



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 128 OF 2013

JAMLECK MBOGO WARU.....PLAINTIFF

VERSUS

CHARITY WAIRIMU NDEGWA (Being sued as

the Personal Representative of

MARTIN NDEGWA GITHINJI.....DEFENDANT

RULING

The Applicant vide a Notice of Motion dated 14th July 2020 brought under certificate of urgency sought the following orders:-

(1) Spent.

(2) That there be a stay of execution of the judgment delivered on 20th September 2019 and all other subsequent orders pending the hearing and determination of this application.

(3) That the respondent be prevented from evicting the applicant from land parcel No. KABARE/NGIROCHE/494 pending the hearing and determination of this application.

(4) That the judgment herein be reviewed and set aside and the matter be heard denovo.

(5) That costs of the application be in the cause.

The application is premised on five grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date. The application is opposed with five grounds of opposition dated 21st September 2020.

Summary of Facts

In his affidavit in support of the application, the applicant deposed that three days before filing the present application, he had visited his advocate's office and was informed that judgment in this case had been entered against him. He stated that the last time he visited his lawyer's office was after the demise of the defendant. He further stated that the lawyer told him that after the demise of the original defendant, he was substituted with his wife CHARITY WAIRIMU NDEGWA who proceeded with the matter to finality and judgment entered against her.

The applicant also contends that her case was dismissed and the defendant allowed to proceed with her counter-claim. The applicant also contends that he was not aware of the judgment until his advocate showed him a copy of the same and that subject matter of this suit is the only property he owns with his family and which they rely for their livelihood. He stated that he is still in occupation of the suit land utilizing the same and that he would be prejudiced if the orders sought are not granted as he will suffer irreparably.

The respondent in her grounds of opposition averred that the application is incompetent and bad in law. She contends that the hearing date was by consent of the parties and that the application is frivolous, vexatious and otherwise an abuse of the Court process.

Legal Analysis and Decision

The gist of this application is that on 23/7/2018, this Court dismissed the plaintiff/applicant's suit in the presence of both counsels for the plaintiff/applicant and the defendant/respondent. While dismissing the plaintiff/applicant's suit, this Court directed the parties to take dates

at the Court's registry for the hearing of the counter-claim by the defendant as against the plaintiff/applicant. The parties thereafter fixed convenient hearing dates at the Court registry and the case proceeded for the hearing of the counter-claim with the full knowledge of Mr. Igati Mwai counsel for the plaintiff/applicant.

On 20/9/2019, this Court rendered itself on the counter-claim whereby it entered judgment for the defendant against the plaintiff as prayed in the counter-claim. The plaintiff/applicant in the present application is seeking to stay the execution of the judgment and decree in respect of the counter-claim by the defendant as against the plaintiff entered on 20th September 2019.

It is not in dispute that this suit was dismissed after the plaintiff failed to show cause on 23rd July 2018. The matter was then fixed for hearing of the defendant/respondent's counter-claim where judgment was issued on 20th September 2019. The plaintiff/applicant is now seeking to set aside the judgment entered by the Court in respect of the counter-claim. It is trite that an application for setting aside an ex-parte order is a discretionary power to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. In exercising the power, the Court must consider numerous issues such as the nature of the action, the conduct of the applicant, the delay, the reasons for such delay if any and whether the opposite party can be compensated by an award of costs.

The Court clearly indicates that after the plaintiff/applicant's suit was dismissed for failure to show cause on 23rd July 2018, the hearing of the counter-claim was fixed for hearing by consent of counsels appearing for both the plaintiff and the defendant. During the inter-partes hearing of the counter-claim on 21st March 2019, counsel for the plaintiff/applicant sought an adjournment which was rejected by the Court. The matter then proceeded ex-parte and judgment given on 20th September 2019. The principles for setting aside ex-parte judgments/orders are set out in the applicable law and numerous precedents. In the case of *Esther Wamaita Njihia & 2 Others Vs Safaricom Limited*, the Court held thus:-

"The discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel Vs E.A. Cargo Handling Services Ltd). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah Vs Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See Sebei District Administration Vs Gasyali. It also goes without saying that the reason for failure to attend Court should be considered".

The applicant in this case has not given reasons why he did not attend Court during the hearing of the counter-claim which was fixed by consent of the parties.

During the hearing on 21st March 2019, Mr. Igati Mwai for the plaintiff

sought adjournment stating that he was unable to contact his client. Since no sufficient reasons were given for the adjournment, this Court rightly declined the application. The applicant has not even explained why he failed to attend Court on the hearing date in his affidavit in support of this application. In the absence of any reasonable or sufficient grounds, the Court cannot exercise its discretion in favour of the applicant. The discretion of the Court can only be exercised judicially and not whimsically. The applicant from the supporting affidavit stated that the last time he visited his advocate's office was after the demise of Martin Ndegwa Githinji (deceased) who was the original defendant. From the death certificate annexed to the affidavit in support of the application, substitution by Charity Wairimu Ndegwa who is the new defendant, the said Martin Ndegwa Githinji died on 21/06/2014. The counsel for the plaintiff has all along been participating in the proceedings of this case and at no time did he say that he was not in contact with the plaintiff.

He even took the hearing of the counter-claim by consent. He cannot now be heard to complain that he was not aware of the notice to show cause which led to the dismissal of this suit. If indeed the counsel for the plaintiff/applicant did not have instructions including the taking of a hearing for the counter-claim on 17/1/2019, nothing would have been easier than for him to file an application to cease acting. The only logical conclusion to be made from this application is that the same lacks merit, incompetent and out for dismissal.

I also note that the application is also brought under **Order 45 Rule 1 of the Civil Procedure Act Cap. 21 Laws of Kenya** which provides as follows:-

REVIEW

(1) *Any person considering himself aggrieved:-*

(a) *By a decree or order from which an appeal has been preferred; or*

(b) *By a decree or order from which no appeal is hereby allowed,*

And who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistakes or error apparent on the face of the record or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay".

The judgment which the applicant is seeking to review was delivered 20th September 2019 while this application was filed on 15th July 2020. The applicant took almost one year to bring the application. No explanation has been given for the delay. The applicant has not also given any new and important matter or evidence which was not within his knowledge when the application for adjournment by his counsel was rejected which this Court can consider in granting this application.

In view of the matter aforesaid, I find the Notice of Motion dated 14th July 2020 incompetent, frivolous and lack merit. The same is hereby dismissed with costs.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 12TH DAY OF MARCH, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Wambui holding brief for Machua for the Plaintiff/Applicant*
2. *Ms Kiragu holding brief for Ngigi Gichoya for the Defendant*
3. *Kabuta – Court clerk.*