



No. 173

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 125 OF 2010

1. RICHARD BUDDY OKEMWA

2. ELIJAH OKEMWA ASIAGO..... PLAINTIFFS

VERSUS

KENYA POWER & LIGHTING CO. LTDDEFENDANT

RULING

1. The Plaintiffs brought this suit by way of a Complaint dated 3rd May, 2010. The Complaint was amended on 16th June, 2010 and again on 21st December, 2011. In the Further Amended Complaint dated 21st December, 2011, the Plaintiffs claimed from the defendant; special damages in the sum of Ksh.567,327.00, general damages for trespassing into the parcel of land known as L.R.No. Nyaribari Masaba/Kiamokama/657 (hereinafter referred to as **“the suit property”**) and destroying cash crops thereon, exemplary damages, costs and interest. The Plaintiffs’ claimed that, on 9th March, 2010, the defendant’s employees entered the suit property and dug four (4) holes for the purposes of installing electricity poles without the consent of the Plaintiffs. The Plaintiffs claimed that in the process of digging the said holes, the defendant’s employees aforesaid destroyed cash crops namely, coffee bushes, tea plants, maize and beans which had been grown on the suit property all valued at Ksh.315,780.20. The Plaintiffs claimed further that, on 11th October, 2010, the defendant’s agents, servants or employees once again entered into the suit property without the Plaintiffs’ permission and removed the electric poles and cables that they had installed thereon earlier during which operation the defendant’s said agents or employees caused further damage to the Plaintiffs’ crops which damage was valued at Ksh.251,546.80. The Plaintiffs claimed that the second act of trespass on 11th October, 2010 was carried out in contempt of a court order that had been issued restraining the defendant from trespassing on the suit property.
2. The defendant entered appearance and filed a statement of defence to the Plaintiffs’ claim. In its amended statement of defence dated 23rd January, 2012, the defendant denied the Plaintiffs’ claim in its entirety. The defendant denied that it had trespassed into the suit property and caused the damage complained of by the Plaintiff. The defendant also denied special, general and exemplary damages claimed by the Plaintiffs. The defendant averred that if it entered into the suit property which it denied, such entry was with the consent of the Plaintiffs. This suit was fixed for hearing on 10th December, 2012 on which day only the Plaintiffs and their advocate appeared in court. The same could not however be reached on that day and the hearing was adjourned to 21st January, 2013. The Plaintiffs’ advocate was ordered to serve the advocates for the defendant with a hearing notice. On 21st January, 2013, once again only the Plaintiffs and their advocate appeared

- in court.
3. After satisfying myself that the advocates for the defendant were served with a hearing notice, I allowed the hearing of the case to proceed in the absence of the defendant. After the close of the Plaintiffs' case, I directed that the parties do file written submissions and fixed the matter for mention on 21st February, 2013 for further orders. I once again directed the Plaintiffs' advocate to serve a mention notice upon the defendant's advocates. As had been the usual practice, yet again, only the Plaintiff's advocate appeared in court on 21st February, 2013. The defendant's advocates did not appear although a notice for the mention was served upon them. Since the Plaintiff's advocates had filed their submissions, I had no alternative but set down the matter for judgment on 10th May, 2013 without the defendant's evidence or submissions. In a judgment dated 10th May, 2013, I entered judgment for the Plaintiffs against the defendant in the sum of Ksh. 567,327.00 for special damages and Ksh. 20,000.00 for general damages together with the costs of the suit.
 4. On 24th June, 2013, the defendants moved this court by way of a Notice of Motion application of the same date seeking the setting aside of this court's judgment that was delivered on 10th May, 2013. This is the application that is the subject of this ruling. The defendant's application was supported by the affidavit of AwuorAwiti, the defendant's senior legal officer in charge of litigation sworn on 24th June, 2014.
 5. The defendant's application was brought on the grounds that the defendant's previous advocates did not inform the defendant of the hearing date for this case and that is why the defendant did not appear at the trial to defend itself. The defendant contended that it had filed a defence to the Plaintiffs' claim and has always been desirous of defending this suit. The defendant contended that the judgment was entered against them without their participation due to an omission or professional negligence of their previous advocates. The defendant urged the court not to condemn it due to mistake of their advocates and that it would be in the interest of justice that the judgment entered herein be set aside so that the case is heard and determined on merit. The defendant indicated that it is willing to pay to the Plaintiff throw away costs and also to abide by any condition that the court may impose.
 6. The defendant's application was opposed by the Plaintiffs. The Plaintiffs filed a replying affidavit sworn by Elijah Okemwa on 8th July, 2013 in response to the application. In summary, the Plaintiffs contended that the defendant has never been interested in defending this case as the defendant was given every opportunity to appear and defend the case but failed to do so. The Plaintiffs contended that no good reason has been put forward to warrant the setting aside of a valid judgment that was entered herein on 10th May, 2013. The Plaintiffs contended that the defendant has failed to give any explanation as to why its previous advocate had failed to appear in court on the numerous occasions that the matter came up for hearing. The Plaintiffs contended that litigation must come to an end and urged the court to dismiss the defendant's application so that the Plaintiffs may realize the fruits of their judgment.
 7. When the application came up for hearing on 8th July, 2013, Mr. Bunde held brief for Mr. Okeyo for the defendant while Mr. Minda appeared for the Plaintiffs. In his submission in support of the application, Mr. Bunde relied on the grounds set out on the face of the application and on the supporting affidavit of Awuor Owiti sworn on 24th June, 2013 together with the annexures thereto. Mr. Bunde submitted that judgment herein was entered against the defendant without its participation due to a mistake on the part of its previous advocate which mistake should not be visited upon the defendant. Mr. Bunde urged the court to allow the defendant's application for the sake of justice and fairness.
 8. Mr. Minda for the plaintiff on his part submitted that; it is not disputed that hearing notices were duly served upon the defendant's advocates who were previously on record. He submitted that it is only the said advocates who could explain as to why they failed to attend court and that there was no explanation from them placed before court. Counsel submitted that there is no good reason given as to why the judgment entered herein should be set aside. He submitted further that the court can only exercise its discretion in favour of the defendant if good reason is given as it is that good reason that can form a basis on which such discretion can be exercised. He submitted that the defendant's previous advocate had consistently failed to attend court on various occasions despite proper service which is a demonstration of lack of interest in the case.
 9. Counsel submitted further that the defendant had not stated in the affidavit in support of the

- application what loss it will suffer if the judgment is not set aside. He submitted further that there is no evidence of mistake of advocate which the defendant has relied on to anchor the present application as there is no evidence on record that the firm of Wasuna and Co. Advocates made a mistake in not attending the hearing of this matter. Counsel submitted that Wasuna & Co. Advocates may have failed to attend the hearing of the matter deliberately in which case the issue of mistake of advocate does not arise and the court cannot therefore exercise its discretion to set aside the judgment herein. Counsel submitted that litigation should come to an end which end would be achieved by the dismissal of the defendant's application.
10. I have considered the defendant's application and the affidavit filed in opposition thereto. I have also considered the submissions by the advocates for the parties and the case law cited. 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 is 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."**
 11. 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"**.
 12. The foregoing are the principles upon which I will consider the defendant's application herein. As I stated at the begging of this ruling, when the defendant was served with the summons to enter appearance herein, it appointed the firm of Wasuna & Company Advocates to act for it. The said advocates entered appearance and filed a statement of defence. This was an indication that the defendant was desirous of defending this suit. The problem arose when this matter was listed for hearing.
 13. As I have set out above in detail, the defendant's said advocates were afforded every opportunity to appear in court and defend this suit but they failed to do so. This resulted in judgment being entered against the defendant on 10th May, 2013 without evidence being tendered on its behalf. The defendant got to know of this judgment by chance on or about 14th June, 2013 and immediately instructed its advocates on record to file the present application which was filed on 24th June, 2013 to set aside the said judgment. This again is a demonstration of the desire on the part of the defendant to defend this suit. There is no indication of whatsoever nature that the defendant failed to appear in court with a view to evade, obstruct or delay the course of justice.
 14. I am satisfied that this is a fit and proper case to exercise my discretion to set aside the judgment entered herein. I would however not set aside the said judgment unconditionally. This is because the defendant has failed to disclose to the court the reason why its previous advocates failed to appear in court. A party seeking the exercise of the courts discretion must make full and frank disclosure of all relevant facts. I have also noted that the matter had progressed up to the taxation stage and as such setting aside the judgment entered herein would subject the Plaintiff to substantial thrown away costs.

15. Due to the foregoing, the defendant's application dated 24th June, 2013 is allowed in terms of prayer 4 thereof on condition that, the defendant shall pay into an interest earning bank account in a reputable bank at Kisii in the joint names of the advocates for the Plaintiffs and the advocates for the defendant a sum of Ksh. 587,327.00 being the principal amount that was awarded to the Plaintiffs herein within 30 days from the date hereof pending the hearing and determination of this suit and shall also pay to the Plaintiffs, thrown away costs assessed at Ksh.10,000.00 within the same period and in default of making any one of the said payments, the judgment entered herein on 10th May, 2013 shall be reinstated automatically and the Plaintiffs shall be at liberty to proceed with the execution of the same. The Plaintiffs shall have the costs of this application.

Delivered, dated and signed at KISII this 29th day of November, 2013.

S. OKONG'O

JUDGE

In the presence of:

Mr. Soire h/b for Minda for the plaintiffs

N/A for the defendant

Mobisa Court clerk

S. OKONG'O

JUDGE