



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND CASE NO. 159 OF 2015

DANIEL KIPLIMO BUSIENEI..... PLAINTIFF

VERSUS

ALPHAX COLLEGE LTD..... DEFENDANT

RULING

1. This is a ruling in respect of Notice of Motion dated **29/1/2016** seeking to set aside the ex-parte proceedings and order made on **22/10/2015**. The genesis of this application can be traced to an application filed by the plaintiff on **30/6/2015** in which the applicant among other prayers sought an order directing the County Surveyor Uasin Gishu to go to the ground and determine boundaries for **Plot No. Eldoret Municipality Block 10/183** and put beacons in place.

2. The plaintiff/applicant appeared before Justice Ombwayo ex-parte on 30/6/2015 when the judge directed that the application be served within three days for inter-partes hearing on 10/7/2015. On 10/7/2015, counsel for both parties appeared before the judge who adjourned the application to 22/10/2015 and granted the parties leave to file replying affidavits and further affidavits. When the application came up for hearing on 22/10/2015, the counsel for the defendant/respondent was not present. The judge having satisfied himself that the date had been given by consent proceeded to grant prayer (2) and (3) of the Notice of Motion filed on 30/6/2015. This is what triggered the present application.

3. The defendant's counsel M/s Khayo swore an affidavit in support of the application seeking to set aside the ex-parte proceedings and order of 22/10/2015. She contends that though she was present on 10/7/2015 when the date of 22/10/2015 was given, she wrongly diarised the date for hearing of the application as 27/10/2015 and accordingly advised her client. She contends that her non appearance in court on 22/10/2015 was not deliberate as she had thought that the matter was due for hearing on 27/10/2015. On 27/10/2015, she attended court for hearing but the application was not listed on that day. Efforts to trace the court file at the registry were in vain.

4. It was not until 25/1/2016 when they received a letter dated 22/1/2016 from the District Survey Office informing them that the Surveyor was to proceed to the ground to implement the Court Order. She dispatched a court clerk to go and peruse the court file. A perusal of the court file revealed that the application had proceeded ex-parte on 22/10/2015 when some prayers were granted. She contends that if the orders of 22/10/2015 are implemented without participation of the defendant, it will be prejudicial. That her non attendance in court on 22/10/2015 is excusable.

5. The application is opposed by the respondent through his replying affidavit sworn on 2/2/2016. The respondent contends that the applicant's application has been overtaken by events in that the Surveyor

proceeded to the ground on 26/1/2016 and put in place beacons on the suit land. That there will be no prejudice suffered by the applicant as what has been done is narrowing the issues which the court will determine at the end of the day and that in any case, the date when the application proceeded had been taken in the presence of counsel for the defendant/applicant and that therefore the present application is an abuse of the process of the court which is only fit for dismissal.

6. I have considered the applicant's application as well as the opposition thereto by the respondent. There is no contention that the counsel for the defendant did not attend court when the orders of 22/10/2015 were given. The issue for determination in this application is whether the explanation given for non attendance of court by defendant's counsel on 22/10/2015 is sufficient to warrant this court to exercise its discretion to set aside the ex-parte proceedings and order.

7. The defendant/applicant's counsel was in court on 10/7/2015 when the date of 22/10/2015 was given. She proceeded to file replying affidavit but did not attend court on 22/10/2015. The explanation for non attendance is that she diarised the date as 27/10/2015. She produced an extract from the cover of her office file and diary which shows that she recorded in both the file cover and diary that the matter was coming for hearing on 27/10/2015.

8. It is clear that counsel's non attendance in court on 22/10/2015 was not deliberate. It was due to what she may have heard in court. The court gave 22/10/2015 but she heard that it was 27/10/2015. When it comes to setting aside ex-parte proceedings or orders, the court's discretion is wide and unfettered. This discretion is to be exercised to avoid injustice or hardship resulting from an accident, inadvertent or excusable mistake or error as was said in the case of ***Shah -vs- Mbogo [1967] EA 116 at 123.***

9. It is clear from the explanation given by counsel for the applicant that the mistake which occurred is excusable. If the proceedings and order are not set aside, it will cause injustice in that the defendant/applicant will be affected by orders which were given without it being heard. In the case of ***Patel -vs- Cargo Handling Services Ltd [1974] EA 75 Duffus P pointed out at page 76 C & E:***

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just.....” The main concern of the court is to do justice between the parties, and the court will not impose conditions on itself to fetter the wide discretion given by it by the rules.”

10. I find that this is a clear case where the court should exercise its discretion in favour of the applicant. The result hereof is that the defendant/applicant's application is hereby allowed with the result that the ex-parte proceedings and order given on 22/10/2015 together with its consequential orders are hereby set aside. The application dated 30/6/2015 shall be set down for hearing on merits at the Eldoret Registry.

It is so ordered.

Dated, signed and delivered at Kitale on this **25th** day of **February, 2016.**

E. OBAGA

JUDGE

In the presence of Plaintiff

Court Assistant – Winnie

E. OBAGA

JUDGE

25/2/2016