



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 310 OF 1993

AGGREY MARUNGU

WAKHU.....PLAINTIFF

V E R S U S

DAVID OTIENO

OBULEMILE.....DEFENDANT

R U L I N G

On 16th March 2010, judgment was delivered in favour of the plaintiff. The plaintiff was declared to be the owner of parcel No. Marama/Shikunga/1034. At page 3 of the judgment, the court stated thus:

“From the plaintiff’s evidence and that of PW2 I do find that the plaintiff has proved his case against the defendant as prayed. It is hereby declared that the defendant holds land title number Marama/Shikunga/1034 in trust for the plaintiff. The Land Registrar to rectify the record and have plot number Marama/Shikunga/1034 registered in the name of the plaintiff Aggrey Murungu Waku. Each party to meet his own costs.”

The proceedings leading to the judgment were conducted in the absence of the defendant. This was after the court was satisfied that the defendant had duly been served with a hearing notice for the date that the suit had been scheduled for hearing. On 2nd March 2011, the defendant filed an application pursuant to the provisions of **Order 10 Rule 11** of the **Civil Procedure Rules** seeking to have the ex parte proceedings and the subsequent judgment that emanated therefrom to be set aside. The defendant pleaded with the court to give him a chance to ventilate his defence. The grounds in support of the application are stated on the face of the application. The defendant complained that he was not informed of the date that the case was fixed for hearing. It was his case that his former advocates on record, the firm of Lugulu & Company advocates was no longer in active practice and therefore they could not possibly have been served to attend court. The defendant urged the court to give him an opportunity to ventilate his defence on its merits so that justice may be done in the case. The application supported by the annexed affidavit of the defendant. The application is opposed. The plaintiff filed a replying affidavit in opposition to the application. In essence, he stated that the defendant had not placed any sufficient reason before the court

to enable the court exercise its discretion in his favour and thereby set aside a judgment which was regularly entered. He urged the court to dismiss the application with costs.

At the hearing of the application, this court heard oral submissions made by Miss Andia for the defendant and by Mr. Athung'a for the plaintiff. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the defendant made a case for this court to set aside the *ex parte* proceedings and the subsequent judgment. This court has perused the proceedings of this court. It is not disputed that the defendant's then advocates M/s Lugulu & Co. Advocates was served with the hearing notice when the case was listed for hearing on 13th October 2009. Although the said firm received the hearing notice under protest, it was clear that the service was proper. The hearing notice was served more than a month prior to the date scheduled for the hearing of the case. The defendant's advocate was specifically served on 8th September 2009. It is the defendant's case that service to the said firm of advocates did not constitute proper service because the said firm of advocates clearly indicated that they had lost contact with him. According to the defendant, it was the duty of the plaintiff to ensure that he had been properly served upon becoming aware that the said firm of advocates no longer acted for him. As can be expected in the circumstances, the plaintiff is of a different view. It is the plaintiff's contention that since the firm of Lugulu & Co. Advocates had not filed any papers ceasing to act for the defendant, the plaintiff acted within the law when it served the said firm with the hearing notice for the date that the case was scheduled to be heard.

This court has evaluated the facts of this case. It was clear to the court that the basis of the defendant's application in seeking to set aside the judgment is that the plaintiff ought to have known that the firm of Lugulu & Co. Advocates, the defendant's then advocates, were no longer in active practice at the time. Therefore, the defendant contends that he ought to have been personally served. The argument advanced by the defendant does not wash. This was because, having appointed an advocate, the only person who could legally be served with documents was the said firm of advocates. That was unless the defendant either withdrew instructions from the said advocate or alternatively the said firm of advocates obtained the leave of this court to cease acting for the defendant. The said firm of advocates were therefore properly on record as acting on behalf of the defendant when they were served with the particular hearing notice.

The principles to be considered by the court in determining whether or not to set aside an *ex parte* judgment are well settled. In **Shah v Mbogo [1967] EA 116** it was held that the court had unfettered discretion to set aside any *ex parte* judgment provided that such discretion should be exercised for the sole intention of avoiding injustice or hardship that may have resulted from an accident, inadvertence, or excusable mistake or error. Such discretion was not meant to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice. In **Patel v East African Cargo Handling Services Limited [1974] EA 75** Sir William Duffus P held at page 76 as follows:

“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 it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless there is a defence on merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In the present application, the defendant was required to pursue the progress of his case with his advocate. The case is the property of the litigant and not his advocate. It is his duty to be aware of the progress of his case. If he loses contact with his advocate, he cannot use that fact as an excuse in an application to set aside an *ex parte* order or judgment. In the present application, it was clear that the defendant was indolent. He claimed he was not aware of the fate of his case even after a year had elapsed after the delivery of the judgment. The plaintiff has gone ahead and executed the judgment. He is now the registered owner of the suit property. This court cannot exercise its discretion in favour of such an

indolent and negligent litigant as the defendant. In any event, the justice of this case demands that the plaintiff, who has been a conscientious litigant, should not be prejudiced by the defendant's indolence.

It is clear from the foregoing that the defendant's application dated 28th February 2010 lacks merit and is hereby dismissed with costs.

DATED AT KAKAMEGA THIS 21ST DAY OF JUNE 2011

L. KIMARU

J U D G E