



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT NAIROBI
ELC SUIT NO.340 OF 2015

MARY NYAMBURA GACHUI.....PLAINTIFF

VERSUS

JOSEPH NDICHU GACHUI.....1ST DEFENDANT

WAWERU WANJIRU.....2ND DEFENDANT

EDITH MUGURE GACHUI.....3RD DEFENDANT

HANNAH NJOKI GACHUI.....4TH DEFENDANT

MARGARET NGENDO GACHUI.....5TH DEFENDANT

GRACE WAMBUI GACHUI.....6TH DEFENDANT

MARGARET WANJIKU WAWERU.....7TH DEFENDANT

RUTH NJERI GACHUI.....8TH DEFENDANT

RULING

1. This is the Defendants' application dated 23rd July 2020. It is brought under Order 22 Rule 22, Order 1, Order 12 Rule 2 and 7 of the Civil Procedure Rules, Section 1A 7 3A of the Civil Procedure Code and all other enabling provisions of the law.
2. It seeks orders;-
 1. *Spent*
 2. *Spent.*
 3. *That the Exparte judgement entered on 27th February 2020 on the basis of non-attendance of the Defendants be set aside and the Defendants be allowed to cross-examine the Plaintiff and proceed with their defence and counterclaim.*
 4. *Such further and other orders be granted as the court may deem fit.*
3. The grounds in support of the application are on the face of the application and set out in paragraphs (a) to (e).
4. The application is supported by the annexed affidavit of the 1st Defendant/Applicant sworn on 23rd June 2020. He deponed that on 23rd June 2019, he travelled from Nyahururu to attend court at 9.30 a.m. in the presence of his lawyer. The matter was confirmed for hearing at 1.30 p.m.
5. He further deponed that his lawyer informed him that she would return to her office in Kikuyu but he should be in court by 1.15 p.m. in case she was held up in traffic.

6. He deponed that he went to town and returned at 1.20 p.m. But he was denied entry to the court premises at the gate as he was informed that no entry is allowed until 2 p.m. He further deponed that at 2 p.m. he entered the court and found the Plaintiff and her lawyer exiting the court and he was informed that the case was concluded.

7. He deponed that upon perusal of the court file with his lawyer who also arrived at 2 p.m. they found out that the Plaintiff had proceeded ex-parte and sought that defence case be closed. He added that there was an error of judgement of the time which made him to be locked out of the court.

8. He deponed that the Plaintiff is an alleged Widow of his father who now seeks to evict the Defendants from their home using a title obtained after their father's death. He further deponed that after 27th February 2020, he travelled to Engineer and was locked out from accessing his Advocates offices due to the covid 19 restrictions at the time. He prayed for a chance to cross-examine the Plaintiff and to testify on the defence and counterclaim.

9. The application was also supported by the affidavit of Mary Wanjiru Muhuhu; advocate in conduct of the Defendants' matter. She deponed that on 23rd July 2019, she appeared in court and this matter was placed for hearing at 1.30 p.m. She stated that she returned to her office in Kikuyu but informed the 1st Defendant to wait in court in case she got late.

10. She deponed that on her way back, she was held up in traffic at Westlands as there was an accident. She was only able to reach the court premises at 2.10 p.m. She added that she met Plaintiff's advocate at the gate who told her that the matter had proceeded. She also deponed that she found the Defendant in court but learnt that he had also been locked out of the court thus he did not attend the hearing.

11. She deponed that this is a serious matter involving the home of the 1st wife and the 2nd wife and as such the mistake should not be visited upon her client. She also deponed that the Plaintiff's case is closed and prayed that it should be re-opened for cross-examination.

12. She deponed that after finding out the judgement was due on 17th February 2020, her assistant Anne Ngige sought to file an application to set aside the proceedings but she could not access the file.

13. The application is opposed by the Plaintiff vide her replying affidavit sworn on 17th November 2020. She deponed that this matter came up for hearing on 22nd July 2019 when all parties and their advocates attended before the judge and the case was confirmed for hearing at 1.30 p.m.

14. She further deponed that the hearing commenced at 1.45 p.m. as only herself and her advocate were present in court and by the time they left the court room at 2.40 p.m. neither the Defendants nor their Advocate was in court.

15. She refuted the 1st Defendants contention that the gate to the court premises was locked between 1.00 p.m. and 2.00 p.m. as she accessed the court building after 1.00 p.m. and the gate was not locked.

16. She also disagreed with the averments of counsel for the Defendant that she got to court at 2.00 p.m but that they met her at the gate at 2.40 p.m. and her advocate informed her that the matter had proceeded.

17. She deponed that the Defendants did not explain the delay in filing the application to set aside the proceedings as they filed their application on 23rd July 2020, a year after the ex-parte proceedings.

18. She deponed that the suit property was gifted to her by her late husband and the Defendants' application should be dismissed for lack of merit and obstructing justice.

19. On the 22nd April 2021, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's submissions

20. They are dated 28th May 2021. The Plaintiff submitted that reasons advanced by the Defendants do not constitute sufficient cause as defined by the supreme court of India in **Parimal v Veena cited in Wachira Karani v Bildad Wachira [2016] e KLR**.

21. She further submitted that the Defendants failed to tender any evidence that would enable the court exercise its discretion in their favour and that failure by the Defendants to attend court was intentional and by design intended to obstruct and delay the course of justice. She added that while the Exparte proceedings were on 22nd July 2019, it was not until 28th July 2020 that the Defendants filed this application without offering any explanation for the delay. She also submitted that both that Defendants and their Advocate were negligent. She relied on the case of **Julius Mbaabu Marete v Tom Ayora & 3 others [2018] eKLR** and asked the court to dismiss the application.

The Defendants' submissions

22. They are dated 21st June 2021. The Defendants' submitted that there are no limits or restrictions on the judge's discretion to set aside an ex parte judgement obtained in default of either party to attend hearing except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. They relied on the court of Appeal's decision in **Martha Wangari Karua v IEBC and Karen Blixen Camp v Kenya Hotels and Allied Workers Union [2018] e KLR**.

23. They also submitted that the discretion is intended so as to be exercised to avoid injustice or hardship resulting from the 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.

24. They further submitted that a discretionary power should be exercised judicially and not arbitrarily and that the court should consider that they were vigilant not indolent.

25. I have considered the notice of motion and the affidavit in support. I have also considered the affidavit in response, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) *Whether the notice of motion dated 23rd July 2020 is merited.*

(ii) *Who should bear costs of this application?*

26. It is the 1st Defendant's as that the matter was confirmed for hearing at 1.30 p.m. and that his advocate instructed him to be in court by 1.15 p.m. in case she was held up in traffic. He stated that he went to town and returned by 1.20 p.m. but he was denied entry at the gate. That by the time he was allowed in it was 2.00 p.m. He found the Plaintiff and her advocate leaving the courtroom. They informed him that the matter had been concluded.

27. The Defendants' advocate on her part stated she got held up by traffic and was only able to get to the court premises by 2.10 p.m. She found the 1st Defendant who told her the matter had been concluded.

28. The Plaintiff on her part stated that the case was confirmed for hearing in the presence of all the parties and their Advocates. She refuted the 1st Defendant's assertion that the court premises were locked. It is her case that the Defendants have not explained the delay in filing this application as the same was filed one year after the exparte proceedings. She prays that the application be dismissed.

29. The well established principles of setting aside interlocutory judgments were laid out in the case of *Patel v EA Cargo Handling Services Ltd [1974] EA 75* where Duffus V P stated:-

"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 judgment as is the case here, the court will not usually set aside the judgment 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 Sheridan J put it "a triable issue" which raises a prima facie defence and which should go to trial for adjudication."

30. In the case of *Wachira Karani vs Bildad Wachira [2016] eKLR* J Mativo stated thus:-

"I find that the reason given by the applicant for failing to attend court is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of Richard Nchapai Leiyangu vs IEBC & 2 others [2013] eKLR where the court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"

31. In the instant case the Defendants' counsel has explained why she was not able to make it to court at 1.30 pm at the time the hearing was to commence. The 1st Defendant on his part has also stated that he was kept out the court premises from 1.20 pm to 2.00 pm. I find that the explanation given is reasonable.

32. I find that the Defendants have demonstrated sufficient cause to warrant this court to exercise discretion in their favour to set aside the Ex parte judgment delivered on 27th February 2020.

33. In conclusion, I find merit in this application and grant the orders sought namely:-

(a) *That the exparte judgment entered on 27th February 2020 and all consequential orders are hereby set aside on condition that the Defendants do pay the Plaintiff throw away costs of Kshs.10,000/- within twenty one (21) days from the date of this ruling.*

(b) *That costs of this application be borne by the Defendants.*

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

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L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

MS KANG'ETHE FOR THE PLAINTIFF

MS. A. NGIGE FOR MRS. MUHUHU FOR THE DEFENDANTS

STEVE - INTERESTED PARTIES

STEVE- COURT ASSISTANT