



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 226 OF 2017

PATRICK NTHIWA KYALO.....PLAINTIFF/RESPONDENT

VERSUS

MUTUA KATUMO NDUUTI.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion Application dated 18th of November 2021 brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 9 Rule 9 and 10, Order 10 Rule 6,9, 10 and 11 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

1. **Spent.**
2. **Spent.**
3. **That the Honourable Court be pleased to set aside the order made on 9th of April 2018 and all the consequential orders.**
4. **That the Court be pleased to order that this suit proceeds for hearing on merit.**
5. **That the costs of the application be in the cause.**

2. The application is premised in the grounds on the face of the application. These grounds are;

- a) **That the Defendant had all along been defended by the firm of Kasyoka & Associates has now instructed the firm of Mutuku Mary & Company Advocates to act for him.**
- b) **That the Defendant had instructed the firm of Mutua Mathuva to file a similar application but disagreed before the application could be heard and determined.**
- c) **That on 9th of April 2018 Hon. Justice Mbogo directed that the matter proceeds as an undefended suit under the mistaken belief that the Defendant never entered defence.**
- d) **That the matter proceeded to formal proof and judgment was delivered on 25th of October 2018.**
- e) **That the Defendant became aware of the judgment on 8th of October 2021 when the Plaintiff in the company of a surveyor, police officers and the area chief went to the suit premises with a view or erecting beacons.**
- f) **That it is in the interest of justice that the matter is heard on merits.**

3. The application is supported by the affidavit of Mutua Katumo Nduuti sworn on the same day. The Applicant averred that after he was served with summons to enter appearance and a copy of the Plaint he instructed the firm of Kasyoka and Co. Advocates who entered appearance and filed a Defence on his behalf on 7th of March 2018. That thereafter his Advocate did not inform him of any other progress in the matter until the 8th of October 2021 when the Plaintiff in the company of a surveyor, police officers and the area chief went to the suit premises to erect beacons.

4. The Applicant contends that his current Advocate established upon perusal of the court that Hon. Justice Mbogo had directed that the suit to proceed as undefended owing to the absence of the defence. That all this while, neither he nor his Advocate were aware of the

proceedings. He averred that although he had filed his defence, it was unfortunate that the matter proceeded ex parte. He argued that it is in the interest of justice that the matter is heard on merits.

5. The Respondent opposed the application vide the grounds of opposition dated 25th of November 2021. These grounds are: -

- a) **That the application is frivolous, vexatious and an abuse of the court process.**
- b) **That there has been inordinate delay of 5 years in filing the Defence by the Respondent which cannot be cured by way of an application.**
- c) **That the Plaintiff cannot be denied the fruits of his judgment due to the negligence of the Defendants Advocate to file their Defence on time.**

6. The application is further opposed by the replying affidavit of Noel M Kabaiku Advocate sworn on 28th of November 2021. Counsel averred that the court delivered its judgment after the hearing of the formal proof. Counsel further averred that he constantly wrote letters to the Defence Counsel but his letters and calls went unanswered. Counsel argued that it was absurd for Counsel to allege that a Defence was filed when none was filed and served upon them as is required by the law. Counsel argued that it was over three years since the judgment was pronounced hence the Defendant has no reason to set aside the judgment. He contends that if the orders sought are granted, it would cause a great injustice to the Plaintiff who has been denied access to his property by the Defendant. He contends that there must be an end to litigation.

7. In response to the replying affidavit, the Applicant filed a supplementary affidavit sworn on 15th of December 2021 and averred that the application was merited and that it was brought in good faith. The Applicant averred that he had always participated in the proceedings in this matter which were initially commenced in Makindu PMCC No. 250 of 2012 and ultimately dismissed on 03/10/2012. That he subsequently participated in the Machakos ELC No. 454 of 2012 which was the origin of the present suit. He argued that the proceedings on 16/03/2015 before Justice Kariuki on 16/03/2015 confirmed that his defence was on record.

ANALYSIS AND DETERMINATION

8. Having considered the application, the grounds, the affidavits and annexures and the rival submissions, I find that the main issue for determination is whether the Applicant is entitled to the orders sought. The Applicant has sought to set aside the orders made on the 9th of April 2018 and all other consequential orders set aside.

9. Courts have the discretionary power to set aside ex parte judgment with a view of doing justice to the parties. The discretion should be exercised to avoid injustice. In the case of **Patel Vs EA Cargo Handling Services Ltd (1974)** EA 75 the court held that;

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

10. The court record shows that this suit was filed on behalf of the Plaintiff on 7th of December 2012 before the High court at Machakos where the Plaintiff sought for the following orders: -

- a) **Permanent injunction restraining the Defendant, his agents, servants and or employees from leasing, transferring, cultivating or in any other way whatsoever from interfering with the Plaintiff’s ownership of Title Number Makueni/Nguu Ranch/388.**
- b) **Vacant possession by the Defendant of Title Number Makueni/Nguu Ranch/388.**
- c) **A declaration that the Plaintiff is the bona fide owner of Title Number Makueni/Nguu Ranch/388.**
- d) **Costs of the suit plus interest at court rates.**

11. This matter was last before the High Court at Machakos on 16th of March 2015 before Hon. Justice Kariuki when the parties herein were to confirm the filing of submissions with respect to the application dated 7th December 2012. The record indicates that on 20/7/2017 the file was placed before Hon. Justice Mbogo sitting at the ELC at Makueni. Mr. Kabaiku was present for the Plaintiff while Mr. Kasyoka Advocate for the Defendant was absent. The Judge directed the Plaintiff to comply with order 11 within the next 30 days. The Defendant was granted corresponding leave to comply. The Plaintiff was further directed to serve the Defendant with the mention notice for 10/10/2017.

12. When the matter came up for mention on the 10/10/2010, both parties herein were absent. The court directed the mention notice for 09/11/2017 to be served upon both parties. On the 09/11/2017 when the matter came for mention, both parties were absent. The court directed that a Notice to Show Cause why the suit should not be dismissed for want of prosecution to be issued to both parties.

13. The matter was subsequently listed on 14/12/2017 for notice to show cause why the suit should not be dismissed for want of prosecution. On that day Mr. Atenya was present holding brief for Mr. Kabaiku for the Plaintiff. There was no appearance on the part of Kasyoka and company Advocate for the Defendant. Mr. Atenya informed the court that the learned Counsel for the Plaintiff had since discovered that the Defendant did not file a reply to the application dated 07/12/2017. On that basis he sought for summary judgment to be

entered against the Defendant and requested the court to place the file aside. The court acceded to his request. Later at 12.45 p.m., Mr Hassan who was present holding brief for Mr Kabaiku for the plaintiff appeared and informed the court that the Defendant had not filed a response to the application dated 07/12/2017 in which the Plaintiff had sought for summary judgment to be entered against the Defendant. The court granted the Plaintiff 3 months to prosecute his suit and in default, the matter would stand as dismissed for want of prosecution. The matter was fixed for mention on 09/04/2018.

14. On 09/04/2018 Mr Hassan was present holding brief for Mr. Kabaiku for the Plaintiff, addressed the court and stated that Mr Kabaiku had requested for judgment to be entered against the Defendant on 10/10/2016 but the same was not to be entered. The court proceeded to enter judgment in the matter and further directed that the matter would proceed as undefended suit. On 04/07/2018, the matter proceeded to formal proof and subsequently the judgment was delivered on 25th of October 2018.

15. Upon perusal of the Court record, I find that there is no indication when this file was transferred from the Machakos High Court to the ELC at Makueni. The Applicant avers that he was not aware that the matter was coming for hearing. I have carefully looked at the mention and hearing notices attached to the Respondent's replying affidavit and I find that they relate to the mention on 16/03/2016, and the hearing on 7th of March 2013 and on the 12th of February 2015 before the High Court at Machakos. No affidavit of service has been placed on record to demonstrate that the Applicant was ever served with the mention or hearing notice after the file was transferred to ELC at Makueni or to appear before the court.

16. It is not in dispute that the Defendant/Applicant was served with the Summons to Enter Appearance and the Plaint. It is also not in dispute that the Firm of Kasyoka and Co Advocates was acting for the Applicant then. The Applicant averred that his Counsel filed a Defence but for unknown reasons it was not placed on the court record. Mr Kabaiku in response stated that the Defendant did not file a Defence as required. I have carefully looked at annexure MM1 in the Applicants supporting affidavit and I find that it is a Memorandum of Appearance dated 07/03/2010, a Statement of Defence dated 13th of March 2015 and court filing fee receipts. It is therefore evident that the Defendant filed a Statement of Defence that cannot be said to be frivolous and it is my view that he deserves to be heard on it

17. There is no evidence that the Applicant was informed of the progress of his matter by his previous Advocate. It is trite law that the mistake of counsel cannot be visited upon a litigant.

18. I find that it would be unjust and indeed a miscarriage of justice to deny the Applicant who has expressed the desire to be heard, the opportunity of defending his case. Article 50 of the Constitution entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. Halsbury laws of England, 5th Edition 2010 vl 61 at para 639 states that;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice.”

19. It is clear that the right to fair hearing is a fundamental human right. I find that no prejudice will be occasioned to the Plaintiff if the matter is heard on merit.

20. The upshot of the foregoing is that the application dated 18th of November 2021 is allowed in the following terms: -

- a) **The ex parte judgment entered on 9th of April 2018 and all the consequential orders be and is hereby set aside.**
- b) **The parties herein are directed to comply with Order 11 within the next 21 days from the date of this ruling**
- c) **This suit shall be heard and concluded within the next three months from the date of this ruling.**
- d) **Each party to bear its own costs.**

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS THIS 20TH DAY OF APRIL, 2022.

IN THE PRECENCE OF: -

Court assistant – Mr. Mohammed

Ms Mutuku for Defendant

Mukire holding brief for Kabaiku for the Plaintiff