



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 781 OF 2017

NYAMBURA N KARIUKIPLAINTIFF

=VERSUS=

JOSEPH NJAKAI KARIUKIDEFENDANT

RULING

1. This suit came up for hearing before Gacheru J on 16/10/2019. The defendant was absent. The hearing date had been fixed in the presence of counsel for both parties. Consequently, the Plaintiff testified and closed her case on the same day. However, on that day, no order was made relating to the defendant's counterclaim.

2. Subsequently, on 15/6/2020, the Hon Judge rendered a Judgment in which she made an award in favour of the plaintiff in the following terms:-

a) That a permanent injunction be and is hereby issued against the defendant restraining him, his agents, servants and/or any other person claiming through the defendant from alienating, selling and/or in any way disposing or taking possession of L.R Ruiru/Ruiru East Block 1/(Githunguri)1387 or at all.

b) That an injunction order be and is hereby issued prohibiting the defendant from interfering with the Plaintiff's and the children's quiet possession of L.R Ruiru/Ruiru East Block 1 (Githunguri) 1387.

(c) That the Plaintiff is awarded costs of this suit to be paid by the defendant.

3. A perusal of the Judgment reveals that no order was made in the judgment disposing the defendant's counterclaim.

4. Subsequently, the defendant brought a notice of motion dated 26/8/2021 seeking: (i) an order granting the firm of *Njue Muriithi & Associates Advocates* leave to represent the defendant; (ii) an order of stay of execution of the decree herein; and (iii) an order setting aside the judgment rendered herein on 15/6/2020.

5. The application was supported by the defendant's affidavit sworn on 26/5/2021 in which he deposed that he was not aware of the hearing date of 16/10/2019 because his previous Advocates, *M/s Kanyi Kiruchi & Co Advocates* did not inform him about the hearing. He added that he learnt about the ex-parte judgment on 18/8/2021 when he was served with the decree herein. Upon being served with the decree, he perused the Court File and noted that the hearing date had been fixed in the presence of the parties' advocates. He deposed that he did not know the intention or motive of his previous advocates in failing to update him on the proceedings in this suit.

6. The application was canvassed through written submissions dated 13/10/2021 filed by the firm of *Njue Muriithi & Associates*. Counsel submitted that the firm of *Kanyi Kiruchi & Co Advocates* filed an application seeking leave to cease acting for the plaintiff but they had failed to prosecute the application, hence the plea by the plaintiff for leave to change advocates.

7. Counsel further submitted that the defendant came to know about the hearing and ex-parte determination of the suit when he was served with the decree restraining him from taking possession of the suit property. Counsel urged the court to grant the defendant opportunity to be heard on the primary suit and on the counterclaim.

8. The plaintiff opposed the application through her replying affidavit sworn on 14/10/2021. She deposed that the decree issued in this suit had already been registered against the Title. She added that although the defendant was laying blame on his previous advocate, there was no evidence that he had lodged a complaint against him at the Advocates Complaints Commission. Further, she deposed that the defendant being her husband, she had no intention of evicting him from the suit property. Lastly she deposed that the defendant's advocate was fully aware of the dates for court activities relating to this suit.

9. In written submissions filed through the firm of *M/s Wangari & Co. Advocates*, dated 14/10/2021, counsel for the Plaintiff submitted that the advocates presenting the application had not been granted leave to act for the defendant, hence the application should be struck out. Counsel added that the discretionary jurisdiction granted to the court under the Civil Procedure Rules could be exercised without the court being satisfied that the Plaintiff had been diligent and his negligence did not contribute to the *ex parte* hearing and judgment. Counsel urged the court to dismiss the application with costs.

10. I have considered the application together with the response thereto and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key questions falling for determination in this application.

11. Ideally, in an application of this nature, the plea for leave to effect a change of advocates should be disposed before the other limbs of the application are considered. The present application first came before this court *ex-parte* under a certificate of urgency on 4/10/2021. The court gave *ex parte* directions on the application, to the effect that the application was to be served for *inter partes* hearing on 18/10/2021. On 18/10/2021, advocates for both parties attended court and informed the court that the plaintiff had filed a response and the parties had exchanged written submissions. They invited the court to render a ruling on the application. It is against that background that the limb relating to the plea for leave to effect change of advocates is being considered alongside the other limbs of the application at this point. I will, in the circumstances, consider the plea for leave to change advocates before I consider the other limbs of the application.

12. There has been no opposition to the plea for change of advocates. Under the law, a party is at liberty to be represented by an advocate of his choice. Secondly, the court record shows that on 10/2/2020, the firm of *Kanyi Kiruchi & Co Advocates* filed an application seeking leave to cease acting for the defendant. The said application has never been prosecuted. In the circumstances, there is no proper basis why the defendant should not be granted leave to be represented by another firm of advocates. The court therefore hereby grants prayer 2 of the notice of motion dated 26/8/2021. I will in the circumstances proceed to consider the other limbs of the application.

13. The key issue falling for determination in the other limbs of the application is whether the defendant has satisfied the criteria upon which our courts exercise the discretionary jurisdiction to set aside an *ex parte* judgment or a default judgment. The principle guiding exercise of this jurisdiction is that the court has unfettered discretion in determining whether or not to set aside the regular *ex parte* or judgment and when exercising this jurisdiction, the court takes into account such factors as the reasons for the failure of the party to attend court; the length of time that has lapsed since the regular *ex parte* judgment was entered; whether the applicant has pleadings that raise triable issues; the likely prejudice to be suffered by each party; whether on the whole it is in the interest of justice to set aside the regular default judgement. **[See (i) *Mbogo & another v Shah [1968] EA 93*; and (ii) *James Kanyiita Nderitu & another v Marios Philota Ghikas & another [2016] eKLR*].**

14. In the present application, there is common ground that the plaintiff and the defendant are co-owners of the suit property. Secondly, there is common ground that at the time the matter came up for hearing, there were two claims falling for trial and determination: the primary suit; and the defendant's counterclaim. Although the plaintiff's suit was heard and granted in terms of prayers (a), (b) and (c) of the plaint, no order was made disposing the defendant's counterclaim. Thirdly, there is common ground that the hearing date was taken in the presence of the parties' advocates. Fourthly, the defendant contends that the reason why he did not attend court to present his evidence is that his previous advocates did not notify him about the hearing. Fifthly, the defendant contends that he has lived on the suit property since 1992 and the *ex parte* judgment effectively evicts him from the property which he co-owns with the plaintiff and which is registered in their respective names as co-owners. No evidence has been tendered to suggest that the defendant's previous advocates duly notified him about the hearing.

15. In the above circumstances, taking the above guiding principles into account, the court takes the view that it is in the interest of justice that the defendant should be granted a chance to be heard on the primary suit and on the counterclaim. However, because this unfortunate situation is entirely attributable to the defendant and/ or his previous advocates, the defendant will indemnify the plaintiff through payment of costs of the *ex-parte* proceedings and the present application, assessed at Kshs 30,000/-, to be paid within 30 days from today.

16. In the end, the defendant's notice of motion dated 26/8/2021 is disposed in the following terms:-

(a) The firm of Njue Muriithi & Associates is deemed to have been granted leave to act for the defendant effective from the date of the inter partes hearing of the application dated 26/8/2021.

(b) The ex parte judgment rendered in this suit on 15/6/2020 is set aside on condition that the defendant shall pay the plaintiff throw-away costs of the ex parte proceedings and of this application, assessed at Kshs 30,000/-, to be remitted to the plaintiff's advocates within 30 days from today. In default, the order setting aside the ex parte judgment shall stand vacated.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Wangari for the Plaintiff

Mr Warutere for the Defendant

Court Assistant: Ms Phyllis Mwangi