



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 462 OF 2013

NGALA NYAGILO PLAINTIFF

VERSUS

GEORGE OTIENO ONGUDHO DEFENDANT

RULING

1. What I have before me is the defendant's application that was brought by way of Notice of Motion dated 28th August, 2014 under order 40 rule 7 and order 51 rules 1 and 15 of the Civil Procedure Rules seeking the following orders:

1. **Spent**
2. **The honourable court be pleased to grant an interim order for stay of the execution of the ex parte order issued on 16th June, 2014 and dated 21st July, 2014 until the determination of this application interpartes.**
3. **The honourable court be pleased to vacate and/or set aside the ex parte order issued on 16th June 2014 and dated 21st July, 2014.**
4. **The application dated 28th March, 2014 be heard afresh meritoriously(sic) inter partes.**
5. **Costs be provided for.**

The application was supported by an affidavit sworn by the defendant on 28th August, 2014. In the affidavit, the defendant stated that; he purchased a portion measuring 30X30 metres of all that parcel of land known as **LR No. North Sakwa/KaderaLwala/53**(hereinafter referred to as "**the suit property**")through an agreement for sale dated 22nd December, 2008 from the plaintiff's father who was the registered owner thereof at a price of kshs. 80,000. He again purchased another portion measuring 0.4 ha. of the suit property from one, Jack Opiyo Ogada who is the plaintiff's brother through an agreement dated 26th January, 2011 at kshs. 200,000. He thereafter settled and built his home on the two pieces of land where he currently resides with his family having relocated from his ancestral land in Nyakach.

2. The defendant stated that apart from his residence, he also rears fish and chicken on the said portions of the suit property which he sells for commercial gain. The defendant stated that as a result of the orders issued herein ex parte on 16th June, 2014, the fish he has been rearing on the suit property have started dying and rotting in the fish pond. Similarly, the chicken are also starving and dying. His other agricultural activities on the suit property have also been brought an abrupt halt. He has stated that his farm on the suit property was being used as a demonstration site for KARI, KEPHIS and USAID organizations which cannot now access the farm. He averred further that he has lived and worked in the said portions of the suit property for over 4 years. He denied the plaintiff's contention that he has encroached and/or trespassed on the suit property. The defendant stated that there was nothing secretive

or sinister about his acquisition of the two portions of the suit property.

3. The defendant has contended that the plaintiff filed this suit maliciously to restrain him from using the suit property. After filing this suit, the plaintiff filed an interlocutory application dated 28th March 2014 seeking a temporary injunction to restrain him from dealing with the suit property until this suit is heard and determined. Upon being served with the Summons to enter appearance, he instructed the firm of P.R. Ojala & Company Advocates to act for him. The defendant contended that the plaintiff's advocates fixed their injunction application dated 28th March, 2014 for hearing on 16th June, 2014 ex parte without involving his then advocates P.R. Ojala & Company Advocates. When his said advocates were served with a hearing notice, they received the same under protest as they had prior commitments at the Rongo Law Court.

4. As a result of the foregoing, no one appeared in court on his behalf on 16th June 2014 to hold brief for the said advocates and seek adjournment of the matter. The application proceeded to hearing and the same was allowed by the court as unopposed. The defendant has contended that he only came to know of the ex parte order when the same was served upon him which service affected him adversely as stated above. He stated that he has not received any explanation from his erstwhile advocates as to why he was not represented in court and his relationship with the said advocates has now broken down irretrievably. The defendant has contended that the mistake of his advocate should not be visited upon him as he was keen to file a reply to the plaintiff's application dated 28th March 2014 and have it heard on merit.

5. The defendant's application was opposed by the plaintiff through a replying affidavit sworn on 6th October 2014. In his affidavit, the plaintiff contended that the defendant did not purchase any portion of suit property from the plaintiff's late father as alleged and that the agreement for sale attached to the defendant's affidavit in support of the application herein is a forgery. As regards the portion of the suit property which is said to have been sold to the defendant by the plaintiff's brother, the plaintiff contended that his younger brother, Jack Opiyo Ogada had no capacity to sell any portion of the suit property to the defendant since his father who was the registered owner of the suit property was still alive when the purported sale took place. The plaintiff contended that defendant moved to the suit property early this year after this suit had been filed against him by the plaintiff for illegally interfering with suit property. The plaintiff has denied that the defendant moved to the suit property 4 years ago from Nyakach as he has claimed.

6. The plaintiff contended that the defendant has continued with his normal activities on the suit property even after he was served with the court order issued herein a conduct which amounts to contempt of court. The plaintiff contended that failure by the defendant's former advocates to oppose the plaintiff's application is not a sufficient ground to grant the orders sought.

7. When the matter came up for hearing before me on 16th October 2014, Mr. Odhiambo advocate appeared for the defendant while the plaintiff was not represented. I allowed the defendant's advocate to proceed with the application in the absence of the plaintiff's advocates notwithstanding after satisfying myself that the said advocates were duly served with the application. Mr. Odhiambo reiterated the contents of the defendant's affidavit in support of the application. He submitted that the defendant had initially appointed the firm of P. R Ojala & Co. Advocates to represent him in this case and that the said firm of P. R Ojala & Co. Advocates failed to oppose the plaintiff's application that had come up for hearing on 16th June 2014 resulting in the said application being allowed as unopposed and the orders sought to be set aside being issued.

8. Mr. Odhiambo submitted that the orders issued on 16th June, 2014 restrained the defendant from interfering with the two portions of the suit property that the defendant had purchased as aforesaid. He submitted that the defendant was let down by his previous advocates. He submitted that the defendant's previous advocates have not explained to him why they failed to defend the application whereas the defendant had a good defence to the application.

9. I have considered the defendant's application, the replying affidavit by the plaintiff in opposition

thereto and the oral submission by the defendant's advocate. The defendant's application was brought under order 40 rule (7) and Order 51 rule 15 of the Civil Procedure Rules. Order 40 rule 7, provides that, **"Any order for injunction may be discharged or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."** Order 51 rule 15 on the other hand provides that, **"The court may set aside an order made ex parte."**

10. 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 exparte 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 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 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 93 and in Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48 Biggs 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".**

11. I am of the opinion that the principles stated above would apply with equal force to applications like the one before me which seeks to set aside an order made ex parte when one of the party's failed to attend court. 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 P. R. Ojala & Company 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 the plaintiff filed an application for injunction later on 2nd April, 2014 and set it down for hearing on 16th June, 2014 ex parte. The defendant's said advocates were duly served with the application but they failed not only to oppose the same but also to attend court for the hearing of the same. This resulted in an order of injunction being issued against the defendant on 16th June, 2014 without the defendant's participation in the proceedings. The defendant has stated in his affidavit that he learnt of the said order when the same was served upon him. The defendant took immediate steps to instruct his advocates on record to file the present application which was filed in court on 28th August, 2014 to set aside the said order. I have noted that although the order was made on 16th June, 2014, the same was not extracted until, 21st July, 2014. It is not clear from the record as to when the defendant was served with the said order. The service may have been done any time between 21st July, 2014 and 28th August, 2014. I am satisfied that the defendant's application herein was filed without unreasonable delay. This again is an expression of the defendant's desire to defend this suit and the application that was heard ex parte. There is no indication or suggestion by the Plaintiff that the defendant's previous advocates failed to appear in court with a view to evade, obstruct or delay the course of justice. I am of the opinion from the facts of this case that to deny the defendant the orders sought herein would occasion him injustice. The defendant has demonstrated that he has a good defence on merit to put forward in opposition to the plaintiff's application that was heard ex parte. 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, an order was made against the defendant without him being heard in his defence as a result of the negligence on the part of his previous advocates. I am of the view in the circumstances of this case, it would not be fair to punish the defendant 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 Plaintiff if the orders sought are granted which cannot be compensated in costs. The Plaintiff did not point out in his affidavit any prejudice or injustice that he may suffer if the orders sought herein are granted which cannot be compensated for in costs.

12. For the above reasons, I will allow the defendant's Notice of Motion application dated 28th August 2014 in terms of prayers (c) and (d) thereof. The defendant shall file and serve a replying affidavit to the plaintiff's application dated 28th March, 2014 within 14 days from the date hereof. The plaintiff shall have thrown away costs and the cost of the application dated 28th August, 2014 assessed at Ksh. 10,000/=payable forthwith.

Delivered, signed and dated at KISII this 21st day of November, 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