



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 164 OF 2014**

**BEATRICE AWINO WOTSEMBO .....PLAINTIFF/RESPONDENT**

**VERSUS**

**DANCAN DAVID ODEKEYO .....DEFENDANT/APPLICANT**

**R U L I N G**

1. The defendant has brought the application dated 2<sup>nd</sup> November 2020 under the provisions of Order 40, Order 51, Order 22 of the Civil Procedure Rules and sections 1A, B & 3A of the Civil Procedure Act. The defendant prays for Orders;

**(a) Spent**

**(b) Spent**

**(c) That this court be pleased to find it proper and just and issue an order setting aside the ex-parte proceedings of 7<sup>th</sup> October 2019, its judgment given on 13<sup>th</sup> February 2020 and its Decree issued on 4<sup>th</sup> June 2020 and all orders consequential thereto.**

**(d) That the case herein be remitted for fresh hearing interpartes.**

**(e) That costs herein be borne by the Plaintiff/Respondent.**

2. The application is supported by the grounds on the face of it and the affidavit of Dancan Odekeyo together with the documents annexed thereto. The applicant deposed that he had instructed Ms Ashioya & Co. Advocates to file a defence and represent him in this case. That he followed up the case with Mr. Ashioya who informed him that the case was yet to be heard. The defendant stated that he was unaware that Mr. Ashioya had ceased to represent him therefore he was surprised to receive a letter dated 26/10/2020 from the Land Registrar asking him to surrender his title for cancellation.

3. The Applicant deposed that he fully paid the Respondent the agreed price of Kshs.175,000 for the land he bought and has been in possession of the same since 2003. That the plaintiffs' remedy if any lies in claiming for the balance and interest and not applying for cancellation of his title. That proceeding with the case in his absence was out of clear misrepresentation, lie and fraud against him. That he has a good defence to the plaintiff's claim as a number of people who witnessed their transaction are still alive and are willing to testify. He urges the court to set aside the judgement to allow him an opportunity to present his case.

4. The plaintiff opposed the application by filing a replying affidavit dated 17/11/2020. The plaintiff deposed that the Applicant works in Nairobi so service of process has always been done to his wife Pamela Odekeyo who stays at home. That the defendant was duly served with a hearing notice through his wife at his village home situated at Dadira village near Dadira Primary School. It is the plaintiff's contention that she got judgment after lawful proceedings were undertaken and the court need not disturb the same on account of a litigant who is not vigilant or hawk-eyed.

5. The Respondent deposed that it is dishonest for the defendant's wife to allege in her affidavit that she cannot append a signature due to illiteracy yet the history of the case shows she signed the Summon to Enter Appearance. That if there is a mistake made by the applicant's previous advocates, the same not to be visited on her. That the instant application does not meet the threshold for grant of stay of execution and or setting aside orders. She urged the court to dismiss the application with costs.

6. The parties filed their respective written submissions which I have taken time to read and consider. The Applicant submitted on the provisions of Order 9 rule 13(1) which he says was not complied to by Ms Ashioya & Co. Advocates thus compromising the Applicant's right to legal representation. The Applicant also denied service of the hearing notice on his wife who he deposed signs in form of a thumbprint. He submitted that departure from personal service is only allowed in exceptional circumstances supporting the submission with

the Case of *Filimona Afwandi Yalwala Vs Indimuli & Ano, (1989) eKLR* that; “It is trite law that service of court process should be upon the party in person to the extent that it is practicable. Departure from personal service is only allowed in exceptional circumstances. There are no exceptional circumstances that rendered personal service of the hearing notice upon the Applicant impossible.” Lastly the Applicant submits that he has a good defence.

7. The Plaintiff/Respondent submitted that order 5 rule 8(1) allows service on an agent and the court was satisfied that service on the defendant for hearing of 7/10/2019 was sufficient. That service of the hearing notice was not the first time the wife was served on behalf of the Applicant. She urged the Court not to set aside these proceedings on account of improper service. The Respondent cited the principles for setting aside of judgement enunciated in the High Court Case of *Trust Bank Ltd Vs Port Ways Stores (1993) Ltd & 4 Others* thus;

**“I may state straight away that the principles applicable to the setting aside default judgements which are regular on their face as is the judgement in this case – are not in doubt. The court has unfettered discretion. Such discretion is to be exercised in order to do justice as between the parties. In weighing the interests of justice the court has to consider among other things, the reasons, if any, why the particular default was committed, the conduct of the parties and in particular such conduct as has a bearing on the court of justice in the case, whether the applicant has a defence on the merits, whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgement, and it should always be born in mind that to deny a person a hearing should be the very last resort of a court of justice!!”**

8. The Respondent concluded her submissions that the defence on record consists of mere denials that does not warrant reversal of the judgment on record. That the Applicant has not made any undertaking to compensate the plaintiff for the inconveniences caused. She urged the court to award her Kshs.20,000 as thrown away costs in case the application is allowed.

9. It is trite law that setting aside is discretionary remedy and a party wishing to have the discretion exercised in his favour must demonstrate that; *In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (1967)E.A 116, Patel v. EA. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173]*. (underline mine for emphasis).*

10. There are two issues which I opine arise for my determination. First whether or not service of the hearing notice was properly effected upon the Applicant. Secondly, whether he has a good defence to the claim. The Respondent has put forth an argument that the Summons to Enter Appearance was served upon the defendant’s wife on 4/9/2014 and no complaint was raised. Instead, the defendant proceeded to instruct an advocate to enter appearance on his behalf on 21/4/2014. The Applicant has denied service on two fronts; that his wife signs by thumb printing not signature. Secondly, that the alternative service should only be resorted in exceptional circumstances.

11. I have looked at the signature on the impugned hearing notice and that appearing on the Summons to Enter Appearance. The court is aware that she is not a handwriting expert. However, the appearance of the handwriting of the name “*Pamella Atieno*” and “*Pamela Odekeyo*” on the two documents have no semblance at all. I am also alive to the fact that the burden of proof rested on the applicant. He has attempted to do this by annexing a statement of Pamela under oath denying signing the impugned document (hearing notice). Although Order 5 rule 13 requires personal service, it does not nullify service on an agent if properly done. It is on account of the variance in appearance of signature of Pamela on the face of the two documents on the court record that I choose to exercise benefit of doubt on favour of the Applicant since he had filed a defence and documents in support thereof.

12. Does the defence on record raise any good to the claim or it is merely general denials? It is pleaded in paragraph 5 and 6 of the defence on record as follows;

**“5. The defendant states that this suit has been brought in bad faith since the plaintiff sold the suit land to the defendant in September 2002 and all the purchase price was paid.**

**6. The defendant avers that the plaintiff’s suit is bad in law and is barred by the statute of limitations and shall at the first instance crave for lease of the court to have this suit herein struck out”.**

13. The two paragraphs in my opinion raises serious triable issues as it brings to question whether or not the entire purchase price was paid to entitle the plaintiff to orders of cancellation of the defendant’s title. The application was also brought without undue delay since the defendant acted immediately he received the Land Registrar’s letter dated 26<sup>th</sup> October 2020. I am therefore satisfied that the application is merited.

14. Although the confusion on service upon the Applicant was a result of the defence counsel ceasing to act without properly notifying him, I hold that for the prejudice the Respondent is likely to suffer as a consequence of setting aside the exparte judgement, it is in the interest of justice that she be compensated by an award of costs. For the compensation, I award her Kshs.15,000 as thrown away costs payable within 30 days of the delivery of this ruling. In default of such payment, the Plaintiff/Respondent is at liberty to execute.

**Dated and signed at BUSIA this 25<sup>th</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**