



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**HIGH COURT**

**CIVIL CASE NO. 52 OF 2000**

**EZEKIEL MUREU KIMAMO..... PLAINTIFF**

**VS**

**PHILIP MUROGO WANDERI .....DEFENDANT**

**RULING**

The application herein is dated and filed on 25/9/2013 wherein the applicant seeks orders that the judgment entered herein on 7/11/2000 and all subsequent orders be set aside and the applicant be allowed to file his defence. The application is grounded on the allegation that the defendant had completed paying for the suit land and obtained title before the plaintiff brought the suit. The defendant was attacked by tetanus after having entered appearance. Lastly that the respondent is merely executing the costs which were taxed and that the Judgment is defective.

The application is supported by the affidavit of the applicant who states that he filed appearance as he was advised to do so within 15 days. Being a layman he thought that after filing the forms of appearance, he would wait for a hearing date. Moreover to complicate the matters after entering appearance he became sick with the disease of tetanus which arose from a cut had on his leg and this kept him down the whole of the year 2000. Furthermore, the only communication he got was a bill of costs served on him and when he went to court to inquire in October, 2002, he was informed that judgment has been entered and the and the Bill of Costs taxed at Kshs.60,000/= and that there was a decree issued as a result of judgment. He instructed his advocates to try and find out what was happening and his advocate informed him that there was never a formal proof to this case. He claims that there is an alleged re-transfer of land parcel No. MWEIGA/BLOCK I/750 from Himself to the plaintiff effected on 22/12/2000 as a result of a court order herein. He believes that he has a very good and cogent defence to the respondents claim in that he had paid him the total of the purchase price by 15/5/99 long before he instituted this suit. He believes that the case has been handled in a clandestine manner and unless the judgment and all orders subsequent thereto are set aside he stands to make untold loss.

The respondent filed a replying affidavit whose inport is that the applicant herein was committed to civil jail on 11/9/2013 for non-payment of Ksh.77,485 accrued interest of Ksh.26,344 and execution expenses making a total of Ksh.125,629/=. That this decretal amount arose from taxed costs arising in this case which costs were taxed by the Honourable Deputy Registrar on 23/9/2002 at 60,735. That the certificate of costs arose from a bill of costs filed herein on 25/8/2002 and since 23/9/2002 when the certificate of costs was issued by the Deputy Registrar, the respondent has not applied for the same to be set aside nor did he file a reference to the High court opposing the taxation as the law requires. That vide a notice to show cause filed on 7/10/2002 the applicant filed an application dated 30/11/2002 praying for the setting aside the judgment entered herein on 7/11/2000 and leave to file his defence. That the

applicant did not bother to prosecute his application dated 28/11/2002 until 18/8/2002 when the application was dismissed with costs by justice MSA Makhandia.

That as such the application dated 25/9/2013 is a replica of the one dismissed on 18/9/2007 and the court cannot entertain the same as the proper procedure ought to have applied for the setting aside the dismissal orders of 18/9/2007 and reinstatement of the application dated 28/11/2002 but not file a fresh application as the same will be res judicata. That on 5/5/2008 when the case came up for hearing of the NISC the applicant did not attend court and a warrant of arrest was issued against him That on 8/1/2010 the applicant was arrested and committed to civil jail for Kshs.77,485 being taxed costs, accrued interest and disbursements but the applicant was released from civil jail on 6/2/2010 without paying the amount he had been committed.

The reason for the release of the applicant from civil jail on 6/2/2010 was because the court file went missing from the registry and as such the respondent's advocates on record could not apply for extension of committals That on 5/5/2010 a fresh warrant of arrest against the applicant was obtained however , between 5/5/2010 and 11/9/2013 a period of over three (3) years the warrant remained unexecuted hoping the applicant would see the light and sense of liquidating the amount by installments. The applicant did not bother to pay a single dim despite being aware that he was committed to civil jail on 8/1/2010 and was released on 6/2/2010 without paying anything towards settlement of the decretal amount.

That respondent's patience dimmed and or wanned on 11/9/2013 when he caused his advocates to arrest the applicant. The applicant was brought before the Honorable Deputy Registrar, failed to show cause and was subsequently committed to civil jail for Kshs.125,629/= and therefore the applicant has not come to court with clean hands . It is clear that for a period of over (eleven) 11 years the respondent has patiently waited for justice to prevail but the applicant has not bothered to honour his part and therefore he does not merit the orders he has sought.

I have considered the arguments of both counsel for applicant and respondent and do find that Judgment herein was entered on the 7/11/2000. The bill of costs was assessed on 13/9/2002 and a Notice to show cause was issued on the 6/11/2002.

On the 29/11/2002, the J.D appeared with his advocate Mr. Ndirangu and stated to the court:

***“We are in the process of filing an application to set aside Judgment and pray that the case be stood over generally”***

The honourable court stood over the matter generally to allow the J.D file an application. The said application was filed instantly on the 29/11/2002. The said application was dismissed on the 18th September 2007 for want of prosecution. I have perused the record and ascertained that H.K. Ndirangu was served with a hearing Notice on the 9/1/2007 for the hearing slated on 18/9/2007 but failed to attend court hence the application was dismissed for non attendance.

The J.D went to sleep thereafter until he was brought to court on 8/1/2010. When given opportunity to address court he said:-

***“I am ready to pay, my advocate did not tell me to pay, I would have paid. I propose to pay Kshs.500/= per month from next month”***

The court was not satisfied with the proposal hence committed the J.D. to jail for 30 days. He was committed and released on 6/2/2010 without paying the amount.

On the 11/9/2013 the court again committed him to civil jail for a period of two months. The applicant moved to this court upon being committed to civil jail and prayed for orders that:

1. ***There be a stay of execution pending hearing of the application.***

2. ***The applicant be released from jail pending the hearing and determination of the application.***
3. ***That the Judgment entered on 7/11/2000 and all subsequent orders be set aside and the applicant be allowed to file defence.***

Prayer 1 and 2 were granted at the ex parte stage hence the only pending prayer is for setting aside judgment. The appellant's reasons for failing to file defence was that he suffered from tetanus. This ground is rejected as no medical report or treatment notes have been annexed.

**Mr. Mwangi's** submissions did not dwell on the reasons why the applicant did not file a defence but dwelt on the process of execution which can be addressed by the Deputy Registrar. No valid ground has been brought to court to set aside the judgment entered on 7/11/2000. **Mr. Kirubi** on his part also dwelt on the process of execution of the decree which should be addressed by the Deputy Registrar. However, of importance are submissions by **Mr Kirubi** that the applicant filed a similar application on 29/11/2002 dated 28/11/2002 for setting aside the judgment herein. The application was dismissed on 18/9/2007 for want of prosecution and submits that the application is res-judicata.

This court concludes that the applicant has not presented any tangible reason to warrant setting aside judgment made on 7/11/2000. This court's discretion cannot be exercised whimsically but judiciously. Moreover the application is an abuse of the process of court due to the fact that a similar application was filed but dismissed for want of prosecution almost six years ago. What has the applicant done since dismissal of the application? He has promised to pay the decretal sum but keeps evading payment with one promise after another.

The upshot of the above is that the application is dismissed with costs.

**DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER 2014**

**ANTONY OMBWAYO**

**JUDGE**