REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 25 OF 2005 (OS)

MERCY NJAMBI MUSOMBA. ……………….……….……….. PLAINTIFF

VERSUS

SAM MUSOMBA KYUMA. …………………………………. DEFENDANT

R U L I N G

By a notice of motion dated 15th January, 2016, brought under Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant/Defendant has moved this Honourable court for the following orders: -

1) Spent

2) That the Honourable Court be pleased to order a stay of execution of the judgment entered on 24th September, 2014 and all consequential orders pending the hearing and determination of this application.

3) That, the honourable court be pleased to set aside the judgment entered on 24th September, 2014, and all other consequential orders flowing therefrom; and make orders that the suit be re-opened, heard and determined on priority basis.

4) That the cost of this application be provided for.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit of the applicant, Sam Musomba Kyuma sworn on the 15th January, 2016.

It is averred that the firm of Bosek & Co. Advocates, then on record for the Defendant/Applicant failed to attend court or advise the Defendant of the hearing of the case resulting in the ex parte judgment of 24th September, 2014.

That the Defendant has discovered that the Plaintiff acquired various properties during the subsistence of the marriage which information the Plaintiff deliberately withheld from the court to the detriment of the defendant. The defendant has prayed for an opportunity to cross-examine the Plaintiff with respect to the Plaintiff's claims.

The Defendant further avers that the properties that the Plaintiff presented as part of matrimonial property had been disposed off long before the dissolution of the marriage and the entire family had benefited from their proceeds during the subsistence of the marriage. It was his further contention that the laws requiring written spousal consent for transfer of the property had not yet been enacted at the time of the sale and

that it has been applied retrospectively to the detriment of the Defendant and that if the Plaintiff is allowed to execute the decree, the Defendant's application would be rendered nugatory.

In his affidavit, the Defendant avers that he has been working with branches of the United Nations outside the country which has made him to be fully dependent on legal counsel as his ability to travel to Kenya is both expensive and controlled by work schedule. He further contends that due to lack of communication by his former Advocate M/s Bosek and Co. Advocates for over a year, he instructed the firm of Otieno-Omuga & Ouma Advocates who discovered that judgment had been entered against him in the matter on 24th September, 2014 without his participation in the trial process.

He avers that if he had been given an opportunity to testify, he would have been able to explain to the court that the properties the subject matter of the suit, had been disposed off prior to the dissolution of the marriage and are no longer his and that the Plaintiff was aware of the said transfers. That he has recently become aware of a prime property that the Plaintiff bought during the pendancy of the marriage along Mbagathi way which information she withheld from the court and which she ought to have disclosed to the court.

He avers that, it is in the interest of justice that the ex parte judgment entered on 24th September, 2014 be set aside and the suit be re-opened afresh and be heard on merits. The Defendant urges the court not to visit the mistake of his counsel of failing to attend court on him as he is innocent.

The Application is strongly opposed by the Respondent/Plaintiff by way of grounds of opposition filed in court on 23rd February 2016 and a replying affidavit filed on the same date. The Respondent contends that the matter is ***"res-judicata",*** the issue of non-attendance or otherwise of the Defendant's Advocates having been disposed off in the judgment. It is also averred that the application is in bad faith having been filed under certificate of urgency and taking 34 days to serve the Respondent and that the Plaintiff's acquisition of various properties as alleged has no bearing on this case. That no security has been offered by the Applicant and that the application is frivolous and an abuse of court process and it's an attempt to defeat the course of justice.

In the supporting affidavit sworn on 23rd February, 2015, David Mukii Mereka who is the advocate on record for the applicant depones that by a an application dated 17th August, 2015, the firm applied for an amendment of the decree which the court allowed and the same had been served upon the firm of Otieno-Omuga & Ouma Advocates. His firm instructed M/s Dunhill Africa Valuers Limited to do a valuation of the subject properties pursuant to the amended decree, the valuation reports are annexed and marked **"DMM 2"** and **"DMM 3"** and by a letter dated 28th August, 2015, to the Defendant's advocates the Plaintiff's advocate calculated the Plaintiff's entitlement to Ksh.13,812,775/- and there was no response from the Defendant's Advocates.

It is further deponed that by the Plaintiff's advocate's firm's letter dated 28th September, 2015 and filed in court on 7th October, 2015 and copied to the Respondent's Advocates, the Applicant's firm requested the court to issue notice for settling terms of sale which date was fixed for 25th February, 2016. That the valuation reports with respect to Nairobi Block 140/40/77 does not show that the property was sold and in respect of Dagoretti/Riruta/T. 77 if the property is in the hands of a third party then the defendant has no proprietory interest over the same.

The Respondent contends that the Applicant has not adduced any evidence to show that the Plaintiff had acquired various properties during the course of the marriage and for those reasons the application has no merits and it is an afterthought.

I have carefully considered the application, the affidavits both in support and in opposition together with the submissions by the counsels and the judicial authorities relied on. I have also taken the liberty to peruse the court record to familiarize myself with the goings-on in the case. It is noted that the originating summons, the subject of the proceedings herein was filed on 22nd July, 2005. It came up in court on several occasions and on most of them, the Defendant/applicant was represented by an advocate. The

matter first proceeded for hearing on 7th December, 2006 when the Plaintiff testified and it was adjourned at the request of the Defendant's counsel to allow him time to prepare for cross-examination of the Plaintiff. A hearing date was to be taken at the registry.

On the 8th May, 2009, the matter was again in court and by consent of both counsels the matter was to start afresh. A hearing date was later taken by counsel for the Plaintiff for 12th February, 2009 which was ex parte but the record shows that service of the hearing notice was effected on 11th November, 2009, and the same was duly received by the Advocate for the Defendant. On the said date, counsel for the Defendant failed to attend court and the matter proceeded ex parte when the Plaintiff testified.

On the 23rd April, 2012, the Plaintiff was recalled to conclude his evidence by producing documents when the Advocate for the Defendant again applied for another date for cross-examination of the Plaintiff. The court granted the Adjournment on condition that the Defendant do pay court adjournment fees of ksh.1000/- and Plaintiff's costs of Ksh.3000/- and in default, the Defendant be denied right to be heard and the adjournment was marked as the last one.

On the 13th June, 2012, the matter was again in court when the learned Judge observed that the Defendant failed to comply with the court orders given on 23rd April, 2012 and that the consequences of default to comply with the order applies. The Judge proceeded to give a date for judgment which was delivered on the 16th September, 2014.

In the intervening period and before judgment was delivered the Defendant filed an application dated 25th February, 2013 which was never prosecuted and to-date has not been. The said application sought orders for enlargement of time to allow the Defendant/Applicant to cross-examine the Plaintiff and also allow the Defendant to give his testimony.

Following the judgment, the advocate for the Plaintiff applied for a decree which they later applied to amend and the application came up for hearing on 9th September, 2015 in the presence of the counsel for the Defendant. The advocate for the Plaintiff fixed the case for notice to show cause on 25th February, 2016 and before the same could be heard, the defendant brought the application before the court under certificate of urgency.

Both parties filed their submissions in support of their respective position which reiterates the affidavits filed herein which I have duly read and considered.

The Respondent has argued that the matter is ***"res judicata"*** and in advancing his argument, he has quoted the following extract from the judgment sought to be set aside.

> ***"I have carefully perused the record. It shows that although the Respondent filed his defence or reply to Applicant's claim he neither offered evidence nor filed responding submission notwithstanding the fact that he was served with each of relevant court process. It can be rightly concluded, therefore, that the Respondent did not oppose the applicant's claim by any evidence."***

The plea of ***'res judicata'*** is provided for under Section 7 of the Civil Procedure Act as hereunder.

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

My understanding of that section is that there has to be a former suit and a subsequent suit involving the same parties same issues and the matter has to have been determined by a court of competent jurisdiction. This position was also held by learned Justice Mabeya J in the case of **Catherine Freshia Gathoni Vs**

Hudson Odingo NRB HCCA No. 618 of 2009) 2015 eKLR where he stated as follows: -

> ***"From the foregoing, it follows that when a plea of 'res judicata' is raised, a court should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the subject case to ascertain; what issues were really determined in the previous; whether they are the same in the subsequent case and whether or not could have been covered by the decision of the case; whether the parties are the same or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction."***

The essence of the doctrine of *"**res judicata'"*** was well brought out by Justice Gikonyo in the case of **Mary Mwangi T/a Worthlin Markerters Vs Celtel Kenya & 2 others**, HCC No. 275/2013 where the learned Judge stated: -

> ***"The doctrine of res judicata is important in adjudication of a case and serves two important purposes: -***
>
> ***1) It prevents multiplicity of suits which would ordinarily clog the courts, and have unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit.***
>
> ***2) It ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings".***

Having considered what constitutes *"**res judicata",*** it is important at this point to look at the definition of a suit. In the Civil Procedure Act, Revised Edition (2010) a suit is defined as follows: -

> ***"suit" means all civil proceedings commenced in any manner prescribed."***

In our case, what is under consideration by the court is the application dated 15th January, 2016 seeking to set aside the judgment entered on 24th September, 2014. The Defendant herein has not filed a new suit but has made an application in the suit which had proceeded ex parte and judgment entered against him, and therefore, the plea of ***"res judicata"*** raised by the Plaintiff has no substance and cannot hold.

The Defendant/applicant has sought to set aside the judgment mainly for the reason that there was lack of sufficient communication between his previous counsel and himself. Elsewhere in this Judgment, I have set out the chronology of events when this matter came up for hearing on various occasions. On most of those occasions, he was represented by a counsel and more particularly on the three of such occasions when the matter proceeded. On the 23rd April, 2012, the matter was adjourned to allow time for the Defendant's counsel to cross-examine the Plaintiff which adjournment was granted on conditions that the Defendant failed to comply with to-date.

The Defendant having filed a replying affidavit to the originating summons was always aware of the pending suit and he ought to have taken initiative of following it up with the counsel. It is noted that as early as February, 2012, the Defendant filed an application seeking enlargement of time to allow him to cross-examine the Plaintiff and to give his testimony but that application was not prosecuted for reasons that he has not bothered to explain.

The judgment sought to be set aside was delivered on the 16th September, 2014 almost one and a half years ago and the Defendant was always aware of the same. In my view, no good reason has been given by the Defendant why he failed to bring the application on time. My position in this regard is fortified by the case of **Shah Vs Mugo (1967) EA 116** at 12B where the court in considering the principles of settling aside a judgment stated.

> ***"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person***

who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

Clearly, the Defendant herein has sought to delay the course of justice and this court should not come to his aid.

In the premises aforesaid this court finds no merit in the application dated 15th January, 2016 and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 21st day of July, 2016.

……………………………….

L NJUGUNA

JUDGE

In the presence of

…………………… for the Plaintiff/Respondent

……………………..for the Defendant/Applicant.