No. 295

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 110 OF 2007

LEKAKENY OLO SONGIRIAN

(also known as OLOOSONGIRIAN DANIEL) ……PLAINTIFF

VERSUS

BENSON OLE SOIT TASUR ……..DEFENDANT

RULING

1. What is before me is the defendant's application that was brought by way of Notice of Motion dated 19th September 2013 seeking the following prayers:-

i. **Spent**
ii. **That leave be granted to the law firm of Messrs. Naikuni Ngaah and Miencha Company Advocates to come on record for the defendant herein after judgment was entered on 22nd May 2013.**
iii. **Spent**
iv. **That the Honourable court be pleased to set aside the judgment entered herein on 22nd May 2013 and all the consequential orders made thereof.**
v. **Spent.**
vi. **That costs of this application to be provided for.**

The main relief sought in the defendant's application is the setting aside of the judgment entered herein on 22nd May 2013 by R. Lagat Korir J. The application was supported by the affidavit of the defendant in which the defendant contended that he was not served with a hearing notice for the hearing which took place on 21st November 2011 pursuant to which the judgment sought to be set aside was delivered. The defendant termed as false the contents of the affidavit of service that was sworn by David Okumu Ojill on 15th November 2011 to the effect that he served the defendant with a hearing notice in contention on 12th November 2011. The defendant denied the signature on the back of the hearing notice dated 12th October 2011 that was returned to court by the said process server claiming that it does not belong to him.

2. The defendant annexed to his affidavit what he termed as his specimen signatures. On account non service of notice upon him prior to the hearing which took place on 21st November, 2011, the defendant termed the proceedings of conducted herein on 21st November 2011 and the subsequent judgment that was delivered on 23rd May 2013 as flawed, null and void. The defendant contended that the notice of the delivery of judgment was also served upon him through a wrong postal address and as such he did not receive the same until 14th September 2013 which explains why he did not bring the application herein earlier.
3. The defendant's application was opposed by the plaintiff through two (2) replying affidavits sworn by the plaintiff and one, David Okumu Ojill on 14th October 2013 and 12th October 2013 respectively. In his affidavit, the plaintiff maintained that the defendant was duly served with a hearing notice for the hearing that was scheduled for 21st November 2011. The plaintiff contended that the defendant's application herein has been brought after unreasonable delay and as such the defendant is guilty of indolence and laches. On his part, David Okumu Ojill who is said to have served the hearing notice dated 12th October, 2011 upon the defendant gave a detailed account in his affidavit on how he effected personal service upon the defendant at his place of work at Stima Plaza, Kolobot road, Nairobi on 12th October 2011. David Okumu Ojill maintained that the defendant was served with a hearing notice in person, he received the same and acknowledged service by signing the reverse copy of the same which was returned to court together with the affidavit of service. David Okumu Ojill denied that he forged the defendant's signature on the back of a copy of the hearing notice that he returned to court with his affidavit of service. He stated that the defendant signed on the reverse side of the said hearing notice in acknowledgment of receipt thereof in his presence.
4. On 22nd October 2013, I directed that the defendant's application be heard by way of written submissions. The defendant filed his submissions on 3rd February 2014 while the plaintiff filed his submissions in reply on 11th February 2014. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit sworn by the plaintiff and the process server, David Okumu Ojill in opposition to the application. Finally, I have considered the written submissions filed herein by the advocates for the parties and the authorities cited. In the case of **Phithon Waweru Maina –vs- Thuku Mugiria [1982-88] 1 KAR 171**, Potter J. A stated as follows at page 172 on the court's power to set aside judgment:-**"This is another case concerning the exercise of judicial discretion under Order 9A, rr 10 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] E.A 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] E A 93 and in Din –vs- Ram Parkash AnandS habbir [1955] 22 EACA 48**, **Biggs J A said a151** "**I consider that under order 9 rule 20, 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."**
5. As we held by Maraga J. (as he then was) in the case of **Linear Coach Co. Ltd –vs- Samson K. M Bichanga & Another [2006] eKLR** that was cited by the defendant's advocate, it is now well settled that the court has no discretion in an application to set aside an ex parte judgment entered

against a defendant who has not been served with summons to enter appearance or like in this case a hearing notice. The court must set aside such judgment *ex-debito justitiae*. It is on the foregoing principles that I have to consider the defendant's application before me.

6. The defendant has contended that he was never served with a hearing notice and as such the judgment that was entered herein without notice must be set aside by the court *ex-debito justitiae*. I have on record two (2) affidavits by the process server who is said to have served a hearing notice upon the defendant. The first is the affidavit of service sworn on 15th November 2011 and filed in court on 21st November 2011. The second affidavit was sworn on 12th October 2013 and filed in court on 14th October 2013 in opposition to the present application. In the two affidavits, the process server stated in great detail how he served the hearing notice dated 12th October 2011 upon the defendant at his place of work in Nairobi on 12th October 2011. The defendant has termed the contents of the process server's affidavit of service as false. The defendant did not however respond to the process server's affidavit sworn on 12th October 2013. In the Court of Appeal case of **Dickson Daniel Karaba –vs- John Ngata Kariuku & 2 others, Nairobi Civil Appeal No. 125 of 2008** (unreported) that was cited by the plaintiff's advocate, it was held that there is a presumption that the court process was properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect. It was held further that where service is denied it is normally desirable that the process server should be put in the witness box and the opportunity given to those who deny service to cross examine him.
7. That was also the holding in the case of **Miruka –vs- Abok & Another [1990] KLR 541**. The defendant has denied that he was served with a hearing notice. The onus was upon the defendant to show that the affidavit of service that was filed by the process server in court which explained how service of the said hearing notice was effectedupon him was false. As I have stated above, the process server filed an affidavit in response to this application and gave a detailed account on how he served the said hearing notice upon the defendant. The defendant did not file any affidavit to controvert the contents of the process server's said affidavit. The defendant did not also apply to court for leave to cross examine the said process server on his affidavit of service and the affidavit he filed in response to the present application. On the material before me, I have no reason to disbelieve the contents of the two affidavits filed herein by the said process server on how he effected service of the hearing notice upon the defendant. The defendant has not denied that he was working at Stima Plaza, Kolobot Road Nairobi. He has also not denied that his office was situated on the 3rdfloor of that building and that on 12th October 2011 when he is said to have been served, he was at his place of work.
8. The defendant has not denied that summons to enter appearance was served upon him at the same place. The defendant's claim that his signature was forged by the process server has no basis. The defendant has not given any reason as to why the process server would have forged his signature. The defendant has also not explained as to how the said process server would have known how his signature looks like to be able to try to forge the same. Furthermore, the signature claimed to have been forged when compared with the signatures which the defendant has provided as specimen leaves no doubt that the same belong to one and the same person. For the foregoing reasons, I am satisfied that the defendant was properly served with the hearing notice in contention. It follows therefore that the judgment entered herein on 22nd May 2013 was a regular judgment and as such the same cannot be set aside *ex-debito justitiae.*
9. Having held that the judgment sought to be set aside was a regular judgment, it is now at the discretion of the court whether or not to set aside the same. Again the onus was upon the defendant to show that he deserves the exercise of this court's discretion. I have noted that the dispute between the plaintiff and the defendant is over a parcel of land which is being claimed by both the plaintiff and the defendant. The defendant had filed a counter-claim against the plaintiff which was dismissed when he failed to turn up to prove the same. I have noted that the defendant brought this application as soon as he learnt that judgment had been entered against him. From the record, I have noted that the plaintiff's bill of costs was served upon the defendant on 17th September 2013. I believe that this is what jolted the defendant to action as this application was filed soon thereafter on 19th September 2013. I agree with the plaintiff that the defendant has not given any valid reason as to why he failed to attend court for the hearing on 21st November 2011.

I have no evidence before me however that the defendant's failure to attend court was a deliberate attempt to obstruct or delay the cause of justice. A right to be heard is a constitutional right and the court would only shut out a party from being heard in extremely rare cases. I am of the view that the loss and inconvenience that would be occasioned to the plaintiff herein by the setting aside of the judgment entered herein on 23rd May 2013 can be compensated for by an award of costs.

10. Due to the foregoing, I am inclined to exercise my discretion in favour of the defendant but conditionally. The defendant's application dated 19th September 2013 is allowed in terms of prayers 2 and 4 thereof on condition that the defendant shall pay to the plaintiff throw away costs assessed at Kenya Shillings Twenty Five Thousand (Kshs.25,000/=) within thirty (30) days from the date of this ruling. In default of payment of the said amount on due date, the judgment entered herein on 22ndMay 2013 shall stand reinstated automatically and the plaintiff shall be at liberty to proceed with the process of execution of the same. The plaintiff shall have the costs of the application.

Delivered, signed and **dated** at **KISII** this **31S day** of **July, 2014.**

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE