



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 60 OF 2014

SHADRACK CHESEREKPLAINTIFF

VERSUS

KIPSEREM MENGICHI1ST DEFENDANT

PETER KIMARU KENEI2ND DEFENDANT

RULING

1. The Applicants filed A Notice of Motion dated 23/3/2016 in which they seek orders of stay of execution and setting aside of the Judgement of this court delivered on 2/7/2015. The Applicants contend that though they were represented by an Advocate, they did not attend court during the hearing of the case resulting in an ex-parte Judgement. They contend that their advocate did not inform them of the date of hearing though they were in constant communication. They state that their advocate kept telling them that the case had not been set down for hearing and that once a date for hearing was set, he would inform them which he did not. That they only learnt on 16/7/2015 that Judgement had had been delivered on 2/7/2015. They therefore seek to have the Judgement set aside so that they can participate in the hearing of the case.
2. The Applicants application is opposed by the Respondent through a replying affidavit sworn on 20/4/2016 and filed in court on the same day. The Respondent contends that this application is an abuse of the process of court in that the Applicants and an advocate who had been sent by their lawyer were in court on the date when the hearing proceeded but that the Applicants opted to go away leaving the court with no alternative other than proceeding ex-parte.
3. The Respondent further contends that the Applicants are out to delay this matter as they are the ones enjoying his land and that they have only come to court after orders of eviction were issued against them. That the Applicants have deliberately chosen not to disclose to the court that they had filed a Notice of Appeal against the Judgement and that they have filed an application for stay at the Court of Appeal in Kisumu.
4. The Respondent further contends that the Applicants having left the court room with impunity during the hearing, they do not deserve the court's discretion and cannot pretend that they were not aware of the hearing date.
5. I have considered the Applicants' application as well as the opposition to the same by the Respondent. This is an application which seeks to set aside an ex-parte Judgement . This basically calls for exercise of discretion. It was said by **Sir Clement De Lestang V.P. In Mbogo & another -vs – Shah 1968 EA 93** that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to

obstruct or delay the course of justice.

6. From the observation of **Sir Clement De Lestang V.P** in the case of **Mbogo & another Vs- Shah** it is clear that the court's discretion should not be exercised to assist a person who has deliberately sought to obstruct or delay the course of justice. In the instant case, the Applicants were in court on 28/5/2015 when the hearing of this case was to take place. An adjournment was sought by Mr Ingosi Advocate who was holding brief for Mr Bungei Advocate for the Applicants. The reason for adjournment was that Mr Bungei had lost touch with his clients and that he intended to file an application to cease acting for them. In response to the application for adjournment, the Respondent's counsel Mr Yano brought to the attention of the court that the two Applicants were actually in court. An adjournment was rejected and the court ordered the hearing to proceed. The file was placed aside for hearing to take place after the call-over. When the file was called out for hearing, the Applicants who were in court and had stood up when their names were called, were not there. Their advocate was also not there. The hearing proceeded to conclusion on that day and Judgement was delivered on 2/7/2015 as scheduled.

7. It is therefore ironical for the Applicants to turn round and claim that they were not aware of the date of hearing. Infact when Mr Ingosi was informed that Mr Bungei's clients were in court, he stated that he was not aware that they were in court. It was therefore clear that the Applicants were aware of the hearing date and were present only that they did not want the case to proceed. This is so because they are the ones in possession and were actually intent on delaying the course of justice. These are not persons who deserve the court's discretion to set aside the Judgement. The Judgement was obtained after they went out of the court after the adjournment was rejected. They cannot claim that they were not in court.

8. The Applicants were even aware of the date of delivery of Judgement. Th is is because soon after the Judgement was delivered they instructed the firm of Simiyu Wafula & Co. Advocates who filed a Notice of Appeal on 17/7/2015 against the Judgement of the court. If indeed they were not aware of the hearing date, they would have immediately applied to set aside the Judgement and not filing an appeal against the same. The application to set aside the judgement was as a result of the eviction order which was issued against them.

9. I have gone through the pleadings in this file. This is with a view to establishing if the Defendants have a defence to the Plaintiff's claim. In the case of **Ceneast Airlines Ltd -vs- Kenya Shell Limited [2000] 2 EA** the court of appeal quoted with approval the following remarks of **Duffus P in Patel -Vs-**

EA Cargo Handling service [1974] 75

“ The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgement as is the case here the court will not usually set aside the Judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view a defence that must succeed, it means as Sheriden J put it “ a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

10. The first Defendant is a brother to the second Defendant and is the one who resides on the suitland **(Plot No. 555) Milimani Settlement Scheme**. The second Defendant in the defence states that he was allocated **Plot No 579 at Milimani Settlement scheme**. The said plot was later found not to be arable and that he was later given **Plot No 555**. **Plot No 555** had already been given to the Respondent. This is confirmed by the Director of Settlement Nairobi. What defence does he have to the claim by the Respondent? I do not think that he has any defence on merits. The allotting authority has confirmed that the owner of **Plot 555** is the Respondent. The second Applicant concedes that he was given **Plot 579**. It would not have been possible that he could be given **Plot 555** which had already been given to the Respondent.

11. I find that the Applicants application lacks merit. The same is an abuse of the process of the court. They are clearly out to delay the course of justice. This is unacceptable. I dismiss their application with

costs to the Respondent.

It is so ordered.

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

E. OBAGA

JUDGE

In the presence of Mr Teti for Mr Wafula for Applicant and M/s Mufutu for Mr Yano for Respondent.

Court Assistant – Isabellah

E. OBAGA

JUDGE

25/5/16