



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 113 OF 2016

PATRICK MBANYA KARANJA.....PLAINTIFF/RESPONDENT

VERSUS

JAMES KINUTHIA.....DEFENDANT/APPLICANT

RULING

(On setting aside judgment arising from *ex parte* proceedings)

THE APPLICATION

1. The Applicant brought a Notice of Motion dated **29/07/2021**. It was filed on the same date. It was brought under **Sections 3, 3A** of the **Civil Procedure Act, Chapter 21** of the Laws of Kenya and **Order 12 Rules 7** of the **Civil Procedure Rules**, although the Rules were wrongly written as the Civil Procedure Act again. The Applicant sought the following specific orders:

1. ...spent

2. ...spent

3. That the judgment in this suit delivered on 17th day of December, 2020 and any other consequential orders be set aside.

4. Costs be provided for.

THE APPLICANT'S CASE

2. The Application was supported by the Affidavit by one James Kinuthia sworn on **3/11/2021** and many grounds which were given on its face. The grounds were that the Defendant was formerly represented by the firm of **C.S. Wanyama & Company Advocates** and on **28/11/2018** he instructed the firm of **Apollo Ambutsi & Company Advocates** to act for him; that on **29/07/2021** he learnt of the matter having been concluded when the Plaintiff and some persons from the County Survey Office went to the suit land to survey it and informed him of that fact; that he was not aware of the hearing and did not participate in it; that upon instructing the learned counsel now on record he discovered further from the perusal by the said counsel of the Court record that judgment had been entered against him and no notice of entry of the same served; that he had entered appearance and filed a defence which raised triable issues; and that failure to attend Court was not deliberate hence the prayers to set aside the judgment.

3. In his Affidavit sworn on the same date, he reiterated all the points in the grounds in support of the Application. He then annexed to the Affidavit and marked as **JK 1 & 2** copies of the judgment impugned which was delivered **17/05/2021** and the subsequent decree and **JK 3** copies of the defence he had filed in this matter. He then indicated that he learnt from a perusal of the record that the former counsel did not attend Court and that he had not seen any evidence of service of the hearing notice having been filed. He then deponed that a mistake by counsel should not be visited on him.

THE RESPONSE

4. The Plaintiff/Respondent filed a Replying Affidavit sworn on **19/08/2021** in opposition to the Application. He deponed in it that the placement of beacons on the suit land was in execution of the decree of the Court. He then swore that the Defendant and counsel were aware of the hearing of **14/08/2021** (*sic*) but intentionally decided not to take part in the proceedings. In paragraphs **6** and **7** of his Affidavit he deponed how on **29/11/2018** the matter came up for hearing but the Defendant changed Advocates from Ms. Wanyama & Company Advocates to M/S Apollo Ambutsi & Company Advocates who then sought an adjournment. He stated further that the Adjournment was granted and the suit fixed for hearing on **11/04/2019** by consent of both learned counsel. He deponed that on **11/04/2019** he together with his Advocate attended Court and despite Mr. Apollo Ambutsi having been in the Court room earlier that morning, he did not bother to

participate in the proceedings. He then stated that the Court was satisfied that the Defendant had notice of the hearing and proceeded with it. He summed it up that from the beginning of the matter the Defendant was indolent and lacked interest in the matter and the instant application was aimed at denying him the fruits of his judgment.

5. The Applicant then filed a Supplementary Affidavit in which he reiterated the contents of the supporting Affidavit and that it was clear that failure to attend Court was due to a mistake by counsel. He insisted that he was not aware of the hearing of **14/08/2021** (*sic*) and his Advocate did not inform him of that hearing date. He deposed that had he been aware of that date he could have attended Court. He then stated that the error was of his Advocate and that he still had interest in the matter.

SUBMISSIONS

6. When the Application came up before me under certificate of urgency on **20/09/2021**, I directed that it be served and be disposed of it by way of written submissions. The Application was mentioned on **18/10/2021** to confirm compliance but by then the Supplementary Affidavit by the Defendant had not been served and the Court gave a further mention date of **30/11/2021**. By that date, the Applicant had filed his submissions dated **24/09/2021** and the Respondent filed his dated **28/10/2021** on **29/10/2021**.

7. In the Applicant's submissions, learned counsel reiterated the contents of both the grounds and the affidavits in support of the Application. He also submitted that the failure to attend hearing was not his mistake but that of the Advocate. He then summarized it that had he been aware of the hearing date he could have attended Court. He relied on the case of **Capt. Phillip Ongom v Catherine Nyero Owola, Civil Appeal No. 14 of 2001** to state that a mistake by counsel should not be visited on the client.

8. The Respondent too submitted that on **11/04/2019** when the Court proceeded with the matter, it was satisfied that service was proper and therefore the Application was devoid of merits and merely designed to deny him the fruits of his judgment.

DETERMINATION

9. I have carefully considered the Application and the grounds in it, the affidavits in support of the Application, the Replying Affidavit, the submissions by both counsel and the law as well. I found two issues for determination. These were:

a) Whether the Applicant has satisfied the requirements of setting aside a judgment entered as a result of ex parte proceedings.

b) What orders to issue and who to bear the costs of the instant Application?

10. I begin by analyzing the first issue which is **whether the Applicant has satisfied the requirements of setting aside a judgment entered as a result of ex parte proceedings**. The record shows that on **29/11/2018** when the suit came up for hearing, the firm of Apollo Ambutsi & Co. Advocates took over the matter from M/S/ Wanyama & Co. Advocates. On that date it was fixed for hearing on **11/4/2019** by consent of both counsel. Nothing appears to have taken place on the subsequent date but there was a Notice dated **03/04/2019** issued by the Deputy Registrar that since the Court did not sit then, the matters for hearing on that date had been taken out of the list and fixed for other dates given, of which this suit was to be heard on **11/07/2019**. On **11/07/2019** both the Defendant and his learned counsel did not attend Court. PW1 testified. At the end of the proceedings, the Court noted, "There are pending proceedings challenging the entire Block 7 and Block 6". Counsel for the Plaintiff then stated that he would not close the Plaintiff's case. After that the Court ordered that the matter be stayed pending the hearing and determination of the two petitions revolving around Block 6 and 7, that is Petitions 5 & 6 of 2018.

11. The matter was fixed for mention on **30/09/2019**. After that, the matter was mentioned on the said date. It was also mentioned on **20/01/2020**, **24/2/2020** and on **20/11/2020** when it was fixed for another mention on **23/11/2020**. On **24/02/2020** when it was mentioned, counsel for the Plaintiff was present and the Defendant. It was given a mention for **30/03/2020** but there is no record on what took place on that date. On **09/10/2020** the Registry gave notice of the mention of the matter on **19/11/2020** but not return seems to be in the file for service of the Notice and it appears the mention took place on **20/11/2020** rather than **19/11/2020**. Thus, it was only the **20/11/2020** when it was mentioned in absence of the defendant and his counsel and then on **23/11/2020** in presence of counsel for the Plaintiff and absence of the Defendant and his Counsel. On this date learned counsel holding brief for the one for the Plaintiff moved the Court to close the Plaintiff's case. Both the Plaintiff and Defence cases were closed and judgment fixed for **17/12/2020**.

12. I have given that summary, to contrast it with the depositions and submissions of both counsel for the Applicant and Respondent. The Applicant gave a fairly correct position of the matter although he erred when he stated that he had not seen any evidence of service of a hearing notice for the date the suit proceeded, and also that he should have been served with a notice of entry of judgment. But it should be clear that there were no proceedings on **14/08/2021** and there has never been fixed a date of that nature in this matter. As the record bears it out, the matter proceeded to hearing on **11/07/2019** after a Notice by the Deputy Registrar had been sent out to the public about rescheduling of matters that did not proceed on the material dates the Court did not sit. By that Notice, this suit was fixed for hearing on that date. Also, since the Defendant was represented and filed a defence, there was no need to serve on him a Notice of Entry of Judgment as he alleged. Similarly, the Respondent did not give a proper picture of the case in the response and submissions he gave.

13. The issues that are determinant in the merits or otherwise of this Application are two. One, whether the Applicant was served for purposes of attending Court on the **23/11/2020** when the matter was mentioned and the order closing his date made. Two, whether the order issued on **11/07/2019** staying the proceedings pending the determination of **Kitale ELC Petitions 5 and 6 of 2018** had been varied by then or a confirmation of the status of the petitions given to Court by the time both the Plaintiff's and defence case were closed.

14. On the first issue on service of the date on the Defendant/Applicant, it is worth noting that only the Plaintiff's counsel attended Court on **20/11/2020** and **23/11/2020**. There is no Affidavit of service to show that the Defendant was ever served for the two dates. The Court did not record anything to that effect either. For the reason, I find that the Applicant's contention that he was not served for the two occasions is correct. Since adverse orders were made against him, especially on **23/11/2020**, in his absence, it would be prejudicial to him and against

the Rules of procedure, that is to say, **Order 12 Rule 2(a)** of the **Civil Procedure Rules** and rules of natural justice that the orders of that date and subsequent ones are not set aside. The rules of natural justice require, among others, that a party be given an opportunity to be heard on his case. Moreover, the orders of **23/11/2020** were substantive ones yet they were prayed for a made on a mention date rather than a hearing date.

15. Regarding the second issue, that is to say, whether the order of staying the proceedings had been varied. It is clear that it had not been. Additionally, I have perused **Kitale ELC Petitions No. 5 and 6 of 2018** on whose account the Court stayed the proceedings in this suit on **11/07/2019**. The record in them (as consolidated) shows that they were concluded on **29/05/2020**. That was a date much earlier than when order closing both the Plaintiff's and Defence cases was made. What was not made was the order of vacating the staying of the proceedings pending the conclusion of the Petitions. To the extent that the Court made the orders of **23/11/2020** without varying the earlier one, I find that the Applicant's prayer in relation to the entire first issue that I was considering herein is **(a)** is merited.

b) What orders to issue and who to bear the costs of the instant Application?

16. For this reason and the one in the paragraph immediately previous to this one, I find that the Applicant has satisfied the requirement for setting aside the judgment dated **17/12/2020** and the consequential orders thereto. In conclusion therefore, in the interest of justice and expeditious disposal of this old suit, the judgment dated and delivered on **12/12/2020** and all consequential orders thereto are hereby set aside on the following terms:-

(a) The Plaintiff's and Defendant's cases closed on 23/11/2020 are reopened and PW1 be and is hereby recalled only for purposes of cross-examination on the evidence he gave on 11/07/2019 and re-examination, if any.

(b) The Defendant is at liberty to tender evidence as per his witness statements and documents filed on 25/08/2016 and any expert witness he may wish to call. All these be done on one day which should be the same as when the PW1 shall be recalled, unless otherwise directed by the Court.

(c) The order of 11/07/2019 staying the proceedings in this matter be and is hereby varied and vacated because Kitale ELC Petitions 5 and 6 of 2018 have since been concluded.

(d) This matter be mentioned on 14/02/2022 to fix a suitable further hearing date.

(e) Costs of this Application be in the Cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JANUARY, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE