



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 76 OF 2013

ZUBEIDA SAID ABDALLAH.....PLAINTIFF

-VERSUS-

MASOUD MOHAMED SHEE

(alias)MOHAMED SUDI SHEIKH.....DEFENDANT

RULING

1. The notice of motion coming for determination is dated 31st March 2014. The Defendant/Applicant seeks for an order that the judgement delivered on 21.2.2014 be set aside and costs of the application provided for. The application is supported by the grounds on the face of it and the affidavits of Mohamed Sudi Sheikh and Yusuf M. Aboubakar.
2. In a nutshell, the Applicant avers that the mistake of his advocate to diarise the hearing date of 17.9.2013 is excusable. Secondly that the matter was not ready for hearing as the Respondent had not filed the reply to the defence and counter-claim and that he has a good defence. The Defendant deposes that he will be prejudiced if his application is not allowed as he is in occupation and use of the suit property.
3. Mr Yusuf M. Aboubakar advocate deposes that he learnt of this matter having proceeded on 17.9.2013 when he was in Court on 19.9.2013 attending to criminal cases Nos 1245 of 2011 and No 189 of 2012. He confirmed the hearing notice was served on his office but his officer who received it failed to bring it to his attention. He urged the Court to consider the fact that the matter was filed on 26.4.2013 and it was a first hearing and therefore the Applicant should be accorded an opportunity to be heard.
4. The application is opposed by the Plaintiff/Respondent. She deposes that this application is similar to the application of 19th September 2013 which was dismissed. The Respondent deposes that the mistake in failing to diarise this matter should not prejudice her rights to enjoy the fruits of her litigation and the Applicant can sue their former advocates in negligence.
5. The plaintiff deposes that the defence has no triable issues and she stands to suffer immense prejudice should the orders sought be granted. She urged the Court to dismiss the application with costs.
6. The parties filed written submissions which I have considered in reaching this determination. The

principles for setting aside judgements is set out in Order 9 A Rule 10 and the renowned case of **Shah vs Mbogo (1976) E. A 116**. Whether to grant an order to set aside or not wholly rests on the discretion of the Court.

7. The Respondent cited the case of **Thomas Ratemo Ongeru vs Zacharia Isaboke & Another eKLR** which is on all fours with this case. In the Ratemo case, the Judge stated that, ***“it cannot therefore be made a general rule that in every case where an advocate fails or is said to have failed to notify his client of a hearing date, the Court proceedings conducted in the absence of such client would be set aside”***.

8. The Respondent further canvassed that the Judge considered the request by the Applicant in his application dated 19.9.13 and dismissed such request.

The applicant in response submitted that the Judge was wrong in dismissing that application without hearing the applicant. This may be so but the applicant did not apply for review/appeal of the Judge's order. Instead he filed the present application.

9. I have noted that the Defendant/Applicant acted with speed as soon as he learnt of the hearing of the 17.9.2013 and brought the application to be heard without delay. Even after the judgement was rendered, he acted fast as he filed this application within one month. They have not denied service of the hearing notice but allude that because of a mistake of his advocate's staff, the date was not diarised hence failure on their part to attend Court.

10. In the circumstances of this case, are they deserving of the Court's discretion where the judgement on record is regular ? The Respondent has not accused the Applicant of a deliberate effort to obstruct the cause of justice. In demanding his right to be heard, the Applicant has cited the decision in **Civil Appeal No 18 of 2013. Richard Ncharp's vs I E B C & 2 others**.

11. I have considered the pleadings vis – va the rights of the parties. It is in my considered opinion that it would serve a fair and just determination of this matter if both parties got opportunity to present their case as both are claiming to own a certificate of title to the suit property. The fact that the Applicant acted swiftly in seeking an opportunity to present his case shows there is no intention to delay this matter. The Respondent can be compensated by way of payment of thrown away costs. The earlier application disallowed by the Judge was not heard and determined on its merits so it cannot make the present application resjudicata.

12. Consequently, I find merit in the notice of motion dated 31.3.2014 and allow it in terms of prayer No 3. The judgement entered on 24.2.2014 be and is hereby set aside. The Plaintiff shall be recalled for purposes of cross –examination and the defendant be at liberty to present his case. The costs of this application awarded to the Plaintiff/Respondent. The Respondent is also awarded thrown away costs assessed at Kshs 10,000= to be paid within 30 days of delivery of this ruling. In default execution to issue.

Ruling dated and delivered in Mombasa this 21st day of April 2016

A. OMOLLO

JUDGE