



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**E.L.C. NO. 89 OF 2017**

**JOHN KIMINI KAMUTU.....PLAINTIFF**

**VERSUS**

**JOSEPH MACHARIA NGUNJIRI.....1<sup>ST</sup> DEFENDANT**

**NATHAN NGARUIYA GITONGA.....2<sup>ND</sup> DEFENDANT**

**FRANCIS WACHIRA MARANO.....3<sup>RD</sup> DEFENDANT**

**NDIANG'UI NGINGA K.....4<sup>TH</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. It would appear from the material on record that the suit (by way of originating summons) proceeded *ex-parte* in the absence of the Defendants. An *ex-parte* judgment was consequently delivered by Hon. Justice M.C. Oundo on 6<sup>th</sup> May, 2020 in favour of the Plaintiff who was granted adverse possession of the suit properties.

2. Being aggrieved by the said judgment and decree, the Defendants applied for setting aside and for them to be accorded a hearing in the matter. Consequently, vide a notice of motion dated 24<sup>th</sup> July, 2020 expressed to be brought under **Sections 1A, 1B, and 3A of the Civil Procedure Act (Cap. 21), Order 9 Rule 9(a) and 10, Order 10 Rule 11, and Order 51 of the Civil Procedure Rules 2010 (the Rules), and all enabling provisions of the law**, the Defendants sought leave of the court to change advocates; stay of execution; and an order for setting aside of the *ex-parte* judgment dated 6<sup>th</sup> May, 2020.

**B. THE DEFENDANTS' CASE**

3. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Defendant, Joseph Macharia Ngunjiri, on 29<sup>th</sup> July, 2020 and the annexures thereto. The Defendants contended that the trial proceed *ex-parte* because they were never notified of the hearing date by their former advocates M/s. Maragia, Ogaro & Co. Advocates. They further contended that it would be in the interest of justice for the *ex-parte* judgment to be set aside so that they are accorded a chance of being heard.

**C. THE PLAINTIFF'S RESPONSE**

4. The Plaintiff filed a replying affidavit sworn on 3<sup>rd</sup> September, 2020 in opposition to the said application. It was contended that there was no evidence to demonstrate that the Defendants had been diligently following up on the matter with their former advocates at all material times. It was further contended that, in any event, the mistakes of the Defendants' advocates should not be visited upon the Plaintiff as the innocent party.

5. The Plaintiff further contended that there was undue delay in filing the instant application in that the *ex-parte* judgment was delivered on 6<sup>th</sup> May, 2020 but the application was not filed until 30<sup>th</sup> July, 2020. It was further contended that the delay had not been explained or satisfactorily explained by the Defendants.

6. It was also the Plaintiff's case that the judgment and decree dated 6<sup>th</sup> May, 2020 had already been executed and that an award of costs

shall not adequately compensate him should the *ex-parte* judgment be set aside.

#### **D. THE DEFENDANTS' REJOINDER**

7. The Defendants filed a supplementary affidavit sworn by the 1<sup>st</sup> Defendant on 18<sup>th</sup> September, 2020 in response to the Plaintiff's replying affidavit sworn on 3<sup>rd</sup> September, 2020. The Defendants contended that their mode of communication with their previous advocates was telephonic hence they could not exhibit any letters evidencing communication. The Defendants also stated that the delay in filing the instant application was occasioned by their liability to access the court file timeously due to downscaling of operations by the judiciary due to Covid-19 Pandemic. It was their contention that the delay of less than three (3) months was not unreasonable.

#### **E. DIRECTIONS ON SUBMISSIONS**

8. When the said application was listed for inter-parties hearing on 21<sup>st</sup> September, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days each within which to file and serve their respective submissions. The record shows that the Defendants filed their submissions on or about 16<sup>th</sup> November, 2020 whereas the Plaintiff filed his on or about 8<sup>th</sup> September, 2020.

#### **F. THE ISSUES FOR DETERMINATION**

9. The court has considered the Defendants' notice of motion dated 24<sup>th</sup> July, 2020, the supporting affidavit and annexures thereto, the Plaintiff's replying affidavit in opposition thereto as well as the Defendants' supplementary affidavit. The court has also perused the written submissions of the parties. The court is of the opinion that the following issues arise for determination herein:

- a. Whether the *ex-parte* judgment dated 6<sup>th</sup> May, 2020 should be set aside.
- b. If the answer to (a) is the affirmative, what should be the appropriate terms for setting aside.
- c. Who shall bear costs of the application.

#### **G. ANALYSIS AND DETERMINATION**

##### **a. Whether the *ex-parte* judgment dated 6<sup>th</sup> May, 2020 should be set aside**

10. The court has considered the material and submissions on record on this issue. The point to be examined is whether the Defendants have made a case or setting aside the *ex-parte* judgment in the present circumstances. The application is predicated upon **Order 10 Rule 11 of the Rules** which stipulates as follows:

**“Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”**

11. The court is, however, of the opinion that the said order applies to *ex-parte* judgments in default of appearance and defence. The Defendants in the instant case had advocates on record and they had filed a replying affidavit in response to the originating summons. In the premises, the court is of the view that the appropriate order would be **Order 12 Rule 7 of the Rules** which stipulates as follows:

**“Where under this order judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”**

12. The Defendants submitted that setting aside an *ex-parte* judgment is discretionary and that there are no limits or restrictions on such judicial discretion save that in every instance the court should ensure that the ends of justice are served. It was their submission that their failure to attend court and defend the suit was entirely due to the fault of their previous advocates and that the mistakes of Counsel should not be visited upon the client. They cited the case of **Esther Wamaitha Njihia & 2 Others v Safaricom Ltd [2014] eKLR, Philip K. Chemwolo & Another v Augustine Kubende [1986] eKLR and Patel v E.A. Cargo Handling Services Ltd [1972] EA 75** in support of their submissions.

13. The Plaintiff, on the other hand, submitted that the Defendants had failed to make out a case for setting aside the *ex-parte* judgment. It was submitted that it was the duty of the Defendants to follow up with their advocates on the progress of their case and that they had failed in that duty. It was the Plaintiff's submission that sometimes it is proper for the mistake of Counsel to be visited upon the client and for losses to lie where they have fallen. The Plaintiff cited the case of **Savings and Loan Kenya Ltd v Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002 and Neeta Gohil v Fidelity Commercial Bank Ltd [2019] eKLR** in support of that submission. The Plaintiff considered the Defendants as indolent litigants in whose favour judicial discretion should not be exercised.

14. The court has considered the rival submissions of the parties. The court has considered the Defendants' explanation for their failure to attend court at the trial. The court does not find the explanation unreasonable for a party cannot be expected to attend court for hearing unless he is notified of the hearing date.

15. In the case of **Girado v Alam & Sons (U) Ltd [1971] EA 448** the court set aside an *ex-parte* which had been given in the absence of the Applicant's advocate even though good cause had not been shown for non-attendance on the material date. Similarly, in the case of **Patel v**

**E.A. Cargo Handling Services Ltd [1974] EA 75** the court held that the discretion of the court to set aside an *ex-parte* judgement was not limited. It was held that “there are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does so on such terms as may be just”. In the latter case, the Court of Appeal rejected the suggestion by the Appellant that before an order for setting aside can be made, a good cause for non-appearance must be shown as well as a defence on the merits of the case.

16. The court has considered whether or not the Defendants have any reasonable defence to the action to warrant a fresh hearing of the suit on merit. It is apparent from the Plaintiff’s originating summons dated 9<sup>th</sup> May, 2013 and amended on 24<sup>th</sup> July, 2014 that he was claiming adverse possession of the various properties set out in the summons.

17. In the case of **Shah v Mbogo & Another [1967] EA 116** at page 123 Harris J. considered the purpose of the discretionary power to set aside an *ex-parte* judgment as follows:

**“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgement obtained ex parte. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice ...”**

18. There is no evidence on record to suggest or demonstrate that the Defendants are merely seeking to deliberately delay or obstruct the course of justice. It must be remembered that denying a litigant a hearing should be the last resort of a court, unless the gravity of the circumstances of the case justify such a course. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 18<sup>th</sup> August, 2014 on his own behalf and on behalf of his co-defendants. The gist of the Defendants’ defence to the action was captured in paragraphs 5 and 6 as follows:

**“5. THAT firstly, the Plaintiff/Applicant does not and cannot qualify to claim my land by adverse possession, or any other way. He has not been in continuous and uninterrupted occupation and use of the said parcel of land for the stated period at all. He has also not developed it at all but only lives in temporary structures (shanties) erected on a small portion of the land.**

**6. THAT the Plaintiff has hidden a very essential material fact that the matter herein had been dealt with in a Tribunal vide Ndaragwa Land Tribunal Case No. NDA/3/2008 and the Plaintiff/Applicant dully acknowledged that he has been occupying my land by mistake and was apologetic and then ready to vacate to his land, but he be granted time. He even relocated his sons to his rightful parcel of land in acknowledgement of the above but he remained on my parcel.”**

19. The court is of the opinion that the Defendants’ replying affidavit has raised some triable issues worth canvassing at a full hearing. Their contention that the Plaintiff has not satisfied all the legal requirements of adverse possession is not a frivolous defence. Equally, their contention that the Plaintiff had acknowledged the 1<sup>st</sup> Defendant’s title to the original suit property is a defence worthy of consideration at the trial. The court is thus satisfied that the Defendants have made out a case for setting aside the *ex-parte* judgment and decree dated 6<sup>th</sup> May, 2020. They have not only established a reasonable explanation for non-attendance during the hearing, but they have also demonstrated that they have a reasonable defence to the action.

#### **b. What are the appropriate terms for setting aside the ex-parte judgment?**

20. As indicated earlier, the main concern of the court is to do justice to the parties. Consequently, where an *ex-parte* judgment is set aside, it should be set aside on such terms as may be just to both parties. The court is of the opinion that upon setting aside the Defendants should be accorded a limited period of time within which to file all their necessary documents, affidavits and statements in preparation for a new trial. The court is also of the opinion that the Defendants should bear costs of the application since it was their advocate who defaulted in notifying them of the hearing date. The court shall also make an order for the new trial to be conducted on priority basis.

#### **c. Who shall bear costs of the application**

21. Although costs of an action or proceeding is at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, due to the peculiar circumstances giving rise to the application and the reasons already given hereinbefore, the Defendants shall not be awarded costs of the application. Instead, the Plaintiff shall be awarded costs of the application since the application was occasioned by the Defendants’ default.

### **H. CONCLUSION AND DISPOSAL**

22. The upshot of the foregoing is that the court finds merit in the Defendants’ notice of motion dated 24<sup>th</sup> July, 2020. Consequently, the said application is hereby allowed in the following terms:

**a. The ex-parte judgment dated 6<sup>th</sup> May, 2020 be and is hereby set aside together with all consequential orders.**

**b. The Defendants shall file their case summary, witness statements, documents, additional affidavits (if need be), and trial bundle duly bound and paginated within 15 days from today.**

**c. The Plaintiff shall also file his trial bundle duly bound and paginated within 15 days upon the lapse of the Defendants’ period. The Plaintiff shall be at liberty to file any additional documents and statements, if need be, within the same period.**

**d. The Defendants shall pay the Plaintiff thrown away costs of Kshs.20,000/- within 30 days from the date hereof in default of which the Plaintiff shall be at liberty to execute for recovery thereof.**

**e. In the event of default by the Defendants to comply with order (b) above, the notice of motion dated 24<sup>th</sup> July, 2020 shall stand dismissed and the ex-parte judgment dated 6<sup>th</sup> May, 2020 shall stand reinstated without further order.**

**f. The matter shall be mentioned on 28<sup>th</sup> April 2021, to confirm compliance and fix a hearing date.**

It is so ordered.

**RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this 16<sup>th</sup> of February, 2021.**

**In the presence of:**

Ms. Wanjiru Muriithi for the Plaintiff

Ms. Muigai holding brief for M/s Ndegwa for the Defendants

Court Assistant - Carol

**Y.M. ANGIMA**

**JUDGE**

**16.02.2021**