REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 513 of 2017

SIMON NGARIU MAINA.....1st PLAINTIFF

THOMAS KURIA MAINA.....2nd PLAINTIFF

VERSUS

DANIEL MAINA GITAU.....DEFENDANT

RULING

1. In the Notice of Motion dated 31st March, 2021, the Defendant/Applicant seeks the following orders:

> ***i. That in the result, the Court be pleased to re-open the Plaintiffs' case for hearing de novo on a priority basis and to grant the Defendant/Applicant an opportunity to participate in the trial by defending this suit.***
>
> ***ii. That the costs of the Application be in the cause.***

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of the Defendant of the same date. It was deponed by the Defendant that this court entered Judgment and subsequently issued a Decree against the Defendant on 28th September, 2020 and that the Judgment and Decree aforesaid were issued as a result of a hearing which was conducted in the absence of the Defendant

3. The Defendant deponed that his failure to attend the hearing was occasioned by his previous advocates who did not inform him of the same; that he only became aware of the Decree upon service of the same by the Plaintiff's clerk sometime in February,2021; that he had duly filed all his pleadings and was keen to defend the case and that he has a credible Defence and the interests of justice dictate that the orders sought be granted.

4. In response, the 2nd Plaintiff on his own behalf and on behalf of the 1st Plaintiff swore a Replying Affidavit on the 7th June, 2021. The 1st Plaintiff deponed that the matter proceeded for hearing on 25th September, 2019 during which date neither the Defendant nor his counsel were present; that the hearing date had been taken by consent of the parties ten months prior to the hearing date and that with reasonable due diligence, the Defendant would have become aware of the same.

5. According to the Plaintiffs, there is no justifiable reason for the Defendant's non-attendance; that the present application is an abuse of the court as there is a similar application in Milimani ELC E 6174 of 2020 filed by the Defendant and that the application is incompetent for having been filed by advocates who did not follow the process of coming on record post Judgment.

6. The 2nd Plaintiff deponed that contrary to his assertions, the Defendant became aware of the Decree on 14th October, 2020; that this application having been brought five months after service of the Decree, the same has been brought late and that the Defendant has in any event not met the legal threshold for stay of execution of Judgment and Decree, setting aside Judgment, review and re-opening of proceedings.

7. It is the Plaintiffs' case that the Defendant has not offered any form of security and that the Plaintiffs will suffer irreparable injury because despite having a Judgment in their favour, they have been unable to enjoy the same as the Defendant has been keen on delaying execution.

8. The Defendant filed a Further Affidavit in which he deponed that a consent was filed between his previous and current advocates allowing the present advocate to come on record post Judgment; that ELC Case No E6174 of 2020 was withdrawn in its entirety on 30th August, 2021; that he was indeed served with a Decree on 14th October, 2020 and that the process of the sale of the suit property to the Plaintiffs was irregular.

9. The Defendant's counsel submitted that the Defendant's failure to participate in the trial is excusable as the same was occasioned by the previous counsel who did not inform him of the hearing date; that the Plaintiff did not serve the Defendant with a Judgment notice contrary to **Order 22 Rule 6** of the **Civil Procedure Rules;** that the entry of the default Judgment was irregular; that the Defence raises triable issues and that if the application is rejected, the Defendant will be condemned unheard.

10. Counsel submitted that the court is empowered by **Order 12 Rule 7** of the **Civil Procedure Rules** to set aside the *ex-parte* Judgment for default of appearance of the Defendant at the hearing; that the aforesaid power of the court is discretionary and that the court ought to consider whether there is sufficient cause and whether the Defence raises triable issues. Several cases in support of these deposition were cited: ***Laban Mukangai & another vs Simon Museve [2004] eKLR, FM vs EKW[2019] eKLR*** and ***David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others [2021] eKLR.***

11. The Plaintiffs' counsel submitted that the court's power to set aside an *ex-parte* Judgment is discretionary and depends on whether the Defence raises triable issues and whether sufficient cause has been demonstrated warranting the setting aside. Reliance in this regard was placed on the cases of ***John Wanguche Were vs John Umwebula Kulubi [2020] eKLR*** and ***Tree Shade Motors Limited vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998***.

12. According to counsel, the Defendant has not demonstrated any sufficient cause warranting the exercise of the court's discretion in his favour and that the claim that his previous Advocates did not inform him of the hearing date is unsubstantiated. In this respect, counsel cited the case of ***John Maina (Suing for and on behalf of the Estate of Maina Thuo-Deceased) vs Samuel Kioi Thuo [2021] eKLR***.

13. It was further submitted that the Defence does not raise any triable issue and the same consists of mere denials and that in any event, the Defendant as an aggrieved chargor has no claim against the Plaintiffs herein being innocent purchasers as appreciated by the court in ***John Kamunya & another vs John Nginyi Muchiri & 3 others [2015] eKLR.***

14. It was submitted that the Defendant is challenging the sale of the suit property to the Plaintiffs by New Milimani Society which is not a party to this suit and that the Plaintiffs will suffer prejudice if the application is allowed because they are being denied the fruits of their Judgment by the Defendant who continues to occupy the suit property two years after Judgment.

Analysis & Determination

15. Having read and considered the Motion, Affidavits as well as the submissions filed by the parties, the issues that arise for determination are;

i. Whether the firm of Rashid & Rashid Company Advocates are properly on record?

ii. Whether the Ex-parte Judgment entered on the 5th December, 2019 and the subsequent Decree issued on the 28th September, 2020 should be set aside?

16. The Plaintiffs have deponed that the present application is fatally defective for non-compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**. In response, the Defendant, through his Further Affidavit, deponed that a consent was duly signed between his previous counsel and his current advocates and that the firm of Rashid & Rashid is properly on record.

17. The procedure that guides the change of counsel after Judgment has been entered is **Order 9 rule 9** of the **Civil Procedure Rules** which provides as follows:

> ***"When there is a change of Advocate; or when a party decides to act in person having previously engaged an Advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-***
>
> ***(a) upon an application with notice to all parties; or***
>
> ***(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."***

18. It is clear from the foregoing that for any change of Advocates after Judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

19. The court has perused the consent filed by the outgoing firm of Ojienda & Co Advocates and the incoming firm of Rashid & Rashid Advocates, and notes that the same was filed on 30th August, 2021, by which time the present application had long been filed on 31st March, 2021. Further, the proceedings indicate that the consent was never adopted as an order of the court. Indeed, it would appear that the filing of the consent was prompted by the Plaintiffs' response to the current application.

20. It is apparent from the foregoing that the present application was filed contrary to the express provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. What then is the consequence of this non-compliance?

21. There appears to be two schools of thought in this respect with some commentators holding that the provisions of Order 9 Rule 9 are mandatory in nature and that pleadings filed in contravention of the same should be struck out.[see ***Stephen Mwani vs Murata Sacco Society Ltd [2018] eKLR*****]** The other school of thought holds that substantive issues before the court should be adjudicated upon and determined on

merit despite the non-compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**, and that non-compliance with the said provision is a technicality which is curable under **Article 159(2) (d)** of the **Constitution** as well as the overriding objective of the court [see ***Regina Nang'unda Tundwe vs Margaret Nasimiyu Wasike [2021] eKLR.***

22. In considering this question, the court remains alive to the fact that the import of **Order 9 Rule 9** is to protect advocates from mischievous clients. This was well articulated by the Court in the case of ***S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR*** where the judge observed as follows:

> ***"…In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him…."***

23. Notwithstanding the initial non-compliance with **Order 9 Rule 9** aforesaid, it would appear that the firm of Ojienda & Co Advocates have consented to having the firm of Rashid & Rashid taking over conduct of the matter, and do not need any protection of the court. Further, no prejudice has been occasioned to the Plaintiffs by the change of counsel. Consequently, it would be improper to strike out the Defendant's application on this ground. The court will in this respect be guided by the Court of Appeal decision of ***Tobias M. Wafubwa vs Ben Butali [2017] eKLR*** in which it was held as follows:

> ***"We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;***
>
> ***"All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all…"***

24. The Defendant seeks to have the Judgment and the subsequent Decree issued on 28th September, 2020 set aside. On their part, the Plaintiffs contend that the Defendant has not met the threshold warranting the setting aside of the Judgment.

25. By way of brief background, this suit was commenced by a Plaint dated 2nd August, 2017. In the Plaint, the Plaintiffs averred that by way of a sale agreement dated 31st August, 2016, they acquired land known as L.R. No. 11344/R BLOCK Z PLOT NO B-540 situate in Kayole, Nairobi County (the suit property); that the sale of the property was by way of public auction conducted by Toplink Auctioneers and that they were duly issued with a certificate of sale. The Plaintiffs averred that the above notwithstanding, the Defendant has refused to vacate the suit property depriving them of quite enjoyment thereof.

26. In the Plaint, the Plaintiffs sought for an order of eviction of the Defendant and for a permanent injunction restraining the Defendant or his agents from interfering with the Plaintiffs' ownership of the suit property.

27. In response, the Defendant entered appearance and filed a Defence on 19th March, 2018 in which he denied the allegations by the Plaintiffs with respect to ownership of the suit property and any purported sale thereof. The Defendant averred in the Defence that he has been on the suit property since it was allocated to him and that in the alternative, the public auction, sale and transfer of the suit property to the Plaintiffs was unprocedural.

28. According to the court records, on 22nd of November, 2018, and in the presence of counsel for both the Plaintiffs and Defendant, the court set down the matter for hearing on 25th September, 2019. On the 25th September, 2019, neither the Defendant nor his counsel was present and the matter proceeded for hearing. On 5th December, 2019, the court delivered its Judgment in which it allowed the Plaintiff's claim. It is the said Judgment and the subsequent Decree issued on 28th September, 2020 that the Defendant is seeking to set aside.

29. Order 12 Rule 2 (a) of the **Civil Procedure Rules** provides that;

> ***"If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the plaintiff attends, if the court is satisfied—***
>
> ***(a) that notice of hearing was duly served, it may proceed ex parte; …"***

30. Order 12 Rule 7 provides recourse to a party where a determination has been made pursuant to the provisions of **Order 12** aforesaid and provides as follows: -

> ***"Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the Judgment or order upon such terms as may be just."***

31. By dint of **Order 12 Rule 7** aforesaid, this Court has discretion to set aside any orders upon terms that it considers just.

32. The Court of Appeal in the case of ***Shah vs Mbogo (1967) EA 166*** established the guiding principles to be considered by the court on an application to set aside an *ex parte* Judgment as follows;

> ***"Firstly, there are no limits or restrictions on the judge's discretion to set aside except that if the judge 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 to it by the rules. Secondly, the discretion to set aside is intended, to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".***

33. More recently, the Court of Appeal in ***CMC Holdings Ltd vs James Mumo Nzioki [2004] eKLR*** stated thus;

> ***"Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle."***

34. The Court of Appeal went on further to state as follows: -

> ***"The law is now well settled that in an application for setting aside ex parte Judgment, the court must consider not only reasons why the defence was not filed or for that matter why the Applicant failed to turn up for hearing on the hearing date but also whether the Applicant has reasonable defence which is usually referred to as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."***

35. Indeed, this was the rationale in the Court of Appeal case of ***Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo (supra)*** cited by the Plaintiffs and which was followed by the court in the case of ***David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others (supra)*** cited by the Defendant.

36. It is clear from the foregoing that in this instance, other than the court's overall consideration of ensuring justice to the parties, the Defendant must satisfy the court that there is sufficient explanation for the non-attendance of the hearing and that the Defence raises triable issues.

37. In the instant case, the Defendant contends that his previous counsel did not inform him of the hearing date. Indeed, the court notes that this is probable taking into account the fact that the said advocates also failed to attend the hearing despite having been present when the date was given. However, it is trite that a case belongs to a client and not his advocate. Even if the Defendant was not informed of the hearing date by his advocate, the Defendant has not shown any steps that he took in finding out the progress of the matter.

38. The Court associates itself with the comments of Waki JA in the case of ***Bi-Mach Engineers Ltd vs James Kahoro Mwangi (2011) eKLR*** where, while commenting on the duty of a client *vis-a vis* his counsel, observed as follows:

> ***"The applicant had a duty to pursue his advocate to find out the position of the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter."***

39. Further, the court notes that there was a ten (10) months' time difference between the issuance of the hearing date being on 22nd of November, 2018 and the actual hearing date on 25th September, 2019. A litigant who consistently follows up on his case, would surely have become aware of this development during this timeline. The court also notes that this Application was filed on 31st March, 2021, five months after the Defendant became aware of the impugned Decree. The five months' delay does not evince any diligence that can be ascribed to the Defendant.

40. In the premises, the court finds that the Defendant has not demonstrated any legitimate reason why he failed to attend court when the matter came up for hearing on the due date.

41. The Defendant has asserted that his Defence raises triable issues and that he will be greatly prejudiced if he is not allowed to defend the suit. The Plaintiff on the other hand insists that the Defence is a sham and consists of mere denials.

42. The Court of Appeal in ***Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR*** defined what a triable issue is follows:

> ***"A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."***

43. A perusal of the Defence shows that the Defendant is challenging the Plaintiff's ownership of the suit property on the basis that New Milimani Sacco did not follow the proper procedure before exercising its statutory power of sale. He avers, *inter alia,* that no statutory

notices were issued to him prior to the sale; that he has been paying the sums due and owing; and that the suit property has been sold at an undervalue. In essence, the Defendant is an aggrieved chargor.

44. It is an established principle of law that once a property has been sold in a public auction by a chargee in exercise of its statutory power of sale, unless the applicant proves fraud, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file a suit for general or special damages. This was enunciated by the Court of Appeal in ***Nancy Kahoya Amadiva vs Expert Credit Limited & another [2015] eKLR*** where the court held;

> ***"Property passes to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale. It is not allowed to continue until conveyance or registration notwithstanding that some time elapses before conveyancing formalities are completed vesting the legal title to the purchaser. (See Fisher and Lightwood Law of Mortgages and James Ombere Okoth case (supra). The cases follow the rule enunciated in Mbuthia vs Jimba Credit Corporation and another by Apaloo JA though dissenting):***
>
> ***"Since then, the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale (see Ze Yun Yang vs Nova Industrial Products Limited [2003] 1 EA 362). This is notwithstanding that the mortgagee and purchaser may adjust the conditions of the contract as they agree. It is not lost on us that the 2nd respondent by the acceptance of his bid during the public auction and subsequent completion of a valid agreement for sale of the suit premises effectively locked out the appellants right of redemption over the suit premises."***

45. The Defendant has not denied he charged his property. Therefore, if the Defendant had any issue with the manner in which the auction was conducted, his remedy lay in damages as per Section **99(4)** of the **Land Act, 2012** which provides as follows:

> ***"(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."***

46. Taking into account the decisions and the legal provisions cited above, as well as the court's analysis, the court finds that the issues raised in the Defendant's Defence are not triable. His claim is against the chargee and not the Plaintiffs who were duly issued with a certificate of sale after the purchase of the suit property through an auction.

47. The upshot of the foregoing is that the court finds that there is no sufficient reasons to warrant the exercise of its discretion in favour of the Defendant.

48. The application dated 31st March, 2021 is unmerited and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF APRIL, 2022.

O. A. Angote

Judge

In the presence of;

No appearance for the Plaintiffs

No appearance for the Defendant

Court Assistant: John Okumu