



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO. 736 OF 2008

REPUBLICAPPLICANT

VERSUS

THE MARAKWET DISTRICT

LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE RESIDENT MAGISTRATE'S COURT AT ITEN 2ND RESPONDENT

THE KEIYO/MARAKWET LAND REGISTRAR 3RD RESPONDENT

AND

JOSEPH CHEPKWONY INTERESTED PARTY/APPLICANT

SUSANA CHEPKURUI EX-PARTE

RULING

The application for determination is the Notice of Motion dated 25th May, 2012 brought under Order 53 Rule 3 and 4 of the Civil Procedure Rules, Sections 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution. It is filed by the Interested Party who prays that the Ex-parte proceedings of 20th March, 2013 and the subsequent Judgment delivered on 2nd May, 2012 be set aside and the Notice of Motion dated 17th February, 2008 be set down for hearing inter-partes.

The application is based on the following grounds:-

- (i) The Ex-parte Applicant's Counsel took an exparte date without inviting the Interested Party's Counsel to fix a date.***
- (ii) The Notice was received with remarks that Counsel was engaged in other pre-fixed matters before the Judge at Kitale.***
- (iii) The Counsel called Nabasenge Advocate to adjourn the matter but when the Counsel came before the Court found that the application had proceeded.***
- (iv) That the Applicant had been ready to proceed previously but an adjournment occasioned by Counsel for the Ex-parte Applicant.***
- (v) There are good grounds raised in the Replying Affidavit which the Court ought to consider***

fully in its Ruling.

(vi) It is in the broad interest of justice that the Ex-parte orders be set aside.

It is supported by the affidavit of Walter Wanyonyi, an advocate of the High Court of Kenya having the conduct of the matter on behalf of the Applicant. He deponed that the ruling was delivered on 2nd May, 2012 when he was in court attending to another matter. That although he was served with a Hearing Notice, he received it under protest, as, on the date the matter was fixed for hearing, he had two criminal matters before Hon. Justice Karanja at the Kitale High Court. He stated that he had sent another advocate, Mr. Nabasenge, to hold his brief, but when he arrived in court, he found the matter already proceeding. He further stated that on two other prior hearing dates, he had been ready to proceed with the hearing, namely, 5th October, 2011 and 11th September, 2011.

The Replying Affidavit was sworn by Joseph K. Cheptarus, counsel for the Respondent (Ex-Parte Applicant) on 31st July, 2012. According to Mr. Cheptarus, on 18th and 20th January, 2012 he served an invitation (notice) to take a hearing date in the registry upon the law firm of Wanyonyi & Company Advocates. On 13th February, 2012 and 16th February, 2012 a hearing notice was served upon the Respondent and Interested Party respectively. However, there was no representation in court by the law firm of Wanyonyi and Company. There was also no information available that counsel for the Applicant was engaged in other matters at the Kitale High Court or that Mr. Nabasenge advocate would be holding brief for him. For these reasons, the Interested Party has himself to blame.

The Applicant made oral submissions. Mr. Kagunza advocate was in attendance on behalf of Mr. Ndungi for the Applicant. He submitted that the non-attendance in court of the counsel for the Applicant was inadvertent. He urged the court to focus on doing justice as opposed to technicalities as envisaged by Article 159 of the Constitution.

On the part of the Ex-Parte Applicant, the Respondent herein, learned counsel Mr. Cheptarus filed written submissions dated 20th September, 2013. He reiterated the contents deponed in the Replying Affidavit. He added that the fact that the hearing notice was received under protest would not of itself result in stay of proceedings. He also submitted that a Judgment of the court is already in place and so the Interested Party's Replying Affidavit had been overtaken by events. That in any case, the Interested Party had denied himself the opportunity to be heard.

Having considered the application and the respective submissions, I take the following view of the application.

In the case of GIRO COMMERCIAL BANK V. HERONGATE LIMITED & 8 OTHERS [2005] e KLR as cited in JOSEPHAT MUTHUI MULI V EZEETEC LTD INDUSTRIAL CAUSE NO. 1224 OF 2012 the learned Judge Kasango J. opined as follows;

“I have considered the objector’s explanation for failing to attend court in time and I think counsel’s explanation can only surprise those who are strangers to the manner in which counsel’s are under extreme pressure to attend to many matters and are left with no option but to request either their pupils or their clerks to get another counsel to hold their brief. This is a common occurrence. The objectors brought their application to set aside the dismissal without delay and I accordingly in exercise of my discretion do accede to the same.”

The principles to be applied before setting aside an ex-parte judgment were also enunciated in SHAH V. MBOGO [1967] EA 116 as follows;

“Applying the principles 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.”

Further, on the issue of the court's discretion the learned Court of Appeal judges in the case of PITHON WAWERU MAINA V THUKA MUGIRIA CIVIL APPEAL NO 27 OF 1982 outlined the principles governing the exercise of the judicial discretion 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 follows;

a) *Firstly, there are 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 to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E*

b) *Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, 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. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.*

c) *Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. Mbogo v Shah [1968] EA 93.*"

In the instant case, the Applicant has demonstrated that the failure to attend court on the hearing date was not deliberate. Although his counsel was served with a hearing notice, he did not ignore it. Instead he dispatched a Mr. Nabasenge advocate to hold his brief and seek an adjournment on his behalf. Unfortunately, by the time Mr. Nabasenge advocate arrived in court, the matter had already proceeded. The counsel did therefore make efforts to be present but his efforts did not come to fruition.

Again, the cause list from Kitale High Court showed that the Applicant's Counsel was scheduled to appear before the said court. And that therefore he did not fail to come to court in this matter so as to thwart or obstruct the cause of justice.

Therefore, in the interest of justice and so as to afford every party an opportunity to be heard, and also to enable this matter to be determined based on merit I will allow the application. I order that the ex-parte proceedings recorded on 20th March, 2012 and the subsequent Judgment delivered on 2nd May, 2012 be set aside. The Notice of Motion dated 17th December, 2008 shall be set down for hearing and hearing dates be taken in the registry. Costs of the application are awarded to the Ex-Parte Applicant. Since the Respondents did not participate in this application, the costs are payable by the Interested Party.

DATED and DELIVERED at ELDORET this 22nd day of July, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Kagunza holding brief for Ndumbi for the Interested Party/Applicant

No appearance for Cheptarus for the Ex-Parte Applicant

No appearance for Attorney General for the Respondents