REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 72 OF 2019

MOSES KIMAIYO KIPSANG.....PLAINTIFF/RESPODENT

VERSUS

GEOFFREY KIPROTICH KIRUI....1ST DEFENDANT/APPLICANT

JOYCE KOECH.....2ND DEFENDANT/APPLICANT

DOMINIC KIPROTICH.....3RD DEFENDANT/APPLICANT

RULING

(On review and setting aside of judgment and leave to file defence)

Introduction

1. On **3/12/2019**, the Plaintiff filed a Plaint together with an application of even date. He did so through the firm of M/S Teti & Co. Advocates. Among the prayers he sought against the defendants was an injunction restraining them from enjoying the quite possession of the suit land.

2. On **11/12/2019**, the defendants filed a Notice of Appointment of Advocates dated **10/12/2019** through the firm of M/S Miyenda & Company Advocates. The also filed a replying affidavit in response to the Plaintiffs' the application for injunction. They also filed submissions thereto. On **10/3/2020**, this Court delivered a ruling in respect of the application in the absence of Counsel for the defendants. In the ruling, the Court ordered the parties **to maintain status quo** pending the hearing and determination of the suit.

3. Afterwards, the Plaintiff filed a further list of documents on **28/1/2021.** That was in a bid to comply with **Order 11** of the **Civil Procedure Rules**. From the record, on **18/1/2021** when this matter came up for mention before the judge, there was no appearance for the defendants. The plaintiff's counsel informed the court that he had not been served with the defence or any documents at all. Again on **2/2/2021** when it came up for mention, there was no representation on the part of the defendants. The court then fixed the matter for hearing on **20/5/2021**.

4. On that date, Mr. Bungei Advocate held brief for Mr. Miyenda Advocate, learned counsel for the defendant, and sought an adjournment on his behalf. He gave the reason for seeking the adjournment that Mr. Miyenda was engaged in an "urgent personal issue", and was yet to comply (*emphasis mine*). Learned counsel for the Plaintiff objected to the adjournment. The Court upheld the objection for the reason that the personal issue had been disclosed. The Plaintiff's counsel argued that the defendants' counsel was served with the hearing date in **February, 2021**, and there was defence on record yet.

5. In declining the application for adjournment, the court noted that the defendant's counsel had been on record since **10/12/2019**. It further found that the Defendants never filed any defence as at the material date and no reason had given for that delay. For those reasons the court ordered that the matter proceeds for formal proof hearing.

6. The plaintiff testified and closed his case and that of the defence on that date. The record does not bear anything done by Mr. Bungei when the matter proceeded to hearing, even cross examination of the witnesses or asking to be excused from the proceedings. Nevertheless, the Court fixed the case for judgment on **25/05/2021** and it was delivered in due time.

The application

7. On **5/8/2021,** the defendants filed the instant application. It was brought under Sections **1**, **1A**, **3**, **3A** and **63 (e)** of **the Civil Procedure**

Act, **Order 10 Rules 1, 4** to **11** and **Order 51** of the **Civil Procedure Rules**. They sought orders for the setting aside and review of the judgment. Specifically, they sought orders:

1. …spent

2. …spent

3. …spent

4. That the Honourable Court be pleased to set aside the judgment dated 25/05/2021 and all consequential orders arising thereunder and the suit be set down for full hearing inter-partes.

5. That in the alternative, this Court be pleased to review the judgments dated 25/05/2021 and all orders arising therefrom.

6. That the defendants be given leave to file their defence within time limits to be set out by the Court and/or the draft defence annexed herewith be deemed by the Court as properly filed subject to payment of the requisite Court fee.

8. They relied on a number of grounds, namely, that the plaintiff did not serve them with his documents including a Plaint and all the accompanying documents; the suit proceeded prematurely to the prejudice of the defendants; they did not file a defence because the parties had not exchanged documents and that pleadings had not closed strictly so. They then denied knowledge of the prayers sought in the Plaint, claiming that they were not served.

9. Further, they alleged that their learned counsel did not attend court on **20/5/2021** because he had another hearing before the High Court in Kisii and that his absence was not due to a personal issue. They then stated that learned counsel was indisposed in the months of June and July and was not in a position to file the instant application. They alleged that a boundary dispute as such would not lead to eviction as was in the judgment. Further, they stated that a decree had been drawn and served upon them on **3/8/2021** and they faced the threat of eviction from the suit land. They contended that if the intended eviction was allowed to proceed it would occasion great and unbearable loss and suffering to them without affording them a hearing. They stated that they had a formidable defence to offer at the hearing and that mistake of counsel should not be visited on them as innocent litigants.

10. The Application was supported by the affidavit sworn by **Evans Ogeto Miyenda**, learned counsel for the defendants. He swore it on **5/8/2021** and filed on **6/8/2021**. In it, he reiterated the contents of the grounds as facts supporting it save for addition of annextures to it. He denied having been away for personal issues on **20/5/2021** when the matter proceeded *ex parte*. Instead he insisted that he had attended court. He annexed a copy of his diary of date **20/5/2021** which showed that he had other matters in Kisii Law Courts but the Kitale ELC one (the instant matter) was the first one on page of the diary which is marked as **annexture A**. He also added that the Applicants were purchasers of the suit land and that the ruling of **10/3/2021** was issued in favour of the defendants because according to him, the defendants tendered watertight evidence to prove ownership of the land.

The Response

11. The Plaintiff/Respondent opposed the application. He swore a replying affidavit on **28/9/2021** and filed it on **29/9/2021**. He responded that the application was misconceived, fatally defective, made in bad faith and amounted to an abuse of the court process. He deponed that the Affidavit in support was full of falsehoods. His contention was that the defendants were served with all the pleadings summons on **4/12/2019**. According to him, they were received by the defendants. He annexed an affidavit of service of the documents and copies of the signed documents by the defendant acknowledging receipt, marked as **MKK2** and **MKK3** respectively.

12. He contended that the defendants instructed their advocates on record who then filed a response to his application dated **3/12/2019.** He deponed that the applicants misled the court by alleging non-service yet that was done and they received all the documents and even acknowledged service by appending their signatures on those returned to court as duly served. He criticized the applicants for failing to make any effort to arrest the judgment even after learning that the matter proceeded *exparte* on **20/5/2021**, and failing to demonstrate that they had any case against him to warrant the grant of the orders sought. He faulted the applicants for failing to explain the inordinate delay they took in filing the instant application. Finally, he prayed for the dismissal of the application as it lacked merit.

Analysis, Issues and Determination

13. Upon careful consideration of the application, the grounds thereto together with the rival affidavits of the parties both in support and opposition, the parties' submissions, the authorities relied on and the law, I find that the issues for determination are as follows:

a. Whether the defendants were given an opportunity to be heard and failed to utilize it;

b. Whether the judgment should be set aside or reviewed;

c. Whether leave to file defence should be granted;

d. What orders to issue and who to bear the cost of the application?

14. I now embark on analyzing the issues one after another as hereunder:

a. Whether the defendants were given an opportunity to be heard and failed to utilize it

15. From the Court record and the facts presented before the Court, there is no dispute that the Applicants were represented by learned Counsel in the proceedings preceding the instant Application. It was the same firm of Advocates that filed both a Notice of Appointment and a response to the Application dated **3/12/2019**. The firm did so on **28/01/2020** through the Notice of Appointment of Advocates dated **10/12/2012** filed on **11/12/2019** and opposed the Application through an Affidavit sworn by one Joyce Koech, the **2nd** Defendant, on **23/01/2020** and filed on **28/01/2020**. It also opposed the Application to the end by filing submissions and taking the ruling thereon.

16. The Applicants argued that they failed to file defence because they were not served with the requisite documents by the Plaintiff. The plaintiff denied the allegation. He stated that the defendants were properly served with court documents and that they received them by appending signatures on the copies returned to court. He demonstrated this by annexing to his Affidavit the copies of summons to enter appearance indicating that each of the defendants were served and appended their signatures on them.

17. Given the rival positions taken by the parties two questions will be worth answering immediately. One, if the documents such as the Plaint were not served, how did the Applicants get to instruct their learned counsel to file a Notice of Appointment and responses to the initial Application? Secondly, from **11/12/2019** when the Applicants' learned counsel's Notice of Appointment of Advocate was filed the time of hearing, what steps did the Applicants take to apprise them of the claim against them?

18. I have carefully studied the Court record, the Affidavit of service sworn on **17/12/2019** by one **Archibald Wekesa Nyukuri**, a process server and the copies of the summons to enter appearance annexed to it. I find that it explains well and clearly how the Defendants were identified to him when he effected service and how the service was done. In any event, none of the Defendant ever disputed by way of affidavit or otherwise that the signatures on the copies returned to Court was his or hers. To that extent, I find that the summons to enter appearance were properly served. Having found so, this Court finds it inconceivable that the process server would deliver only copies of summons to enter appearance without the Plaint and other documents.

19. At any rate, even assuming that only copies of summons were served on the Defendants, they did not explain how it would be that the Application to which they responded and ably opposed by appointing counsel to act for them in was served. The Court notes that both the Application, the Plaint and copies of summons to enter appearance were all delivered to Court on the same date, the **3/12/2019** and on the following day the summons were extracted or signed and received for purposes of effecting service.

20. In the annexed affidavit of service the process server deponed how on **4/12/2019** he received copies of Summons to enter appearance, Plaint, verifying affidavit, list of witnesses, witness statements, list of documents, Notice of Motion application under certificate of urgency and the supporting affidavit from the firm of M/S Teti & Co. Advocates with instructions to serve the defendant herein. In short, the affidavit of service has never been challenged to date by the defendants.

21. Granted that the Applicant did not serve the requisite documents to enable the defendants to enter appearance and file defence, the Defendants are caught flat footed by the law and practice on two fronts which they did not explain in this Application hence did not come out convincing in their contention in Court. One, under **Order 5 Rule 2** the law provides for validity of summons to enter appearance. **Rule 1** provides that summons to enter appearance are valid for the first **12** months but must be collected within **30 days** of filing the suit failure of which the suit abates. However, under **Rule 2 sub-rule 2** the validity may be extended if the period of service expires before they are served. Under **sub-rule 7**, if no application for extension is made within **24** months of the issue of the original, the Court may dismiss the suit. The implication of the provisions I have cited is that if it is true that the summons were not served, and the no extension thereof made within twenty-four months of **4/12/2019**, the Applicants should have moved the Court to dismiss the matter. They never did so, as at the time of writing this ruling.

22. The second front where the Applicants were found without an answer is failing to exercise due diligence in the matter. If indeed it was true that they were not served with summons to enter appearance and the respective documents, they ought to have perused the Court record, seen the claim therein and taken copies of the documents and made ready for the case. This was particularly so because when they were served with the hearing notice in **February, 2021**, they neither protested nor took steps to indicate to the other side or Court that they were not ready for hearing. It was their duty, under **Section 1A (3)** of the **Civil Procedure Act** to assist the Court to not only hasten the matter but arrive at a just conclusion. They did not do so. Instead, they waited up to the date of hearing on **20/05/2021** and moved the Court for adjournment on account of the two reasons alluded to above. Of interest at the point is the Second reason that the which was "Mr. Miyienda is yet to comply". The immediate attendant question is, what was learned counsel to comply with and how? The straight and simple answer to that is that he was required to comply with **Order 11**. It presupposes that a party who wishes to comply with the **Order** and moves the Court for more time, as it was for the case of Mr. Miyienda Advocate, has been served with the requisite documents and wants the Court to give more time for him to file his. But **Order 11** is only supportive and complementary of the steps a party, if a Defendant, is required to take under **Order 7 Rule 5** of the **Civil Procedure Rules**.

23. The question the Court may pose is: what are the consequences of non-compliance of **Order 7 Rule 5** and **Order 11**? Before I answer the two questions, it is should be clear that extension of timelines provided by law or Court and which are not complied with is at the discretion of the Court and on a case by case basis. However, the discretion has to be exercised judiciously. Thus, the Court cannot wait endlessly or parties to comply with timelines that are given by the rules or Court. There are consequences for failure to comply. One of them is that the Court may proceed without waiting for the late party to rectify his situation. That would not meant that the matter proceeded prematurely as, for instance, was argued by the Applicants.

24. With regard to the import of failure to observe **Order 7 Rule 5** of the **Civil Procedure Rules**, the consequence is that leave of the Court may be sought to file the witness statements at least **fifteen (15) days** before Directions being given under **Order 11**. Failure to comply with **Order 11** which the Applicants fault the Court over is provided for under **Rule 7** of the same Order. **Rule 7(2)** provides that parties and should strictly comply with the provisions. **Sub-rule 3** provides that a party or Advocate who does not comply with the strict provisions "… *shall be deemed to have violated the overriding objective as stipulated in **Section 1A** and **1B** of the **Act** and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise*." That does not preclude the Court from proceeding with the matter non-compliance notwithstanding, particularly in a situation where the party appears to be indolent or unwilling to

comply. The Court cannot and shall not wait for him since as they say, time waits for no man. The situation is even dire during this time of backlog of cases.

25. Even where counsel comes on the record and by an oversight on the part of the other counsel, service is not effected, it is the cogent duty of that counsel to peruse through the court file and obtain the documents they deem necessary for their case. For the defendants to allege so and the record speak for itself is misleading the court. Service was in my considered view proper because it was received personally by the defendants.

26. In regard to the defendants' learned counsel's non-appearance on **20/5/2021**, I compare the Defendants' learned counsel's depositions in the Affidavit supporting the Application with the sentiments, of Mr. Bungei Advocate to the Court when he held his brief. Whereas Mr. Bungei sought an adjournment on the ground that Mr. Miyenda was attending to a personal issue and had not complied, Mr. Miyenda deponed in his affidavit that he had another matter in Kisii Law Courts whose presence was required. Mr. Miyienda annexed a copy of his diary of the date to evidence that. At the top of the diary is listed this very matter as the first one fixed for hearing on that date. Why learned counsel elected not to attend to a matter he has prior notice of all others and marked so in his diary for hearing and gave preference to others is a mystery. But of importance is that instructions given to counsel who held brief were at variance with the true position of things. At best they were designed to mislead the Court. That is inexcusable.

27. Having found that the defendants were properly served, this court is of the view that it must consider whether the defendants were accorded a chance for fair hearing. The record speaks for itself. Defendants' counsel appeared on two occasions only but failed to attend the other court sessions. Again, even when the matter was fixed for hearing and learned counsel failed to attend Court, there is no explanation whatsoever that has been given by the Defendants themselves as to why they did not attend Court in absence of the counsel. There is no law or practice that is to the effect that once learned counsel fails to attend Court the parties he represents also automatically fail to attend Court. This does not show good faith and seriousness on the part of the defendants themselves, especially when they did not file a defence. He has stated that his mistake should not be visited on the client. This court notes that the case is of the client and not his advocate. The totality of the facts and circumstances is that the court is of the opinion that the defendants were accorded a chance to be heard but they chose not to. **Order 12 Rule 2 i**s clear on what the Court should do in the circumstances such as were on **20/05/2021** and the Court cannot be faulted.

b. Whether the judgment should be set aside or reviewed

28. The next issue the Court is to determine is whether the judgment can be set aside or be reviewed as requested for in prayers **4** and **5** of the Application. It should not be gainsaid that the grant of orders for setting aside of a judgment provides opportunity to an aggrieved party under two scenarios: one, is where the judgment is irregular, two, where the judgment is regular. For an irregular judgment sought to be set aside, it shall go that way as of right because it means that the party was not given an opportunity to be heard and rules of natural justice cannot permit it to be that a party is condemned unheard. This is what the Applicants state in their contention but I think otherwise. The reason as I explained above is that they were duly served.

29. In cases of irregular judgment, the Court will set it aside *ex debito justiciae* - as of right. As the Court of Appeal observed in **James Kanyiita Nderitu & Another [2016] eKLR**, there is little option for a court but to set aside such a judgment. The Court stated:

> **"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.**
>
> **In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."**

30. Having come to the conclusion that service was proper and the Applicants did not attend Court at their fault when the matter proceeded I find that the the judgment delivered on **25/05/2021** was regular. I then turn to how a regular judgment should be set aside. While it is a right for a party to be heard in any matter, where he has been given opportunity that he has squandered he must give a satisfactory explanation for his failure to avail himself of the opportunity. He also must demonstrate that he has a good defence. The defence does not have to be one that must necessarily succeed at the hearing but it must raise triable issues. I will therefore conclude, as the Court of Appeal guided in the above-cited authority that while the Court should exercise its discretion to set aside any judgment or order, it must judiciously do so, and it is not necessarily a walk in the park for a party moving the Court for an order to that effect.

31. From the facts of the instant case, have taken into account the reasons given by the Defendants for failure to file their appearance and defence, I do not find them truthful and convincing even if they were not to be truthful. I have also considered the length of time from

11/12/2019 when they became aware of this matter and instructed counsel to act for them, and their actions in the intervening period and I find it extremely inordinate in length. I have also tried my best to find whether or not the intended defence raises triable issues but I have not come to that conclusion for the following reasons, namely, that there is no defence that was exhibited in whichever manner to the Application or brought to my attention in any manner howsoever. All that the Applicants stated in the application was that there was an annexed defence but there was none: it was not even annexed to Mr. Miyienda's Affidavit despite the fact that he stated that his clients demonstrated a formidable defence at the interlocutory stage when the Court delivered its ruling. Mere words of a strong or formidable defence without demonstrating what that strength or formidability is are mere void words which cannot amount to a defence raising triable issues as the law provides; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment the Applicants did not

32. Lastly, the Court was neither moved by the Applicants under **Order 45** nor was it given any pleadings by way of affidavit or facts, leave alone there being no submissions to warrant an order for a review of the judgment. I can therefore do no more than refuse the fourth prayer.

c. Whether leave to file defence should be granted

33. As to whether leave to file defence should be granted, I am unable to grant the order for two reasons. One, the order could only be granted if the judgment delivered on **25/05/2021** was set aside under **Order 10 Rule 11** or reviewed and set aside under **Order 45**. To the extent that the two have not materialized, the prayer dies at infancy. Secondly, the applicant ought to have filed even a skeletal defence to demonstrate what kind of a defence they have so that the court could ascertain whether the said defence raised any triable issues. They did not. Equity does not aid the indolent, it aids the vigilant.

d. What orders to issue and who to bears the cost of the suit

34. Much has been said about the unmeritorious application that was before me. For the reasons given above the consequence is that the application is hereby dismissed with costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF FEBRUARY, 2022

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.