REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE NO. 205 OF 2007
MUKURIA OLE KOILEKEN……1ST PLAINTIFF
HELLEN NOOSEYIA MERIKI……2ND PLAINTIFF

VERSUS

JOHN MWANGI KOILEKEN……..DEFENDANT

RULING

By an application brought by way of a Notice of Motion dated 5th August 2009 the Applicant (Defendant), sought two principal orders, namely, a stay of execution of the judgment of the court delivered on 23rd July 2009, and that the said judgment be set aside, the defendant be granted leave to defend the suit on its merit.

The Application was brought under the provision of Order IXB rule 8 of the Civil Procedure Rules. The said rule empowers the court to set aside, or vary upon terms that are just a judgment which has been entered under rule 3 of the said order. **Rule 3** says -
"3. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends and if the court is satisfied -

(a) that the notice of hearing was duly served, it may proceed exparte,

(b) …..
(c) ….."

In this case it is apparent from both the judgment and the 2nd Plaintiff's Replying Affidavit that the court was satisfied that the Applicant/Defendant's Advocate was duly served, with the Hearing Notice, but appears to have failed to diarise the matter in his Diary, and consequently failed to attend court on the hearing date. The court therefore proceeded *ex parte*, and heard the Plaintiffs' evidence and delivered its judgment on the basis of the uncontroverted evidence of the Plaintiffs and granted the prayers they sought basically the cancellation of the Title to the suit land NAROK/CIS-MARA/NAIRAGIE ENKARE/1043 and that a new one be issued in the name of the 1st Plaintiff, and directed the Applicant *(Defendant)* to deliver immediate possession of the suit land to the plaintiffs.

It is that judgment and orders thereunder which the Defendant/Applicant seeks to set aside. He blames the entire failure to file a defence, and appearance for the hearing to his erstwhile Advocate who upon being given instructions merely entered an appearance but never filed any defence. His new Advocate, Mr. Musembi, submitted that a party should not be condemned upon the failure or default of his Advocate, and prayed that the judgment be set aside as a matter of right - *ex debito justitiae*.

On his part Mr. Murimi counsel for the Plaintiff/Respondent opposed the application. He argued that the Applicant concedes that he was served with the plaint, he took it to his Advocate, and after that went into deep slumber for a period of 2 years from September 2007, and failed to follow his Advocate. In addition, there is no affidavit from his former Advocate to support this state of affairs.

Mr. Murimi also took issue with the averments in paragraph 6 of the Applicant's Supporting Affidavit which indicates that the Applicant had issues with his Advocates, as early as January, February and March 2009 *(when he visited his former Advocates' offices)* and yet failed to check up the status of the case himself.

The right to defend a suit and the right of the plaintiff to have his suit heard and determined are indeed concurrent rights, and it is not merely failure of the Advocate, but also of the Applicant who failed to follow up his Advocates, and that this is no fault of the Plaintiff. Counsel relied on the decision of the Court of Appeal in the case of **EXPRESS (K) LTD vs. PATEL [2001] E.A. 1 54 (CAK),** where the court dismissed an appeal against a decision of the court declining to set aside a judgment entered in default of filing a defence.

Mr. Murimi also added another reason unique to this matter, and why judgment should not be set aside. The 1st plaintiff gave evidence and died before judgment was delivered. His evidence would be lost if the judgment was set aside, and such an order would thus be very prejudicial to the Plaintiff/Respondent.

I have considered these rival arguments. The first question to answer is whether a judgment delivered after the death of a plaintiff is a regular judgment? Mr. Musembi for the Applicant suggested that such judgment is irregular and should be set aside as a matter of course.

The answer to this question lies in Order I, rules 1 and 4 of the Civil Procedure Rules. Rule 1 provides that all persons may be joined in one suit as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally … Rule 4 on the other hand provides that judgment may be given without amendment -

(a) for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable to their respective liabilities;

In this case, although the plaintiffs were father and daughter, the relief sought went to the father - that the suit land belonged to him, and title to any other person be cancelled. The 2nd plaintiff did not get any relief, but was in my humble opinion, as a party, entitled to receive the judgment in vindication of her father's claim, notwithstanding he was dead at the time of pronouncement of the judgment. That judgment was therefore in my humble opinion again, proper and not irregular as contended by Mr. Musembi, Counsel for the Applicant.

Having disposed of that question, I must return to the core issue, whether or not the judgment should be set aside.

The main ground for opposing the application was that the delay of 8 months by the second advocate *(from his instructions in about January to August 2009)* was unexplained. In the case of **Express (K) Ltd vs. Patel** one of the grounds *(in the High Court)* for not dismissing the application to set aside was that the appellant had not ***stated what caused the delay in entering appearance (or in their case defence) and that judgment entered properly cannot be set aside on the mere say so of the Applicant."***

Order IXB rule 8 confers upon this court the discretion to set aside an exparte judgment on terms. Like all discretion it is to be exercised judiciously, that is to say, on sound principles of law and equity. The sole ground advanced by Mr. Musembi for setting aside the judgment is the failure of counsel for the applicant

to file a defence in the matter, and to attend the hearing of the case despite being served by the plaintiff's counsel. Indeed, whatever the issues he had with the Applicant, never came out of the Application as the Applicant failed to secure any affidavit from him. It is perhaps too much to expect from an Applicant who has fallen out with his Advocate that he would go back to him for an Affidavit. It is clear from the Applicant's Supporting Affidavit that his counsel failed him. Failure by counsel should not be visited upon an innocent party.

The delay of some 7 months from January to July when the Applicant discovered that his counsel was not responding to his inquiries is not an issue. Delay in bringing an application to set aside a judgment or orders thereof, relates, not to any period before, but only o the period of the judgment. Judgment here was delivered on 23rd July 2009. The application to set aside the judgment was made on 5th August 2009 by new counsel was on record. The delay was just under 13 days. It was not unreasonable delay. Besides, the Applicant believed in his Advocate. There are therefore good reasons for the court to exercise its discretion to set aside the judgment.

I will however not do so. The order would be pyrric. It is clear from the Respondent's Advocate Affidavit that the suit land belonged to the first plaintiff. He is now dead. The proper step for the parties to take is to apply for Letters of Administration for the deceased first Plaintiff's estate and to determine the rightful heirs.

For that reason I decline to set aside the judgment, and dismiss the application dated 5th August 2010 and direct each party to bear its own costs.

Dated, signed and delivered at Nakuru this 1st day of October 2010

M. J. ANYARA EMUKULE
JUDGE