had been dismissed for want of prosecution on 22<sup>nd</sup> May 2018. The absence of the defendant and Counsel is attributed to the rainy weather conditions. I am inclined to believe this explanation because the application was filed on the same day that the application dated 14<sup>th</sup> November 2017 was dismissed. That can only lend credence to the defendant's claim that both she and her Counsel arrived in Court on the day their application was scheduled for hearing albeit late after it had been dismissed.

The Court retains a wide discretion to set aside *ex-parte* orders but on terms that are just. The principle duty of the Court is to determine cases on their merits so that the right to a fair trial enshrined under **Article 50 of the Constitution** can be protected. Unless there is clear evidence that a party seeks to defeat the cause of justice, he should be allowed his day in Court. Each case must however be considered on its own peculiar circumstances. In this case, there was a mistake both on Counsel and the defendant in arriving in Court late but that has been satisfactorily explained. The defendant also moved with speed upon learning that the application had been dismissed and filed this application on the same day. I think the cause of justice will best be served by allowing the application but on terms.

The up-shot of the above is that the defendants Notice of Motion dated 22<sup>nd</sup> May 2018 is hereby allowed as follows:

- 1. The order dated 22<sup>nd</sup> May 2018 dismissing the defendant's Notice of Motion dated 14<sup>th</sup> November 2017 is set aside.**
- 2. The application dated 14<sup>th</sup> November 2017 is hereby reinstated to hearing.**
- 3. The defendant shall meet the costs of this application.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma.

MS. MUMALASI for MS. TUM for defendant - present

MS. NANZUSHI for plaintiff – Absent

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

**MS. MUMALASI:** I am instructed to take a date for the hearing of the application dated 14<sup>th</sup> November 2018.

**COURT:** That application be served for hearing on 19<sup>th</sup> February 2019.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**