

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 29 OF 2002

LYDIAH MUTHONI NDUNGU.....PLAINTIFF

VERSUS

FRANK KADENGE LIJODI.....DEFENDANT

RULING

This is an application made under **Order IXB Rule 3 and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** for orders that the judgment entered against the Defendant pursuant to the ex-parte proceedings and all the consequential orders be set aside upon terms as the Court may deem appropriate. The Application is supported by the annexed affidavits of Frank Kadenge Lijodi and C. D. Obura Obwatinya. The grounds in support of the Application are that there was a lapse in communication between the Defendant and his Advocate. The Defendant has further stated that he was bereaved at the time the case was scheduled to be heard. The Defendant further states that it would be in the interest of justice for the ex-parte judgment entered to be set aside and heard on its merits as the day this case was heard was the first time that the case had been listed for hearing. In the supporting affidavit of Frank Kadenge Lijodi he has deposed that he had a good defence that should be allowed to be ventilated in a full trial. He further deposes that he could not attend the hearing of the case on the 10th of May 2004 as his uncle, John Moroyian ole Tameno had died and he was attending his funeral. The Defendant further deposed that he was unable to communicate to his Advocate and inform him of the bereavement as there was a communication problem at Loitoktok. The Defendant further deposed that it would be in the interest of justice for the case to be heard and determined on merits.

Mr C. D. Obura Obwatinya, the Advocate for the Defendant swore an affidavit stating that the reason why he did not attend Court during the hearing of the case on the 10th of May 2004 was due to the fact that he had problems travelling from Eldoret to Nakuru owing to the reforms that were being carried out by the Government on the matatu industry at the time. Mr Obwatinya further deposed that he was unable to communicate to the Defendant as he resided in Loitoktok where there was communication difficulty. He further deposed that it would be in the interest of justice if the case, which involves land, could be heard on merits. In his submission before Court, Mr Obwatinya, Learned Counsel for the Defendant reiterated the contents of the Application and the affidavits in support thereof and prayed that the application be allowed. The Plaintiff opposed the application. She filed a statement of grounds of opposition and a replying affidavit to the Plaintiff's application. The Plaintiff stated that the rules under which the Defendant brought the application would not avail him the orders sought.

The Plaintiff in her replying affidavit deposed that the Defendant's application lacked merit. The Defendant further deposed that she purchased the suit land in a public auction from Barclays Bank who were exercising their power of sale as chargees. The Defendant further deposed that since the suit was filed the Plaintiff had not made any attempt to join the said bank as a party to this suit. The Defendant stated that the Court would be acting in vain if it allowed the application as the Defendant had already been evicted from the suit land and the Plaintiff had taken possession of the same. The Plaintiff further deposed that the Defence filed by the Defendant did not raise any triable issues that could make this Court order that the case be heard on merits. The Plaintiff further deposed that no cogent reasons were advanced why the Defendant and his Advocate failed to attend Court when this case was scheduled to be heard.

Miss Bosibori, Learned Counsel for the Plaintiff reiterated the contents of the replying affidavit and the grounds filed in opposition. She further submitted that the judgment entered against the Defendant was regular and lawful. It was her submission that the Application had been overtaken by events as the Defendant had already been evicted from the suit land and the Plaintiff had already taken the

possession of same pursuant to the said judgment obtained. Counsel for the Plaintiff further submitted that the Defendant was indolent in bringing this application to this Court as the Defendant were served with the decree before execution was levied. She urged the Court to dismiss the Application.

I have read the pleadings filed in Court both in support and in opposition of the Application. I have also considered the rival submissions made by Counsel for the Plaintiff and Counsel for the Defendant. The issue for determination by this Court is whether the judgment entered against the Defendant pursuant to ex parte proceedings should be set aside. The Defendant and his Counsel have stated that they were unable to attend Court on the day this case was scheduled to be heard due to problems of communication and bereavement on the part of the Defendant. The Defendant is urging this Court to set aside the said judgment so that the issues in dispute may be heard on merit. On their part the Plaintiff has deponed that pursuant to the said judgment, the Defendant had been evicted from the suit land and further that the Plaintiff had taken possession of the said suit land. According to the Plaintiff, the Defendant's application had consequently been overtaken by events.

I have perused the record of the Court. The Plaintiff fixed the hearing of this case for the 10th of May 2004 on the 16th of December 2003. This hearing date was fixed in the absence of the Defendant's Counsel. The Defendant's Counsel were however served with the hearing Notice on the 16th of February 2004 which they duly acknowledged. An affidavit of service was duly filed. On the 10th of May 2004 neither the Defendant nor his Counsel appeared in Court for the hearing of the case. This Court being satisfied that the Defendant was properly served ordered the Plaintiff to proceed with the hearing of the case, the absence of the Defendant notwithstanding. Judgment was delivered on the 14th of May 2004.

This Court entered judgment in favour of the Plaintiff and made an order that the Defendant be evicted from the suit land, thirty days after the Defendant was notified the judgment of the Court. From the record, it is evident that the Defendant's Counsel became aware of the judgment on the 15th of May 2004 when they were served with the draft decree for their approval. In spite of being aware of this fact, the Defendant did not make the application to set aside the judgment until the 26th of July 2004 after the Defendant had already been evicted from the suit land.

I do find that the Defendant was indolent. No cogent reasons were advanced to this Court why the Defendant, having been made aware of the judgment by the Plaintiff, did not make the Application immediately after the said judgment was entered. Further the reasons put forward by the Defendant why he and his Counsel failed to attend Court when the case was fixed for hearing does not carry any water. In this era of mobile telephony, it is inconceivable that the Defendant could not communicate with his Counsel and inform him of his bereavement. Further it was not difficult for the Counsel for the Defendant to inform another Advocate within the station and ask him to hold his brief while the said Advocate was travelling from Eldoret to Nakuru. In my mind, the reasons given by the Defendant is a red herring meant to divert this Courts attention from the fact that the Defendant did not have absolutely any reason why he failed to attend Court

. In any event, even if, the Defendant was bereaved, the funeral of his uncle was on the 12th of May 2004 while the case had been fixed for hearing on the 10th of May 2004. If the Defendant was keen to pursue his case, he would surely have attended Court on the 10th of May 2004 and then attended his uncle's funeral on the 12th of May 2004. I have looked at the Defence filed by the Defendant. The Plaintiff filed this suit seeking vacant possession of parcel No. Laikipia/Marmanet/485 which she had purchased in a public auction from a bank which was exercising its power of sale as chargees. The Plaintiff is the duly registered owner of the said parcel of land after the bank had transferred the said parcel of land to her.

The Defendant did not challenge the said sale by public auction. The Defendant only moved to Court when the Plaintiff had taken the initiative to file this suit to evict him from the suit land. Pursuant to the judgment of this Court, the Defendant has already been evicted from the said suit land. This Court will not act in vain. The Defendant having been evicted from the said suit land, it would serve no useful purpose if the application is allowed. The Defendant's application has already been overtaken by events. No useful purpose would be served if an order is made that case to be heard on merit when the

circumstances on the ground is such that this Court would be acting in vain.

In the premises therefore, the Application filed by the Defendant to set aside is hereby dismissed. The Plaintiff shall have the costs of the Application.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE