REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

NAKURU

ELC CASE NO. 390 OF 2016

JACQUELINE NJERI NJUGUNA.....1ST PLAINTIFF

JUDY WAIRIMU NJUGUNA.....2ND PLAINTIFF

(Suing as the administrators of the estate of the late David Ng'ang'a Njuguna (deceased))

VERSUS

BISHOP MBUGUA KARANJA.....1STDEFENDANT

MARY WANJIKU MUNGA.....2ND DEFENDANT

TABITHA NJERI NJENGA.....3RD DEFENDANT

DAVID NJOROGE NJENGA.....4TH DEFENDANT

JOHN MBUGUA WACHIRA.....-5TH DEFENDANT

RULING

Application

1. The 4th defendant/applicant moved the court through the Notice of Motion application dated **30/11/2021** brought under **Article 50** of the **Constitution, Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act, Order 9 Rule 9(b), Order 12 Rule 7, Order 22 Rule 22** and **Order 45** of the **Civil Procedure Rules** seeking the following orders:

> **(1) …spent**
>
> **(2) That Messrs Gichuki Karuga & Company be allowed to come on record for the 4th defendant despite the fact that judgement has already been entered.**
>
> **(3) That this honorable court be please to review its judgement dated 24th June 2021, the subsequent order/decree dated 22nd October 2021 and subsequently set it aside.**
>
> **(4) That the 4th defendant be allowed to prosecute his defence.**
>
> **(5)…spent**
>
> **(6) That the costs be in the cause.**

2. The application is supported by the affidavit sworn on **30/11/2021** by the 4th defendant. The grounds on the face of the application and the supporting affidavit are that on **18/11/2021** the 4th defendant received a phone call from Solomon Njenga, who is a son to Jessi Mwaura who is among the persons he had sold a portion of the suit property to, who informed him that they had been summoned to appear at the DCC Nakuru County offices to discuss about a court order; that after attending the meeting, he became aware of the said court order; that he then called his advocate one Waithaka Mwangi to make inquiries but the two were unable to communicate.

3. He went on to state that after perusing the court file on **22/11/2021,** he found out that judgement had been delivered after hearing and mention notices had been served upon his advocates who were on record; that he then wrote to Messrs Waithaka Mwangi Advocate requesting for his file; that he was surprised that his advocates did not attend court or inform him of the hearing date and yet he had paid them; that he has a formidable defence which he is ready to prosecute; that he has bank slips that show that he bought the suit property which he has now sold to third parties; that the mistake of his advocates should not be visited upon him and he therefore prays that his application be granted.

Response

4. The 2nd plaintiff filed a replying affidavit sworn on **13/12/2021** and deposed that she had the authority of her co-plaintiff to swear the affidavit; that after the matter was fixed for hearing on **24/03/2021** the 4th defendant/applicant's advocates, Waithaka Mwangi & Co. Advocates were served with a hearing notice dated **25/01/2021** on **2/02/2021** and an affidavit of service filed on **03/02/2021**; that when the matter came up for hearing neither the 4th defendant nor his advocate showed up in court; that the court proceeded to hear the case after satisfying itself that there was proper service and thereafter closed the 4th defendant's case.

5. She also stated that the matter was fixed for mention on **27/04/2021,** her advocates on record wrote a letter dated **30/03/2021** to counsel for the 4th defendant who received the same on **01/04/2021** together with a mention notice dated the same date indicating that the matter was due for mention on **27/04/2021;** that the letter informed the counsel of all the directions given by the court on **24/03/2021**; that when the matter came up for mention on **27/04/2021** neither the 4th defendant nor his advocates were present in court and so the court gave a further mention date for **13/05/2021**; that the 4th defendant's advocates were served with the mention notice for the said date on **27/04/2021**; that on **13/05/2021** neither the 4th defendant nor his advocates showed up in court; she further stated that the 4th defendant and his advocates were aware of all the proceedings in this matter; that judgement was delivered on **24/06/2021**; that at the time judgement was delivered, the matter had been pending in court for five years and two months; that the 4th defendant/applicant's argument that his advocates on record did not inform him of the hearing does not hold as his advocates ought to have sworn an affidavit that they had mistakenly failed to inform their client; that he also did not attach to his affidavit any letter or communication from himself to his advocate seeking to find out the progress of the matter; that in the absence of an affidavit sworn by his advocate, the court cannot make a finding on whether or not there was a mistake on the part of his advocate and that allowing the 4th defendant/applicant's application will prejudice them and it should therefore be dismissed with costs.

Submissions

6. The 4th defendant/applicant filed his submissions dated **7/01/2022** and filed on **10/01/2022** while the plaintiffs/respondent had filed their submissions dated **20/01/2022** and filed on **21/01/2022**.

7. The 4th defendant/applicant in his submissions addressed the court on the preliminary facts leading up to the application and submitted that he does not dispute that his advocates on record, Waithaka Mwangi & Company Advocates were notified of the hearing date but for some reason they failed to inform him. He relied on the cases of **Shah Vs. Mbogo** and **Civil Appeal 20 of 2016 Patriotic Guards Ltd Versus James Kipchirchir Sambu** and sought for the application to be allowed as the plaintiffs/respondents have not shown any prejudice they stand to suffer if the application is allowed.

8. The plaintiffs/respondents in their submissions argued that the 4th defendant/applicant did not demonstrate any efforts he made to find out about the progress of the matter from his advocates and he was therefore not seriously interested in following his case. They relied on the case of **Gerald Mwithia v Meru College of Technology (Sued Through the Chairman Board of Governors) & another [2018] eKLR** among other cases and submitted that the 4th defendant/applicant's defence lacks merit and sought that the application be dismissed with costs to them.

Analysis and determination

9. After considering the application, the replying affidavit and the submissions, the only issue for determination is whether the 4th defendant has laid before the court sufficient grounds to review and set aside its judgement delivered on **24/6/2021**.

10. Order 45 of the **Civil Procedure Rules** provides as follows on review of judgement:

> **(1) Any person considering himself aggrieved;**
>
> > **a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **b. by a decree or order from which no appeal is hereby allowed…**
>
> **(2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review."**

11. Order 12 Rule 7 provides that under that Order, where judgement is entered in favor of the plaintiff, the court may set aside the judgment at its own discretion. The court in the case of **Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] eKLR** quoted with approval the case of **Shah v Mbogo and Another, (1967), E.A. 116 at 123 BC as follows:**

> ***'The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who had deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice'.***

12. The 4th defendant/applicant alleges that his advocates on record did not inform him when the matter came up for hearing and that he later found out that judgement had been delivered when the son of one of the persons he had sold the suit property to informed him so. He admits that his advocates were served with both the hearing and mention notices but they failed to inform him or represent him in court. He blames his advocates on record for being negligent.

13. In the case of **Rajesh Rughani –v- Fifty Investment Ltd. & Another (2005) eKLR** the Court of Appeal held that:

> **"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not an excusable mistake which the Court may consider with some sympathy".**

14. The court also in the case of **Habo Agencies Limited –v-Wilfred Odhiambo Musingo (2015) eKLR** stated that;

> **"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."**

15. As rightly pointed out by the plaintiffs/respondents, the 4th defendant/applicant has not demonstrated any steps that he took to find out the progress of the matter as he had the obligation to do so. The court in the case of **Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & Another [2021] eKLR** held as follows:

> **"This court is always skeptical of parties that seek to blame their Advocates and fail to produce any evidence that they have taken any steps to make the said Advocate liable for their negligence. The court recognizes that a case belongs to a party and it is upon that party to follow up on their case and once a party appoints an Advocate, the party then becomes liable for the actions of the said Advocates who was acting on their behalf."**

16. From the court record, the 4th defendant/applicant entered appearance on **5/12/2019** and filed his statement of defence on **16/12/2019** together with his witness statement and list of documents. Also court record shows that counsel for the 4th defendant never appeared in court hence the blame laid upon him be his erstwhile client.

17. I have been of the opinion that it would be a tall order to require the client to produce an affidavit of admission to wrongdoing or indeed explaining anything, from his erstwhile, defaulting advocate with whom they are usually at loggerheads in situations such as that the applicant finds himself in and this court has given applicants a benefit of doubt on several occasions. I have found instances where the defaulting counsel is the one who has gracefully prepared the application and explained the circumstances leading to his default. An advocate is an agent and once he fails to communicate the hearing date or some other crucial information to his client it may be proper to exercise caution and consider that a client may not always have a proper explanation to satisfy the court as to why the advocate conducted himself in the manner he complains of. In certain instances this court may consider such persons as being in need of intervention to prevent adverse effects of their former counsel from having a deleterious effect on their claim. It is no wonder that in **Patel v EA Cargo Handling Services Ltd [1974] EA 75** at **page 76,** the court held as follows:

> **"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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."**

18. I would therefore be inclined to peruse the record and establish the defence if any raised by the 4th defendant. it is there right in the record, filed on **16/12/2019.** I have considered its contents and in my thinking it is not an idle defence comprising of mere denials. It sets out facts that will require evidence to prove them and I am convinced that a defendant who raised such a defence was intent on prosecuting it come the hearing date. However as has been indicated herein before, it may not be possible to know what transpired so that no counsel came to court or communicated the date of hearing to the defendant.

19. It is noteworthy that the application at hand does not seek to reopen the plaintiff's case and it is therefore possible to hold the defendant alone accountable for any further defaults that may occur as this court drives this litigation forward to an expeditious end.

20. For the foregoing reasons I find that I must exercise my unfettered discretion in favour of the 4th defendant and grant the application dated **30/11/2021** if only to pave the way for the hearing of the defence case on the merits.

21. In conclusion therefore, it is my opinion that the 4th defendant has demonstrated sufficient grounds for the court to review and set aside its judgement delivered on **24/6/2021** and the application dated **30/11/2021** is granted in terms of **prayers nos (2), (3), (4),** and **(6)** thereof. The judgment of this court dated **24/6/2021** and all consequential orders are set aside and only the defendant's case is hereby re-opened for hearing.

22. As I consider the plaintiffs innocent of the events that rewound this case back to the hearing stage I hereby order that the 4th defendant will however bear the thrown away costs of **Ksh 20,000/-** to the plaintiffs. The suit shall be mentioned for fixing of a hearing date on **21/4/2022.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF MARCH, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU