



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 1020 OF 2014**

**DAVID WANYOIKE GATHUA.....PLAINTIFF**

**=VERSUS=**

**HOSEA IMBO OWINO.....DEFENDANT**

**RULING**

1. Hearing of this suit proceeded *ex-parte* on 6/11/2019. The plaintiff had prior to that filed an affidavit of service indicating that the defendant had been served with a hearing notice published in the Standard Newspaper Edition of 29/8/2019 as earlier directed by the court. This court subsequently rendered an *ex-parte* Judgment on 9/6/2020 and issued the following disposal orders:

**a) An order of permanent injunction is hereby issued directing the defendant, together with his agents/servants to cease trespassing on, constructing on, or dealing with Plot No 38 Kahawa West, Phase II, Nairobi.**

**b) An order is hereby issued for eviction of the defendant from the said Plot.**

**c) The plaintiff is awarded costs of the suit.**

2. Subsequently, the plaintiff brought a notice of motion dated 13/7/2020 through which he sought a correction of paragraph 9 of the judgment to read “**Plot Number 37 Kahawa West Phase II**” instead of “**Plot Number 38 Kahawa West Phase II**”. The said notice of motion is one of the two applications falling for determination in this ruling. The second application is the defendant’s notice of motion dated 13/10/2020 through which the defendant seeks an order setting aside the said *ex-parte* judgment rendered in this suit on 9/6/2020.

3. I have considered the affidavits and submissions filed in support of the two applications. I have also considered the relevant legal frameworks and jurisprudence. Because the defendant’s application seeks the setting aside of the *ex-parte* judgment rendered on 9/6/2020, I will dispose it first. This is because, if it is successful, the plaintiff’s application will stand spent.

4. The single question falling for determination in the defendant’s application dated 13/10/2020 is whether the defendant has satisfied the criteria upon which our courts exercise jurisdiction to set aside an *ex-parte* judgment.

5. The criteria was outlined by **Apaloo JA in Philip Chemwolo & Another v Augustina Kubede (1982-88) KAR 103** in the following words:

**“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.**

6. The defendant’s case is that he runs a tailoring shop in Kahawa West, Nairobi, in the neighbourhood where the plaintiff similarly operates. The plaintiff used to sell him sand when he was constructing on the suit property and the plaintiff knows where he lives and carries on business. He has lived in the suit property for 15 years. He was allocated the suit property by the City Council and he has been faithfully paying ground rent to the County Government. He owns the suit property. He has a good defence to the suit herein. He was not aware of this suit until his niece, Sheila Mukoa Khakame who recently got admitted to the Bar draw his attention to the judgment delivered on 9/6/2020. He was shocked to learn that this case had been heard and decided in his absence and without any notification to him. Upon being served with summons, he duly entered appearance and filed defence in this suit but he had not received subsequent notifications relating to hearing of the suit.

7. He added that his former employer, Petronilla Adikinyi Ojiambo, whose postal address he used at the time of entering appearance and filing defence, fell sick, terminated the employment and he could not access mails sent to her postal address. Consequently, communications

mailed through her postal address did not reach him. He added that he did not see the notice published in the Standard Newspaper on 20/8/2019 due to his meagre earnings and nature of work as tailor.

**8.** The plaintiff opposed the application through a lengthy affidavit sworn on 16/11/2020 in which he deposed that the defendant had been properly served with hearing notices but had all along ignored this case.

**9.** It is clear from the evidential materials before court and from the court record that the defendant entered appearance and filed a defence in this suit. He did not, however, notify the court and the plaintiff about the fact that the service address contained in the above two instruments were no longer available for use. Indeed, it was largely because of this default on part of the defendant that the plaintiff incurred expenses towards purchase of newspaper space to publish a hearing notice relating to the hearing of 6/11/2019.

**10.** The court is however alive to the fact that the dispute in this suit relates to land. The defendant lives in a house developed on the said land. It is therefore important that the dispute in the suit is disposed on merits. I will in the circumstances conditionally set aside the *ex-parte* judgment. The condition is that the defendant will pay the plaintiff the newspaper expenses of Kshs 17,400 together with throwaway costs of Ksh 10,000, together totaling Kshs 27,400 (Twenty Seven Thousand Four Hundred) within the next sixty (60) days. In default, the order setting aside the *ex-parte* judgment shall stand vacated and the plaintiff application dated 13/7/2020 shall stand granted.

**11.** In light of the above finding and disposal orders, and subject to compliance by the defendant, the plaintiff's application dated 13/7/2020 is marked spent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

**Mr Mulandi for the Plaintiff**

**Mrs Oloo for the Defendant**

**Court Assistant: June Nafula**