



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 5 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN CHERANGANY

LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

BOAZ KAINO.....2ND RESPONDENT/APPLICANT

EX-PARTE.....RICHARD CHEPKONGA/RESPONDENT

RULING

Applicant

1. Before me is the 2nd respondent’s Notice of Motion dated **8/12/2020** brought under **Order 10 Rule 11, Order 22 Rule 52** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, seeking the following orders:

(i) ...spent

(ii) ...spent

(iii) ...spent

(iv) That this honourable court be pleased to set aside the *ex parte* judgment entered on 19/11/2018 and all other consequential orders.

(v) That this honourable court do grant leave to the 2nd respondent to file a reply to the Judicial Review Application and set down the suit for hearing.

(vi) That costs of this application be provided for.

2. The sworn affidavit of the applicant dated **8/12/2020** was filed in support of the application. The grounds relied upon by the applicant are that the Judicial Review application proceeded *ex-parte* without the knowledge of the applicant; that the firm of Ms. C.K. Yano & Co. Advocates who was on record for the applicant was served and received notices without acting on them and/or appearing during the hearing of the said judicial review application; that the applicant ought not to be punished as a result of the commissions and/or omissions of the advocate who was on record acting for him; that the applicant has a good and valid response against the *ex-parte*’s application and should not be shut out of the litigation; that the applicant’s application is in good faith and that *ex-parte* shall suffer no prejudice if this application is allowed.

The Response

3. The *ex-parte* applicant filed a replying affidavit sworn on **21/1/2021**. His response is that the application brought before to this honourable court is in bad faith and meant to mislead the court; that the judicial review application was heard and determined unopposed; that despite being served with the Judicial Review Application, the Applicant herein failed to respond to it; that the 2nd Respondent /Applicant admits to being served with the Judicial Review Notice of Motion through his former Advocates on record, the firm of M/s Yano & Company Advocates; that the 2nd Respondent/ Applicant was aware of the proceedings against him but chose not to participate in it; that the Application before this Honourable Court is meant to prevent the *ex-parte* Applicant from enjoying the fruits of his litigation; that failure to

act or appear in court by the 2nd Respondent/Applicants' former counsel on record is untenable; that the 2nd Respondent/Applicant was not keen in prosecuting his case since the Application is filed **24 months** after *ex-parte* judgment was entered hence he is guilty of laches; that the 2nd Respondent/Applicant has not given sufficient reasons to warrant the orders sought and that it is only just and fair that the application is dismissed with costs to the *Ex-parte* Applicant/Respondents.

4. The Applicants did not file any supplementary affidavit.

Submissions

5. The applicant's written submissions were filed on **9/2/2021** while the *ex-parte* applicant filed his on **24th February, 2021**.

Analysis, Issues and Determination

6. I have carefully considered the application, the supporting affidavit, the annexures thereto, the replying affidavit, the rival submissions and the authorities submitted by both counsels and find that the issues for determination are:

(a) Whether the judgment should be set aside?

(b) Whether the 2nd Respondent should be granted leave to file a Reply to the Judicial Review Application and set the suit for hearing?

(c) Who bears the cost of the application?

7. A court has unfettered discretion to set aside its judgment. In **Patel v EA Cargo Handling Services Ltd (1974) EA 75** the Court stated that:

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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 to 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 it is satisfied that there is a defence on the merits. In this respect, the defence on the 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.”

8. The courts' discretion to set aside judgment is therefore unfettered.

9. In **John Mukuha Mburu -vs- Charles Mwenga Mburu (2019) eKLR** the court held that:-

“It is trite that the test to correct approach in an application to set aside a default judgment are: firstly, whether there was defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the Court of Appeal in the case of **Mohammed & Another vs Shoka (1990) KLR 463.**

10. Has the Applicant satisfied the test laid down in the above case?

11. Does the applicant have defence on merit?

12. In **Patel -vs- Cargo Handling Services** the Court of Appeal considered the meaning of defence and held that:

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J. put it, a triable issue.”

13. The Applicant herein has annexed a draft response to the application dated **6th July 2010**. In my considered view, the draft response does not counter the averments raised in the supporting affidavit of the *ex-parte* applicant rather it narrates the events which took place that resulted to the filing of the application dated **6/7/2010**. The application does not raise any triable issues to be adjudicated by the court at all.

14. On the issue of delay, I find that judgment was delivered on the **19/11/2018** whereas the instant application was filed on the **8/12/2020; 2 years** after judgment was delivered. I find the delay of **2 years** to be unreasonable.

15. The next issue to consider is whether the delay has been explained by the applicant.

16. The suit commenced in **2010** and the applicant herein was served with the application for review together with all other court documents filed in court through his former advocate. He does not dispute service. He acknowledges service of the court documents through his former advocates; the firm of Ms. Yano Company Advocates who acted for him (the applicant) in the matter.

17. The court was satisfied that service was effected upon the applicant/2nd respondent herein, it proceeded to hear the substantive

application dated **6/7/2010**. The Applicant does not dispute service of the court documents. He did not file any response to the application and did not appear in court for hearing and mentions of the application. Upon failure of the Applicant/2nd Respondent to attend court, the court proceeded to hear the application *ex-parte* and it delivered its judgment on the **19/11/2018**. This prompted the Applicant herein to file the instant application.

18. The 2nd Respondent/Applicant attributes his non-attendance in court to the mistake of his then counsel on record; that he was served and received notices without acting on them and or appearing during the hearing therefore he ought not be punished as a result of commissions and/or omissions of the advocate who was on record for him.

19. I find that the Applicant has failed to explain the delay adequately. It has been held that a litigant should not suffer due to the transgressions of their advocate. However, litigants are also duty bound to ensure that their Agents/Advocates attend court and prosecute the case as they should. In **Savings and Loans Limited-v- Susan Wanjiru Muritu (Nairobi) (Milimani) HCC NO. 397/2002 Kimaru J. observed that:**

“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 his or her case. The court cannot set aside dismissal of a suit on the sole ground of mistake by the counsel for the litigant (or) on account of such advocates failure to attend the court. It is the duty of the litigant to constantly check with the advocate the progress of her case.”

20. Further, in **Shah -vs- Mbogo (1979) EA 116** the court stated that:

“The discretion [to set aside an ex-parte judgment] is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether evasion or otherwise to obstruct or delay the course of justice.”

21. In the instant Application, the Applicant has failed to convince the court that he made follow up of his case with his former advocate on record. He did not put any effort to inquire about the progress of his case **9 years** after it was filed against him; he slept on his rights to participate in the suit; he avers that he got information of this suit when he went to the offices of his advocate to make a follow up of another case that the advocate was handling when he was informed of the bill of costs in respect to the application for judicial review. Clearly, he was not vigilant to defend the suit. The applicant has also failed to demonstrate that he was in communication with his former advocates regarding the judicial review application, hence this court’s reluctance to act solely on the basis of allegations of default made against the advocates. In this court’s view, the applicant deliberately sought to evade the suit and thus obstructed the cause of justice and he intended to delay the course of justice and keep the *ex-parte* applicant from enjoying the fruits of his litigation.

22. Courts have held that clients cannot continue to hide behind failure of their advocates to perform certain actions on their part. I do not find the applicants’ former advocate blameworthy for the predicament the applicant now finds himself in.

23. As to whether the applicant will suffer any prejudice if the application is not granted, I find that the applicant has not demonstrated what kind of prejudice he will suffer in his application and the supporting affidavit.

24. I find that the application dated **8/12/2020** devoid of merit and proceed to dismiss it in its entirety with costs to the *ex-parte* applicant.

25. For the avoidance of doubt the interim orders of stay of execution issued earlier in this suit are hereby vacated.

It is so ordered.

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

MWANGI NJOROGE

JUDGE, ELC, KITALE.