REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 111 OF 2005 (O.S)

MATHEW KIPROP TONUI.....PLAINTIFF/RESPONDENT

VERSUS

KIMUTAI ARAP TOO.....1ST DEFENDANT/RESPONDENT

ALICE CHERONO TOO.....2ND DEFENDANT/RESPONDENT

PETER KIBET TOO.....3RD DEFENDANT/RESPONDENT

JULIUS CHERUIYOT TOO.....4TH DEFENDANT/RESPONDENT

WILLIAM KIPKEMOI TOO.....5TH DEFENDANT/RESPONDENT

RULING

Introduction

1. What is before me is the Defendants' Notice of Motion dated 27th September, 2018 brought pursuant to Order 10 Rule 11, Order 22 rule 22(1) and 52 of the Civil Procedure Rules seeking a stay of execution of the decree issued herein and an order setting aside the judgment delivered on the 30th May 2018 together with all the consequential orders thereto.

2. The application is based on the grounds that the Defendants failed to attend court due to the inadvertent failure of the 5th Defendant to inform them of the hearing date after he had been notified of the same by their advocates. The second ground is that the Defendants have a defence that raises triable issues.

3. The application is supported by the affidavits of Johana Kimutai Arap Too and William Kipkemoi Too the 1st and 5th Defendants herein sworn on the 27th September 2018. In his affidavit 1st Defendant depones that he learnt of the judgment on 13th September 2018 through the son of the 2nd Defendant who had in turn been informed by the Plaintiff. Upon further inquiry from their advocate he learnt that a letter had been sent to the 5th Defendant informing him about the hearing date and advising him to inform the other defendants but he had failed to do so. He further depones that their defence raises triable issues as the Defendants and Plaintiff herein have litigated over the suit property at the Ainamoi Land Disputes Tribunal signifying that the Plaintiff whose suit is founded on adverse possession had not met the requirements of section 7 of the Limitation of Actions Act.

4. In his affidavit the 5th defendant confirms that he did receive the letter from their advocates M/s Migiro & Co Advocates but due to the mental stress he was undergoing after losing two of his children, he forgot to inform his brothers about the hearing date.

5. The application is opposed by the Plaintiff through the Grounds of Opposition dated 22nd October 2018 and his Replying affidavit sworn on the 23rd October 2018. In the said affidavit, he denies that he met or informed Raymond Bett about the judgment. He also punches holes in the explanation given by the defendants for failing to attend court. In particular, he points out that even though the Defendants' advocate had received the hearing notice under protest indicating that he was no longer in contact with his clients, he fails to explain why he did not attend court.

6. Learned counsel for the Plaintiff has also filed a Preliminary Objection on two grounds; firstly that the application is bad in law, scandalous, frivolous and vexatious and amounts to an abuse of the process of the court. Secondly, the respondent contends that the application does not meet the threshold for setting aside under Order 10 rule 11 of the Civil Procedure Rules.

7. The application was canvassed by way of written submission and both counsel filed their submissions.

Issues for determination

8. The following issues arise for determination:

i. Whether the Preliminary objection is sustainable

ii. Whether the application ought to have been made under Order 10 rule 11 of the Civil Procedure Rules.

iii. Whether the applicants are entitled to the orders sought.

Analysis and determination

9. I agree with learned counsel for the applicants that the Preliminary points raised by the applicant do not fall within the definition of a preliminary objection as set in the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Civil Appeal No. 9 of 1969** where Justice Law observed as follows:

> *"So far as am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of the suit…. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*

10. In the instant case the Applicants are invoking the court's discretion to set aside the ex-parte judgment and the P.O is therefore misplaced.

11. The second issue is whether the Applicants should have applied for setting aside judgment under Order 10 Rule 11 of the Civil Procedure Rules. Order 10 of the Civil Procedure Rules deals with the Consequences of Non-Appearance, Default of Defence and Failure to serve. Rule 10 provides that:

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

The above order applies in a case where a party has been served but failed to enter appearance and the consequently a suit proceeds to be heard under order 10 rule 5.

12. In the instant case the Applicants entered appearance on 7.11.2005 through the firm of M/s Migiro & Co. Advocates and Johana Kimutai Arap Too filed his Replying Affidavit on 23rd November 2005. The case was then set down for hearing on 19.03.2018 when the Defendants and their advocate failed to attend court. Judgment was subsequently entered against the Defendants on 30.05.2018. The application has therefore been filed under the wrong provisions of the law. It ought to have been filed under Order 12 which deals with hearing and the consequences of Non- Attendance. In particular Rule 7 thereof provides as follows:

> ***"Where under this order judgement has been entered or the suit has been dismissed, the Court, on application may set aside or vary judgement or order upon such terms as may be just"***

13. In **the case of Thomas K Sambu V Paul K. Chepkwony alias Paul Chepkwony Koskei Nakuru Civil Appeal No. 234 OF 2015**, the learned Judges of the Court of Appeal R.N. Nambuye, F. Sichale and S. Ole Kantai at page 11 paragraph (3) re-stated the case of **Jaldesa Tuke Dabelo Versus IEBC & Another (2015) eKLR** where the Court of Appeal stated as follows:

> ***"It has often times been stated that the rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievances, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of The Constitution was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts"***

14. At page 12 paragraph of the above ruling, the Honourable Judges stated herein quote:-

> ***"In the light of the above enunciations on the construction of Article 159 (2)(d) of The Kenya Constitution, 2010, we find no trace in the said Article that can cure the Appellant's failure to follow the correct procedure to redress his grievances after losing out on his application for review and setting aside"***

15. The above decision is binding on this court. On this ground alone the application cannot succeed.

16. However, should I be wrong, I would have to look at the reasons for the Defendants' failure to attend court when the case came up for hearing.

17. The essence of the Defendant's explanation is that even though the 5th Defendant received a letter from their advocate informing him of the hearing date and requesting him to inform the other Defendants, he forgot to do so owing to the mental anguish he was experiencing at the time after losing two of his children. It would have been more convincing if the 5th Defendant had attached documentary proof of loss of his children.

18. This explanation falls short of the standard for "sufficient cause" set in the case of **The Attorney General V The Law Society of Kenya (2013) eKLR** where Musinga J stated as follows:

> "*Sufficient cause has to be rational, plausible, logical convincing, reasonable and truthful. It should be an explanation that leaves no doubt in a judge's mind. The explanation should not leave gaps in the sequence of events".*

19. Furthermore, the Applicants' counsel has not explained his absence at the hearing thereby leaving gaps in the sequence of events. This coupled with the delay in filing the application to set aside the judgment do not augur well for the applicants.

20. In view of the foregoing, I am unable to exercise my discretion in favour of the Applicants and I therefore dismiss their application with costs to the Plaintiff.

Dated, signed and delivered at Kericho this 17th day of December, 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Migiro for the Defendants/Applicants

2. Mr. Siele Sigira for the Plaintiff/Respondent

3. Court assistant - Rotich