



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND**

**AT THIKA**

**ELC NO. 88 OF 2020**

**PETER NGIGI KIGIRA.....PLAINTIFF /RESPONDENT**

**VERSUS**

**FREDRICK NGANGA KIGIRA.....DEFENDANT/APPLICANT**

**RULING**

1. This motion was filed by the Defendant on the 13/10/2021. It seeks orders to set aside the judgement of this Court rendered on the 24/6/2021.

2. The grounds upon which the application are premised are; the Applicant is in possession of the suit land; the Applicant failed to attend the hearing because his counsel inadvertently forgot to diarize the date; the Applicant's defence raises triable issues and should be heard on its merits; Applicant stands to suffer irreparable harm and damage if the orders are not granted.

3. In support of the application, Mr George G Kamau, Advocate for the Applicant avowed that the hearing date for the suit was given in the presence of counsels for the parties however, the said date was not diarized in the main firms diary as the same date taken at the height of the pandemic and pursuant to Government directives to work from home. That the failure to diarize was a mistake which mistake should not be visited upon the Applicant. That the judgement was issued on the 24/6/2021 without notice to the Defendant and therefore the Applicant was unable to seek stay of execution of the said judgement. That the Plaintiff has since moved to evict the Defendant/Applicant who is currently in possession of the suit land. That no prejudice will be suffered by the Plaintiff if the application is granted and urged the Court to reopen the case so that the Applicant is heard on his defence which in his view raises triable issues.

4. On the 4/11/2021 the Plaintiff's counsel having not filed his response requested for 14 days to file. The Court further directed the parties to file and exchange written submissions within 30 days and proceeded to reserve the date for ruling. The written submission were due on or by the 4/12/2021. None has filed. The application therefore is unopposed. That said the Court will be guided by the parties' pleadings on record and determine the application on its merits.

5. Order **12 Rule 7 of the Civil Procedure Rules** provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application **may** set aside or **vary** the Judgment. The power to set aside **ex parte orders** are discretionary, and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in **Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75**, 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 fester the wide discretion given to it by the Rules.”**

6. I have perused the record which shows that this suit was filed on the 13/7/2016. On the 20/3/18 the matter was fixed for hearing on the 12/2/2019 in the presence of the counsel for the parties. Come the hearing day the Defendant and his counsel were absent and the hearing proceeded ex parte to conclusion and a judgement date was set for the 28/1/2020. In the meantime the Defendant filed a motion seeking to set aside the ex parte proceedings of the 11/7/2019.

7. On the 28/1/2020 the Parties recorded a consent to allow the application and set aside the proceedings so that the matter proceeds for hearing inter partes.

8. On the 15/7/2020 on the request by the parties the file was transferred to Murang'a ELC Court for hearing on the grounds that the suit property was situate in Murang'a. However on arrival at Murang'a Court, on the 29/9/2020 the file was transferred back to Thika on request of the Plaintiff's counsel who informed the Court that he realized that they had misled the Court in Nairobi to transfer the file to Murang'a. The Court acceded to his request and the file found its way to Thika Court in whose territorial jurisdiction is the suit property.

9. On the 15/10/2020 the Court set the date for hearing on the 8/12/2020. Come the hearing date the Defendant and his Advocate were absent. The matter proceeded to full hearing and the Court rendered its judgement on the 24/6/2021.

10. In the case of **Pithon Waweru Maina Vs Thuka Mugiria (1982-88) 1 KAR 171** Bosire J [as he then] was set out the principles applicable to the above orders as follows; the power to set aside judgment is discretionary; the discretion is unlimited provided it is properly exercised; it being judicial discretion must be exercised on the basis of evidence and sound legal principles; the Court has powers under this order to set aside on terms as are just; the Court is obliged to look at the defence the Applicant /Defendant may be having to the claim; if a party establishes a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined towards setting aside.

11. In the case of **Shah Vs Mbogo & Anor (1967) E.A 470** Court of Appeal for Eastern African held: -

**“applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”**

12. The discretion therefore is not designed to assist a party guilty of deliberate conduct intended to obstruct or delay the cause of justice and where the Court is persuaded of the intentions of such a party to so obstruct or delay justice, it should not hesitate to disallow such an application.

13. The next question is whether the conduct of the Applicant and his advocate fall the category in **Shah Vs Mbogo** of being considered accident, inadvertence, or excusable mistake or error.

14. The explanation given by the advocate for the Applicant is that he inadvertently failed to diarize the hearing date because it was taken in the midst of the pandemic and secondly that counsel was working from home. From the record the Applicants counsel actually attended Court on the 15/10/2020 when the hearing date was fixed in the presence of both counsels. Counsel has not explained how the pandemic prevented him from diarizing the date in his office or through working from home. The explanation in my view is nothing but flimsy and goes to show imprudence on the part of counsel. Those are internal management concerns that only he is in control. Going through the record, the Applicant has been absent from Court a number of times. As stated above the proceedings in this matter were set aside by the consent of the parties on account of the Applicant’s non-attendance. I have perused the affidavit in support of the then application dated the 22/10/2019 in which the reason for non-attendance was that the matter was wrongly diarized for the 11/6/19 in the advocates diary when the same did not appear on the day’s cause list.... there was no representation on behalf of the Defendant and the said non-attendance is deeply regretted as the matter had not been diarized on the said date. It went to state that the advocate only realized the error on the 31/7/19 when the matter came up to confirm filing of the written submissions after the completion of the hearing and a judgement date set by the Court. A case belongs to the party and not the advocate who is the agent. There was clearly evidence on lackluster on the part of the Applicant and his advocate in defending this matter.

15. The Applicant has not persuaded the Court that the non-attendance was an act which is accidental, inexcusable, mistake, inadvertent or an error. What is evident is a party and his counsel who have chosen to take the Court for a ride and want to be heard on their own terms that is to say as and when it is convenient to them. It is excusable if it happens once but this is a routine and a habit and this Court will be bending backwards to stifle the smooth flow of the administration of justice. I am guided by the provisions of section 1B of the Civil Procedure Act on the overriding objectives of this Court which require the Court to hear matters expeditiously. Allowing this application will be reopening the case for a third time on the same reasons. He cannot have his cake and eat it. The Respondent has a judgement which for no other lawful reason is entitled to its fruits and enjoyment.

16. There is delay of 4 months in bringing the application since the delivery of the judgement. The Defendant went to slumber and only woke up upon being served with the notice of eviction. Even then it took him another 90 days to file the application. Therefore, to the contrary this is a party guilty of laches and conduct intended to obstruct the course of the administration of justice. I am afraid the Applicant has disintitiled himself of the Courts discretion.

17. This Court is required to check if the Applicant has a triable defence. The Applicant is claiming the land on account of possession even during the lifetime of his father. Though prima facie the Applicant has a triable defence, I find that no explanation has been given for the failure to attend Court. It is the sufficiency explanation that opens the flow of discretion in favour of the Applicant.

18. Although the constitution guarantees the right to be heard, the Applicant was granted the opportunity to be heard but squandered it by failing to attend Court for the hearing not once but twice. The right to be heard does not mean a party will be heard on his own terms. If that were to be the case, then the business of the Court would be interrupted at will as and when a party feels like being heard. Once a date has been given and a party fails to appear for the hearing the Court is mandated to proceed with the hearing of the parties that are ready to be heard. Courts time is precious and must be utilized prudently. The Applicant is not without a remedy against his agent for the appropriate action.

19. In the end I find that this is a case that does not merit the exercise of the Court’s discretion.

20. It is dismissed with no orders as to costs.

21. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 10<sup>TH</sup> DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS PLATFORM.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Amolo holding brief for Gitonga for Plaintiff/Respondent

Muriithi holding brief for Kamau for Defendant/Applicant

Ms. Phyllis – Court Assistant