REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO.245 OF 2017

GILBERT CHARO MSHANGA.......................................PLAINTIFF

VERSUS

CHINA HENAN INTERNATIONAL CO-OPERATION(GROUP)

COMPANY LTD...DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein on 16th December 2019, China Henan International Co-operation (Group) Company Ltd (the Defendant/Applicant) prays for orders that this Honourable Court be pleased to set aside the Judgment of Court delivered on 31st January 2019 as well as the proceedings of 26th June 2018 and the consequent decree. The Defendant further urges the Court to grant it leave to file a defence herein.

2. The application which is supported by an affidavit sworn by the Defendant's Manager Chen Jun is based on the grounds:

a) That Judgment was delivered herein on 31st January 2019 and the Defendant has been condemned unheard;

b) That the Plaintiff failed to disclose to the Court that he had disposed off the suit property to one Leonard Mbonani Bikanga prior to the filing of the suit and that he nolonger had any proprietary interests thereon;

c) That the Defendant was served with summons to Enter Appearance on 14th December 2017 and they proceeded to instruct P.G. Kangu & Company Advocates and Michira Messah Advocates to represent them;

d) That even though the previous Advocates filed a Memorandum of Appearance on 21st December 2017, they did not file a Statement of Defence;

e) That the said Advocates neither informed the Defendant of their failure to file the Statement of Defence nor did they inform the Defendant of the hearing dates served upon them;

f) That the Defendant only came to learn that the case was determined when they were served with warrants of sale and a proclamation by the Auctioneers;

g) That the negligence and/or ignorance of the Defendant's previous Advocates on record ought not to be visited upon them;

h) That the execution and implementation of the decree will occasion immense injustice to the Defendant who stands to suffer irreparable loss; and

i) That it is therefore only fair and in the interest of justice that the Defendant be given a chance to be heard and hence the application herein ought to be allowed.

3. The application is opposed. In his Replying Affidavit sworn and filed herein on 16th January 2020, Gilbert Charo Mshanga (the Plaintiff/Respondent) avers that the Defendant was properly served with Summons to Enter Appearance and it proceeded to appoint two Law Firms to represent itself in these proceedings.

4. The Plaintiff avers that the Defendant has failed to disclose the reasons its Advocates failed to file a Statement of Defence to enable the Court determine whose fault it was. The said Advocates have also not filed anything to show why they failed to file a Statement of Defence and or to take part in the proceedings herein.

5. The Plaintiff asserts that having been made aware of the suit, it was the duty of the Defendant to follow up the progress of the case and they could not just sit on their laurels and hope that by stroke of luck the case would fade away.

6. The Plaintiff reiterates that he is the registered proprietor of the suit property and asserts that he has not transferred the same to any third party as stated by the Defendant and urges the Court to dismiss the application.

7. I have perused and considered the Defendant's application as well as the Plaintiff's response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

8. Order 10 Rule 11 of the Civil Procedure Rule empowers the Court to set aside an ex-parte Judgment for default of appearance and defence. The discretion of the Court to set aside an ex-parte default Judgement was considered by the Court of Appeal in ***Pithon Waweru Maina –vs- Thuka Mugiria (1983) eKLR*** where Kneller JA observed as follows:

> ***"The former relevant order and rules were Order IX rules 10 and 24. The Court has no discretion where it appears there has been no proper service;*** *Kanji Narana –vs- Vernji Ramji (1954) 21 EACA 20**; and the power to set aside the Judgment does not cease to apply because a decree has been extracted**. Fort Hall Bakery Supply Company –vs- Fredrick Muigon Wargoe (1958) EA 118**.***
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> ***The Court has a very wide discretion under the Order and rule and there are no limits and restrictions on the discretion of the Judge except that if the Judgment is varied it must be done on terms that are just:*** *Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75, BC.*
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> ***This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.*** *Shah –vs- Mbogo (1969) EA 116, 123 BC Harris J.*

9. Accordingly, to set aside a regular default Judgment, the Defendant/Applicant ought to offer a reasonable explanation why the Memorandum of Appearance and/or Defence were not filed within the prescribed period.

10. In the matter before me, it was not disputed that the Summons to Enter Appearance was served upon the Defendant on 14th December 2017. Some seven (7) days later on 21st December 2017 Messrs P.G. Kaingu Advocates filed a Memorandum of Appearance herein for the Defendant dated the same day. On that very day however as if on cue, another law firm-Messrs Michira Messah & Company Advocates filed a "Notice of Appointment of Advocates" also seeking to act for the same Defendant.

11. As it turned out none of the Advocates filed a Statement of Defence. And none of them turned up at the trial despite service of hearing notices made upon them. That position is acknowledged by the Defendant at paragraphs 5 and 6 of Chen Jun's Supporting Affidavit as follows:

> ***"5. That I aver that the Defendant/Applicant on the 21st day of December 2017 instructed an Advocate Firm by the name of P.G. Kaingu & Company as well as Michira Messah to represent it in this matter.***
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> ***6. That I am informed by my Advocates on record that the said firms of Advocates filed Memorandum of Appearance on the 21st day of December 2017 but did not file a Statement of Defence."***

12. As to why the Defendant neither filed a Statement of Defence nor participated in these proceedings, an explanation is offered at Paragraph 13 to 16 of the Supporting Affidavit as follows:

> ***"13. That I aver that my prior advocates on record never informed me the progress of the matter.***
>
> ***14. That I aver that the said firms of Advocates were instructed by the Director of the Defendant who on most occasions is out of jurisdiction.***
>
> ***15. That I aver that on several occasions I inquired from the firm of Michira Messah the progress of the matter whom informed me that the matter was due for hearing but did not say when.***
>
> ***16. That I aver that I was not aware that the matter had proceeded for hearing until the 10th day of December 2019 when I was served with a proclamation notice as well as a warrant of sale of property in execution of decree for money…."***

13. As can be seen from the foregoing, the Defendant does not disclose the name of the director said to have instructed the two firms nor does it give any evidence of the inquiries said to have been made to the former advocates about the position of the suit herein. Setting aside a Judgment or decree is in my view not a matter of right. It would be a travesty of justice where the Court were to set aside a Judgment due to the indolent conduct of a Defendant.

14. While the Defendant heaps the blame on its former Advocates for the failure to file a Statement of Defence and to take part in the Trial, it does not demonstrate what actions it took to move the matter forward. As Kimaru J stated in ***Savings and Loans Ltd –vs- Susan Wanjiru Muritu (Nairobi Milimani) HCCC No. 397 of 2002:***

> "*Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.*"

15. In the matter before me, the summons were served upon the Defendant on 14th December 2017. The matter proceeded to hearing and Judgment was delivered herein more than a year later on 31st January 2019. There is no evidence that the Defendant took any action to find out from the former Advocates as to what was going on. Indeed, it took no action until almost another year later when the Plaintiff moved to execute the decree in December 2019.

16. This being a matter for the exercise of judicial discretion, the decision whether or not to set aside the Judgment must be based on evidence and sound legal principles and not on private opinions, sentiments and sympathy. In such circumstances and as the custodian of justice, the Court must always stay alive to the interests of both parties. While it is true that mistakes of Counsel should not be visited upon their clients, it should be noted, as the Court of Appeal observed in ***Tana and Athi Rivers Development Authority –vs- Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR***, that:

> ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."***

17. In the premises, I am not persuaded that there is any merit in the application to set aside the Judgment. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE