



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC CASE NO 335 OF 2017

**JOHN KATILI MAKAU (Suing as the Legal Representative and Administrator of the Estate of
Syokwia Makau Ngunzi alias Ngunzi Mukonzi).....PLAINTIFF/RESPONDENT**

VERSUS

MUTUKU SILINGI.....DEFENDANT/APPLICANT

RULING

1. Before this court is an application dated 23rd of September 2021 brought under Order 9, Order 10 Rule 11 and Order 22 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Article 50 and Article 159 of the Constitution of Kenya and all enabling provisions of the law where the Applicant is seeking for the following orders:

a. Spent.

b. Spent

c. That pending hearing of this application, this Honourable Court does issue an order for stay of execution of the ex parte judgment and decree dated 29th April 2020.

d. That pending the hearing and determination of the suit, this Honourable Court do grant a stay of execution of the ex parte judgment and decree of 29th April 2020 and all consequential orders thereto.

e. That the Honourable Court be pleased to set aside the ex parte judgment and decree of 29th April 2020.

f. That pending the hearing and determination of the application, the Honourable Court be pleased to stay the intended attachment and sale by Mumbu Auctioneers of motor vehicle number KAZ 158 and 25 goats belonging to the defendant/applicant as per the warrants of attachment dated 20th of September 2020.

g. That the Honourable Court be pleased to grant the Defendant leave to file a statement of Defence as per the annexed statement of defence.

h. That the cost of the application be in the cause.

2. The Application is premised on the grounds set out therein and on the supporting affidavit of the Applicant Mutuku Silingi sworn on the 24th of September 2021 and the supplementary affidavit sworn on 18th of October 2021.

3. The Application was opposed vide the Respondent's Replying Affidavit sworn by the Respondent herein.

APPLICANT'S CASE

4. A summary of the grounds and the averments is that the Defendant had instructed the firm of Kurauka and Company Advocates to represent/defend him in this suit. The Applicant averred that he made several attempts to find out the progress of his case but his calls went unanswered. He further averred that he became aware that the matter had reached the judgment stage after his property was proclaimed by

Muumbu Auctioneers. He stated that he had since instructed the firm of Mirara and Company Advocates to take up the matter from the firm of Kurauka and Company Advocates. He contends that he was not given an opportunity to defend himself and that he had a good defence that raises triable issues. He contends that the inadvertence of his previous Counsel should not be visited upon him.

RESPONDENT'S CASE

5. The Respondent opposed the application vide his Replying Affidavit sworn on the 6th of October 2021 where he stated that after this matter was commenced in 2017, the Defendant/Applicant upon being served with the pleadings raised a Preliminary Objection on the 6th of November 2017 which was eventually dismissed by the court. He averred that the Applicant and his Advocate failed to appear in court on the 10th of July 2019 when the matter was fixed for hearing. That the court directed that the matter to proceed for hearing.

6. He further averred that when the judgment was ready for delivery, the Defendant's former counsel was notified and a copy of the judgment transmitted to him via email. That thereafter, the Respondent's Counsel filed a bill of costs for taxation and served the Applicant's Counsel with a notice of taxation on the 24th of June 2021. He argued that it was therefore not true that the Applicant was not given an opportunity to be heard as they were duly served.

7. He further averred that it was not true that there existed a boundary dispute and that the Defendant had trespassed on the Plaintiff's land. He argued that the Applicant's current Advocate was instructed to defend the bill of costs and they were therefore aware of the matter.

8. He contends that the annexed defence does not raise any triable issues and that the Applicant had not demonstrated that he would suffer irreparable damages if stay of execution of judgment is not granted. He argues that the application was fatally defective, an abuse of the court process and a delaying tactic.

9. In his supplementary affidavit sworn on the 18th of October 2021, the Applicant averred that service was not effected upon him as the signature on the documents was not his and that the alleged Wayua Mutuku who is said to have been served with the documents was not his wife.

SUBMISSIONS

10. The application was canvassed by way of written submissions. The Applicant through his written submissions filed on the 1st of November 2021 submitted that the suit relates to a boundary dispute between plot number 421 and 422 Kaumoni Adjudication Section. Counsel for the Applicant submitted that service was effected upon the Respondent as an affidavit of service was not filed to prove the same. The Applicant also disputed service on the grounds that his signature was forged and that the alleged Wayua Mutuku was not his wife. He further submitted that after the Preliminary Objection was dismissed, his former counsel failed to follow up on the matter. He argued that the court should exercise its discretion to set aside the judgment as he was not given an opportunity to defend himself.

11. The Plaintiff/Respondent through his written submissions filed on the 3rd of November 2021 submitted that the Applicant was served with court documents as evidenced by the several affidavits of service and therefore his allegation that he became aware of the matter after his goods were proclaimed was untenable. Reliance was placed on Order 10 Rule 2 of the Civil Procedure Rules and on the following decisions:-

i. Ali Bin Khamis Korobe & 2 Others (1956) EACA 195

ii. James Kanyita Nderitu v Maries Philotas Ghika & Another (2016) e KLR.

12. Counsel for the Respondent further submitted that the allegation by the Applicant that his Advocate did not inform him about the progress of the matter does not hold any water as no explanation was offered for the inaction by the Applicant from the time they filed a Memorandum of Appearance up to when judgment was issued and a bill of costs taxed and served upon his former Advocate. The Respondent relied on the following decisions to buttress his submissions:-

i. Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2015) e KLR

ii. Mwangi v Kariuki (1999) LLR 2632 (C.A.K)

iii. Mwangi Gachiengu & 2 Others v Mwaura Githuku & Another (2019) e KLR

iv. Shah v Mbogo & Another (1967) EA 116

ANALYSIS AND DETERMINATION

13. Having considered the application, grounds, affidavits, annexures and the rival submissions, I find that the main issue for determination is whether the ex parte judgment and all consequential orders should be set aside.

14. Order 10 Rule 11 of the Civil Procedure Rules provides that ex parte interlocutory judgments in default of appearance or defence may be set aside. It stipulates as follows:-

“where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or upon such terms as are just.”

15. Courts have the discretionary power to set aside ex parte judgment with a view of doing justice to the parties. The discretion should be exercised to avoid injustice. In the case of **Philip Kiptoo Chemwoto and Mumias Sugar Company Ltd v Augustine Kubed (1982-1988) KAR**, the court held that:-

“the court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties”.

16. The well-established principles of setting aside interlocutory judgment were laid out in the case of **Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75** where the court held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. 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”.

17. In the present case, this suit was filed on behalf of the Plaintiff on the 16th of September 2017 vide a Complaint dated the same day. The Defendant entered appearance on 6th of November 2016. The Defendant did not file a Statement of Defence within 14 days as required. The matter proceeded for hearing on the 10th of July 2019 and judgment was delivered on the 29th of April 2020. The Applicant stated that he became aware of the judgment after his goods were proclaimed by Muumbu Auctioneers. He submitted that his Advocate did not inform him about the progress of the case.

18. The general principle is that an Applicant should not suffer due to the mistake of its counsel. This was the position in **Lee G Muthoga v Habib Zurrich Finance (K) Ltd & Another Civil Application No Nairobi 236 Of 2009** where it was held that:-

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight”.

19. The right to be heard is a protected right under Article 50(1) of the Constitution which provides that:-

“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

20. It would be unjust and indeed a miscarriage of justice to deny a party who has expressed his desire to be heard the opportunity to prosecute his case. The Applicant in my view has offered a candid explanation as to why he did not attend court.

21. One of the factors to consider is when setting aside an ex parte judgment is whether the Defendant has a defence on merit. It is apparent from the Plaintiff’s Complaint dated 18th of September 2017 and filed in court on the same day, the Plaintiff is claiming for the following orders against the Defendant:-

a. A declaration that land parcel Number 421 Kaumoni Adjudication Section belongs to the deceased’s estate.

b. A permanent injunction restraining the Defendant by himself, his agents and/or servants from entering onto and/or encroaching and/or remaining on and/or grazing and/or cutting down trees or in any other manner whatsoever interfering with land parcel number 421 Kaumoni Adjudication Section.

22. I have had the benefit of reading through the draft defence and in my opinion it raises triable issues. It will be in the interest of justice if the parties are heard fully on merit.

23. Another factor to consider is whether the application was made promptly and without delay. I find that the application was made promptly and without delay. There is no evidence that the Defendant is merely seeking to delay this matter.

24. In light of the foregoing, the application dated 23rd September 2021 is allowed in the following terms:-

a. The ex- parte judgment dated 29th of April 2020 be and is hereby set aside together with all the consequential orders.

b. The Applicant files its Statement of Defence within 14 days of this ruling.

c. The Applicant to pay the Respondent thrown away costs of Kshs.20000/- within 30 days from the date hereof in default of which the Plaintiff shall be at liberty to execute for recovery thereof.

d. In the event the Applicant fails to comply with orders b and c above, the order of setting the judgment shall be vacated forthwith.

RULING READ, DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 23RD DAY OF FEBRUARY, 2022

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Muthiani for the Plaintiff/Respondent

Kwemboi Court Assistant.