



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 108 OF 2013

MOSES OGUTU ODONGO..... PLAINTIFF/RESPONDENT

-VERSUS-

JOHNSTONE OTIENO LONDE.....1ST DEFENDANT/APPLICANT

RONALD OMOLLO OLONDO.....2ND DEFENDANT/APPLICANT

LOICE AKINYI ONYANGO.....3RD DEFENDANT/APPLICANT

DESTINY RECONCILIATION CHURCH.....4TH DEFENDANT

RULING

BRIEF FACTS

The 1st, 2nd, and 3rd Defendants approached this court by a Notice of Motion Application dated 26th August 2021 filed under Section 3, 3A & 63 (e) of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules and all other enabling provisions of the Law. The Defendants sought for the following orders:

1. That this Application be certified urgent and be heard in the first instance.
2. That pending the hearing of this application interparties, this court be pleased to order that there be stay of execution of the judgment and decree of this court arising from the judgment on 30th July 2021.
3. That the ex parte judgment entered herein together with any subsequent proceedings and/or consequential order flowing therefrom be set aside or varied on such terms that are just.
4. That the proceedings of this court of 17th December 2020 be set aside and the matter do start de novo.
5. That in the alternative, the Applicants/Defendants be granted leave to cross examine the Plaintiff on his evidence on the 17th December 2021 and thereafter the Applicants/Defendants be granted leave to canvass their evidence.
6. Such other reliefs as may be just and expedient in the circumstance.
7. That costs of this application be in the cause.

The Application was based on grounds that the ex parte judgment was granted on 30.07.2021 against the 1st, 2nd and 3rd Defendant and a decree has already been served upon them. That a hearing date was taken ex parte and failure to attend the hearing was due to the fact that the Defendants' Advocate did not attend court nor advise them of the hearing date.

That upon being served with the Hearing Notice, the Defendants' Advocate received the notice under protest as the notice was too short. Failure to attend court was not deliberate as it was occasioned by counsel who failed to advise the Applicants of the hearing date.

That mistake of the Advocate should not be revisited upon the Applicants and that the Applicants are willing to abide by the directions of this

court for purposes of granting the orders sought.

The Application was supported by the Affidavit of LOICE AKINYI ONYANGO who stated that she has been staying in the suit property for a period of over 20 years having been married into the home of the 1st and 2nd Defendants/Applicants and she has constructed her home in the suit property which was allocated to her deceased husband as the property is family land.

She stated that she was served with a decree on 23rd August 2021 after Judgment had been entered against the Defendants and upon enquiring from her Advocate, she was informed that the matter proceeded on 17th December 2020. That she was not informed of the hearing date by her Advocate and therefore the Defendants failed to attend court and the Judgment had the effect of dispossessing the Defendants of their rights in the suit property.

It is the Defendants' case that the hearing date was taken ex parte by the Plaintiff without involving her Advocate and therefore her Advocate upon being served with the hearing notice received the same under protest. None of the Advocates informed her or her co-defendants of the hearing date and failure to attend court was a result of failure on the part of his Counsel to advise her of the hearing date.

She further stated that failure on the part of Counsel to advise her of the hearing date should not be visited upon her and her co-defendants. That they have a good Defence to the suit and if the Plaintiff is allowed to proceed with execution, she shall suffer irreparable loss as she stands to lose the only land where she has been staying with her children and family for over twenty years.

It is stated that the Defendants intend to abide by the orders and conditions likely to be imposed by the court for grant of the orders sought and that it is in the interest of justice that the prayers are sought.

Moses Ougutu Odongo the Plaintiff herein file a Replying Affidavit where he stated that the Applicant is trying to mislead this Honourable court by seeking to stay execution of the judgment and decree of this court arising from the judgment delivered on 30th July 2021 as the Defendants had an Advocate who was properly served with the Hearing Notice. That this court should not set aside, sit on and or vary its own judgment since this is an old case which started at Nyando Law Courts when the 3rd Defendant encroached on the suit property as she wanted to bury her late husband which prompted the Plaintiff to move to court seeking for injunctive orders.

It is the Plaintiff's case that the 3rd Defendant illegally encroached on to the suit property and therefore the Defendants don't deserve the orders of setting aside the proceedings of 17th December 2020 for the matter to start de novo. That the Defendants took this matter lightly and were reluctant to attend court on several occasions and also failed to attend 3 mediation sessions and therefore this Application is incurable defective, abuse of the court process and should be dismissed.

That the Defendants have never bothered to file a single document to support their case and are using this application as a delay tactics to frustrate the Plaintiff from using the suit property. The Plaintiff further stated that the Defendants have not shown any reasonable grounds for setting aside its Judgement and therefore the Application should be dismissed with costs to the Plaintiff.

The Defendants filed a Supplementary Affidavit pursuant to leave of court granted on 22nd September 2021 where Loice Akinyi deposed and stated that failure to attend court by her advocates was occasioned by the fact that Mr. Odongo had received the hearing notice under protest as he had other matters which had been fixed earlier while Mr. Nyaya advocate had no instructions to proceed with the matter. That she was not informed of the hearing date and that is why she failed to attend court.

The Plaintiff filed a Reply to the Supplementary Affidavit pursuant to leave of court granted on 22nd September 2021 where he reiterated that the Defendants deliberately failed to attend court as they are in occupation of the suit property and have erected illegal structures where they are earning monthly rental income. That the Defendants were supposed to be checking with their Advocates regularly to know the position of their matter and if the court is inclined to grant the orders sought then the Plaintiff will be seeking that the Applicants to deposit Kshs. 200,000/= in court before the case proceeds further to show their commitment and seriousness in this case. He therefore prayed that the Application be dismissed.

Defendants'/Applicants Submissions

The Defendants filed their Submissions on 28th September 2021 where on the issue of whether the court should set aside the ex-parte proceedings of 17th December 2020, they stated that their Advocate failed to attend court as the Hearing Notice was received under protest and therefore, they had given a reasonable explanation. That the Plaintiff took the hearing date ex parte yet it is always good practice that hearing dates be taken by consent of both parties to the suit to avoid inconvenience and unnecessary adjournments.

It is the Defendants' submission that on 22nd November 2017, this suit was dismissed on account of the Plaintiff's failure to attend court and prosecute this matter. The Plaintiff filed an application and the court reinstated the Plaintiff's suit and gave him a chance to be heard and therefore this court should give the Defendants a chance to defend their case as the Plaintiff was also given a chance.

On the issue of whether there is a Defence which raises triable issues, it is submitted that the Defendants had filed their statement of Defence and were keen to attending court save for the hearing day where they failed to attend court. That allegations of fraud have been made in the Statements of Defence filed by the Defendants.

The Defendants further submitted that the wheels of justice requires that no party should be condemned unheard and place reliance in the case of *Murai....vs Wainaina..... (No. 4)1982 KLR 38*. They further stated they are ready and willing to defend the suit and relied in *CMC Holdings Ltd vs James Mumo Nzioka*.

The Defendants urged the court to allow the Application and grant the orders sought.

Plaintiff's/ Respondent's Submissions.

The Plaintiff filed his submission on 4th October 2021 where he submitted that the explanation given by the Applicants does not hold water as the Applicants were fully aware of the hearing dates as they occasionally attended court. That the hearing date was taken earlier enough and served on time therefore the excuse by the Advocates failing to attend court does not add up as their advocates have partners/associates whom they could have held their brief and request for an adjournment.

The Plaintiff further stated that the Defendants' Defence does not raise triable issues as the same is intended to delay this matter since the 3rd Defendant's husband was and other family members were given portions of land being NYANDO/KAKOLA/7968 from the original land NYANDO/KAKOLA/978 where she is supposed to claim her portion but not NYANDO/KAKOLA/7130.

It is the Plaintiff's submissions that the Defendants should be ordered to deposit damages in court as security.

Analysis and Determination

It is not in dispute that the matter came up for hearing on 17th December 2020 and it is also not in dispute that Counsel for the Defendants herein were served with a hearing notice. The main issue for determination in this case is whether the Defendants should be granted the orders sought in the Application.

Judgment was delivered on 30th July 2021 and the same had been entered against the Defendants herein. The 3rd Defendant came to know that Judgment had been entered upon being served with a decree on 23rd August 2021. She enquired from her Advocate who informed her that the matter proceeded for hearing on 17th December 2020 but her advocate failed to inform her of the hearing date. The Plaintiff in his Replying Affidavit has stated that the Defendants should not be granted the orders in the Application as they have been taking this matter lightly and the Defendants have been reluctant to attend court on several occasions including three mediation sessions. From the court record it is clear that when this matter was filed parties were not ready to prosecute or defend their case until upon dismissal of the same that prompted the Plaintiff to file an Application for reinstatement which was allowed.

The Defendants' Advocate avers that the hearing date was taken ex parte by the Plaintiff without involving them and upon service of the Hearing Notice, the same was received under protest and this resulted to the Defendants not attending court as they were not informed. It is the Defendants case that mistake of the Advocate should not be revisited upon the client. This court finds that failure of the Defendants to attend court was not deliberate as their Advocate failed to inform them of the hearing date.

In Wachira Karani v Bildad Wachira [2016] eKLR Mativo J held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

Order 10 Rule 11 of the Civil Procedure Rules provides as follows;

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

The Defendants' Statement of Defence filed on 13th June 2013 where they have denied that the Plaintiff is the registered owner of Plot No. 7130-Kakola Adjudication Section and have denied any trespass that the 3rd Defendant's husband was buried on the suit property. The Defendants also denied that the 3rd Defendant has put structures and continues to occupy the Plaintiff's land and that the Plaintiff has been deprived his right of quiet possession and enjoyment of the suit property by the Defendants. It is also the Defendants' case that the Plaintiff acquired the suit property through fraudulent means as enumerated in paragraph 14 of the Statement of Defence.

It is clear from the Statement of Defence that the Defendants have raised triable issues and this court needs to hear the Defendants' case.

In Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 Duffus P. held that:

"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 judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

This court finds that the Defendants have given sufficient reason as they were being represented by an Advocate who failed to inform them of the hearing date. The Defendants have also demonstrated that they are willing to defend their case as it raises triable issue. This court therefore orders as follows:

1. That the ex parte Judgment entered herein together with any subsequent proceedings and/or consequential order flowing therefrom

are hereby set aside.

2. That the proceedings of this court of 17th December 2020 are hereby set aside and the matter do start de novo.

3. The Defendants are granted leave to cross examine the Plaintiff on his evidence on the 17th December 2021 leave is granted to the Defendants to canvass their evidence.

DATED AT KISUMU THIS 15TH DAY OF FEBRUARY 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE