



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 107 OF 2017

MARGARET NABUIN LOMATONG.....PLAINTIFF

VERSUS

SYLVIA ABEI KOSIAE.....1ST DEFENDANT

JACKSON EKIRU KOSIAE.....2ND DEFENDANT

RULING

The Application

1. By a notice of motion dated **4/11/2020** and filed on **12/11/2020**, brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 40 Rules 1(a) & 4(1)** and **50** of the **Civil Procedure Rules**. The applicant/plaintiff seeks the following orders:

(1) ...spent

(2) ...spent

(3) That the honourable court be pleased to set aside its orders of 14/10/2020.

(4) That the applicant herein be granted leave to respond to the respondent's application dated 11/10/2020.

(5) That the honourable court do grant any further orders it deems fit to grant.

1. (6) That costs of this application be allowed.

2. The application is supported by the affidavit of the plaintiff's counsel sworn on **4/11/2020**. The application is based on the ground that failure to respond to the said application was not deliberate but due to oversight on the part of the plaintiff's counsel for which the client should not be made to suffer. Counsel for the applicant attributes his failure to act in the matter to his inability to access the court link on the **14th October, 2020** when the matter came up for hearing electronically by way of an *e-conference*. The application is not opposed.

3. I have considered the background to the instant application according to the court record. It is that an application was filed by the Nasike Wafula & Associates, the defendants' advocates seeking orders that there be a stay of execution of the decree in this matter and that the *ex parte* judgment be set aside and that the defendants be granted an opportunity of being heard. The application came up for directions on **16/9/2020** and the court ordered that the application be disposed of by way of written submissions and gave the parties a timeframe for the filing of their respective submissions. The court also set the matter down for a mention on **14/10/2020**, the date on which counsel for the instant applicant states he had problems accessing court by electronic means. On that day the court granted the application dated **11/9/2020** as it was not opposed. That is what has generated the current application.

4. There is no response to the instant application. Though the plaintiff's counsel has made an apparent mistake in referring to the application dated **11/9/2020** "as the application dated **11/10/2020**", this is an error that may be overlooked since the proceedings of **14/10/2020** related only to the application dated **11/9/2020**.

5. The application dated **11/9/2020** had the effect of setting aside the judgement entered in the matter. The defendant's application for setting aside had been based on the allegation that the suit had to their knowledge been earlier dismissed but was reinstated by way of an application that was never served upon them. The court agreed with them and set aside the judgment in order to enable them be heard.

6. It is clear from the record that the advocate for the plaintiff was aware of the existence of the application dated **11/9/2020** and the contents

of that application and the effects of not filing even a response thereto.

7. This court has been constituted for the purpose of hearing matters on merit and not on the basis of technicalities only. Where *ex parte* judgment has already been set aside by reason of default on the part of the plaintiff to defend an application seeking such a setting aside order, the court would be going contrary to one of the fundamental principles upon which it was constituted if it set aside the earlier orders setting aside judgment. It matters not that the counsel for the plaintiff was for any technical reasons unable to access the court by electronic means. This is not to say that observance of procedure does not matter. It does. However, under our current Constitutional dispensation every person has the right to have a dispute that is capable of resolution under the law heard and determined in a fair manner before an impartial court or tribunal or other body, to paraphrase **Article 50** of the Constitution. Besides **Article 159 2(b)** and **2(d)** provides that justice shall not be delayed and it shall be administered without undue regard to technicalities.

8. It is clear that as the plaintiff focuses on reinstating an *ex parte* judgment time is passing by, and it would be quite unfortunate perchance the instant application was granted, and it later turned out that the obtainance of the said judgment was irregular, just as had been found in the earlier application dated **11/9/2020**.

9. I believe it is now the appropriate moment for this court to grant the parties justice by way of a substantive hearing as envisaged by the above provisions contained in the Supreme Law of the Land. The matters raised by the plaintiff's instant application are merely procedural. No one has any vested right in procedure.

10. Finally, upon a perusal of the court file I have found that there is no affidavit of service showing that the instant application was served upon the respondents and granting it in the absence of a sworn affidavit of service may only promptly give birth to yet another application by the respondents for setting aside of the orders sought herein.

11. Looking at this matter in its entirety this court is of the view that in so far as judgment has already been set aside in this matter, and the parties are now at par just as at the inception of the suit, the court process should not be used by the plaintiff to incubate and breed successive applications of setting aside orders made in previous applications as this may subject the court process to ridicule.

12. For the foregoing reasons I find that the application dated **4/11/2020** has no merit and the same is hereby dismissed. However each party shall bear their own costs thereof. This suit shall be mentioned on the **10th March, 2021** to fix a suitable hearing date.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 26th day of January, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.