



No. 204

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO.132 OF 2002

1. NYANKABARIA ISABOKE

2. ORENGO ISABOKE..... PLAINTIFFS

VERSUS

MASIRA ISABOKE.....DEFENDANT

RULING

1. The Plaintiffs brought this suit against the defendant on 12th June, 2002. In their plaint dated 5th June, 2002, the Plaintiffs claimed that during the land adjudication process, the defendant who is their elder brother got registered as the proprietor of **LR. No. West Mugirango/Nyamaiya/1169** and **LR. No. West Mugirango/Nyamaiya/1886** (hereinafter referred to “**the suit properties**”) which were ancestral land on his own behalf and on behalf of the Plaintiffs. The Plaintiffs claimed that the defendant had an obligation to have the suit properties sub-divided and shared equally between the Plaintiffs and the defendant an obligation which the defendant had neglected and/or refused to undertake despite demand made upon the defendant by the Plaintiffs. The Plaintiffs claimed that in the circumstances, they were left with no alternative but to file this suit. The defendant entered appearance and filed a statement of defence through the firm of Nyamweya Osoro and Nyamweya Advocates. In his statement of defence, the defendant denied the Plaintiffs’ claim and contended that the suit properties are owned by the defendant absolutely and that the Plaintiffs have no legal right over the same. The defendant claimed that the parties’ ancestral land was situated at places known as Nyangoko and Gesurura and that the same had been shared equally by the parties.
2. The Plaintiffs’ case came up for hearing for the first time on 10th March, 2004 before Bauni J. when the Plaintiffs’ gave evidence and closed their case. The defendant’s advocate asked for adjournment on that day because the defendant was not in court. The defendant was granted adjournment and the matter stood over generally. On 14th May, 2004, the suit was listed for further hearing on 27th July, 2004. On that day, the defendant was not ready to proceed with his case. The defendant’s advocate applied for adjournment again on the ground that he had not informed the defendant of the hearing date. The judge, Bauni J. reluctantly adjourned the matter and stood it over generally. On 1st November, 2004, the suit was once again listed for further hearing on 11th April, 2005. When the matter came up for hearing on 11th April, 2005, once again, the defendant was not ready to proceed with the defence case. The defendant’s advocate for the third time asked for an adjournment on the ground that the defendant was not informed of the hearing date. On that day, the court granted to the defendant the last adjournment and stood over the matter generally. Following the sad demise of Bauni J. the matter was placed before Gacheche

- J. on 15th February, 2007 when it was directed that the proceedings be typed and certified so that the matter may proceed from where it was left by Bauni J.
3. The proceedings were typed and certified as had been directed by Gacheche J. On 11th November, 2008, the suit was once again listed for further hearing on 16th June, 2009. On that day, there was no appearance for the defendant. Both the defendant and his advocate did not attend court. Since the matter was coming up for the defence hearing and he was absent without any explanation the court, Musinga J. (as he then was) deemed the defendant's case as closed and proceeded to set the matter down for judgment on 16th July, 2009 which judgment was ultimately delivered on 11th September, 2009. The court entered judgment for the Plaintiffs against the defendant. The court held that the defendant was registered as proprietor of the suit properties in trust for himself and the Plaintiffs and ordered each of the suit properties to be sub-divided into three equal portions so that the Plaintiffs and the defendant may each have equal portion thereof. The decree was extracted and issued by the court on 8th December, 2009. On 16th April, 2010, the firm of Omariba & Company, Advocates filed an application for leave to take over the conduct of this suit on behalf of the defendant from the firm of Nyamweya Osoro and Nyamweya Advocates which application was allowed through a consent letter that was signed by the firm of Omariba & Company, Advocates and Nyamweya Osoro and Nyamweya Advocates and filed in court on the same day, namely, 16th April, 2010. It is not clear from the record what happened between 16th April, 2010 when the said firm of Omariba & Company was allowed to come on record and 10th February, 2012. I have not seen on record a Notice of Change of advocates that was filed by the said firm of advocates to formally take over the conduct of the defence of this case from the firm of Nyamweya Osoro and Nyamweya Advocates.
 4. On 10th February, 2012, the defendant filed an application dated 14th April, 2010 through the firm of Omariba & Company Advocates seeking an order that the court be pleased to set aside the judgment that was entered for the Plaintiffs against the defendant on 11th September, 2009 and that the suit be set down for hearing on merit. The application was supported by the affidavit of the defendant sworn on 6th April, 2011. The defendant deposed in the said affidavit that he had instructed the firm of Nyamweya Osoro and Nyamweya Advocates to act for him in this suit and that the said firm entered appearance and filed a statement of defence. The said firm however failed to update him on the progress of the case and also failed to appear in court to defend him. He deposed further that his failure to attend court when this case came up for hearing was not deliberate and that as soon as he realized that an *ex parte* judgment had been entered against him, he took steps through his advocates on record to set aside the said judgment. He contended that he has a strong defence to the Plaintiffs' case which he should be given an opportunity to put forward.
 5. The defendant's application was opposed by the Plaintiffs. Through their grounds of opposition dated 4th June, 2013, the Plaintiffs contended that the defendant's application is irregular and the same has been filed in contravention of the law. The Plaintiffs contended further that the application has not been filed timeously and that the defendant was given several adjournments to enable him present his case but failed to do so. The Plaintiffs have termed the defendant's application as frivolous and a calculated move to frustrate the Plaintiffs from realizing the fruits of their judgment. On 1st July, 2013, the advocates for the parties agreed to argue the defendant's application through written submissions. The Plaintiffs' filed their submissions on 9th July, 2013 while the defendant filed his submissions on 16th September, 2013.
 6. I have considered the defendant's application and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the Plaintiffs and the respective submissions by the advocates for the parties. In the court of appeal case of, **Pithon Waweru Maina vs. Thuku Mugiria (1982-88)1KAR 171**, Potter J.A stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or defence or upon failure of either party to attend a hearing; **"This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948, to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well**

established in our law. Firstly, as was stated by Duffus P in *Patel vs. EA Cargo Handling Services Ltd.* [1974] EA 75 at 76C and E: “There is no limits or restrictions on the judge’s discretion 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 or fetter the wide discretion given to it by the rules.” Secondly, as Harris J. said in *Shah vs. Mbogo* [1967] EA 116 at 123B, “This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, 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”. That judgment was approved by the court of appeal in *Mbogo vs. Shah* [1968]EA 93and in *Shabbir Din vs. Ram Parkash Anand* [1955]22EACA 48Biggs JA said at 51 “I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

7. The rules which were under consideration in the foregoing statement by Potter J.A were similar to the current Order 10 rule 11 and Order 12 rule 7 of the Civil Procedure Rules, 2010. It is therefore on the principles laid down on the decision above that I will consider the defendant’s application herein. As I have stated at the begging of this ruling, when the defendant was served with the summons to enter appearance herein, the defendant appointed the firm of Nyamweya Osoro and Nyamweya Advocates to act for him. The said advocates entered appearance and filed a statement of defence on the defendant’s behalf. This was an indication that the defendant was desirous of defending this suit. The problem arose when this matter was listed for hearing. As I have set out above in detail, the defendant’s said advocates were afforded every opportunity to appear in court with the defendant for the purposes of defending this suit but they failed to do so. This resulted in judgment being entered against the defendant on 11th September, 2009 without evidence being tendered on behalf of the defendant. By the time the matter was set down for judgment, the court had granted to the defendant three adjournments. It is not clear from the record as to how the defendant got to know of this judgment. However, he has deposed in his affidavit that soon after realizing that judgment had been entered against him, he took steps to instruct his advocates on record to file the present application which was filed on 16th February, 2012 to set aside the said judgment. This again is an expression of the defendant’s desire to defend this suit. There is no indication or suggestion by the Plaintiffs that the defendant failed to appear in court with a view to evade, obstruct or delay the course of justice. The court record is very clear that the defendant was let down by his previous advocates. All the adjournments that the said advocates sought were on account of the fact that they had not notified the defendant of the hearing date. I have no reason arising from the foregoing to doubt the defendant’s claim that his previous advocates had failed to notify him of the hearing dates for this case. I am satisfied from the facts of this case that to deny the defendant the orders sought would occasion him injustice. As was stated in the case that I have cited above, the court’s discretion to set aside judgment entered *ex parte* or due to the failure by one party to appear at the trial is exercisable so as to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error. It was stated that the main purpose of the court in exercising that discretion is to do justice to the parties. I am of the opinion that in this case, judgment was entered against the defendant without him being heard in his defence as a result of the negligence on the part of his previous advocates. The excuses that the said advocates gave for the three adjournments that they sought point clearly to this conclusion. I am of the view that this is the kind of case where a party should not be punished as a result of the fault of his advocate. As the intention of the court in an application of this nature is to do justice to both parties, I have considered whether serious prejudice or injustice would be occasioned to the Plaintiffs if the orders sought are granted which cannot be compensated in damages. The Plaintiffs did not file an affidavit in response to the defendant’s application. I therefore have no material before me on the basis of which I can find that the Plaintiffs would suffer serious prejudice or injustice if the orders sought are granted a part the obvious inconvenience of delay that would be occasioned by re-opening the case and the

thrown away costs. The Plaintiffs' objection to the application was based mainly on points of law. I am in agreement with the submission of the Plaintiffs that the defendant's application was not filed timeously. I am of the opinion however that the delay was not so inordinate as to disentitle the defendant to the order sought. I am also in agreement with the Plaintiffs' submission that the defendant's application was brought under the wrong provisions of law. The application should have been brought under Order 12 rule 7 of the Civil Procedure Rules, 2010 and not under Order IXB Rule 8 of the repealed Civil Procedure Rules. This error I believe came about due to the fact that the application was prepared before the Civil Procedure Rules, 2010. This is clear from the date of the application. The application was however filed after the new rules had commenced and the defendant's advocates should have amended the application before filing if they were diligent enough. The Plaintiffs' have not pointed out in what manner they have been prejudiced by the wrong citation of the rules under which the present application was brought. The objection in my view therefore amounts to a mere procedural technicality which the court is allowed to overlook under Article 159 (2) (d) of the Constitution of Kenya for the sake of substantive justice. The other objection raised by the Plaintiffs was that the application was filed by advocates who were not properly on record. As I have stated above, before this application was filed, the firm of Omariba & Company Advocates filed an application for leave to take over the conduct of the defence of this case from the firm of Nyamweya Osoro and Nyamweya Advocates. Such application is normally required so as to protect the interest of the advocates previously on record which in this case was Nyamweya Osoro and Nyamweya Advocates. The firm of Omariba & Company Advocates and Nyamweya Osoro and Nyamweya Advocates entered into a consent through which the application for leave to come on record for the defendant by the firm of the Omariba & Company Advocates was allowed. The consent letter duly signed by the two law firms was duly filed in court. The present application was filed after the said consent was entered into. It is not true therefore to say that the firm of Omariba & Company is irregularly on record in this matter. The issue that I have pointed out and which the Plaintiffs did not raise in their objection is the fact that the said firm of Omariba & Company did not file a Notice of Change of Advocates under Order 9 rule 5 of the Civil Procedure Rules upon obtaining leave to come on record. The issue not having been raised by the parties, I would not wish to comment further on the same. If I was to determine it however, I would have held it to be a procedural technicality and would have ordered the defendant's advocates on record to file a Notice of Change of advocates within a prescribed time.

8. I am satisfied that this is a fit and proper case to exercise my discretion to set aside the judgment entered herein on 11th September, 2009. Due to the foregoing, the defendant's application dated 14th April, 2010 is allowed in terms of prayer (c) thereof on condition that the defendant shall pay to the Plaintiffs thrown away costs assessed at Kenya Shillings Twenty Thousand only (Ksh.20,000.00) within 21 days from the date hereof failure to which the judgment entered herein on 11th September, 2009 shall be reinstated automatically and the Plaintiffs shall be at liberty to proceed with the execution of the same. The Plaintiffs shall have the costs of this application.

Delivered, dated and signed at KISII this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Sowe for the Plaintiffs

N/A for the Defendant

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE