REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 46 OF 2020

(FORMERLY MURANGA ELC CASE NO. 18 OF 2019)

MUKUNYA MUGO 'A'.....1ST PLAINTIFF/RESPONDENT

WINNIE WAMBUI.....2ND PLAINTIFF/RESPONDENT

VERSUS

ELIZABETH MUGURE MUKUNYA.....DEFENDANT/APPLICANT

RULING

There are two matters for determination. One is the Notice of Preliminary Objection dated 22nd May 2020, by the Plaintiffs/ Respondents and the other one is the Notice of Motion dated **6th February 2020,** by the Defendant/ Applicant.

The **Notice of Preliminary Objection** is premised on the grounds that;

a) That the Defendant's numerous applications have not attained the mandatory requirements relating to a Notice of Appointment of an Advocate under Order 9 rule 7 of the Civil Procedure Rules.

b) That no Notice of Appointment of advocates was filed as it is mandatory before Advocate comes on record.

c) That the Notice of Change of Advocates dated 6th March 2020, has not attained the mandatory requirement as per Order 9 Rule 9 and 10 of the Civil Procedure Rules 2010.

d) That the Notice of Change of Advocates filed after Judgment has been entered cannot be effected without an order of the Court.

e) That M/s Gitamo Onsombi & Co. Advocates and A. G. Opiyo & Co. Advocates are not property before the Court and their names ought to be struck off from the record.

f) That subsequent the Notice of Motion dated 6th February 2020 and Notice of Change of Advocates dated 6th March 2020, the Notice of Motion dated the 6th March 2020 and the Notice of Motion dated 21st April 2020 herein should be struck out with costs to the Plaintiff and the orders given subsequently vacated.

The said Notice of Preliminary objection is supported by the Affidavit of **Wainaina Kinyanjui Advocate,** who reiterated the grounds stated in the Preliminary Objection and further averred that the Judgement was entered on **11th December 2019,** and the **Decree** was issued on the **10th June 2020.** That the **Law Firm of M/s A. G. Opiyo & Co advocates,** filed a Notice of Motion on **6th February, 2020** and no Notice of Appointment of Advocates was filed as required under **Order 9 Rule 7** of the **Civil Procedure Rules.** That temporary Orders were obtained on **7th February 2020,** and on **6th March 2020, M/s Gitamo Onsombi & Co Advocates** filed a Notice of Change of Advocates after Judgment had been entered. That there was no order of the Court contrary to the provision of **Order 9 Rule 9(a)(b)** of the **Civil Procedure Rules 2010.** Further that the provisions of **Order 9 Rule 9(a)(b),** are mandatory and failure to comply with this procedure renders the Notice of Change of Advocates incurably irregular.

The Notice of Motion Application dated **6th February 2020,** is brought under **Article 159(2)** of the **Constitution 2010, Sec 3A** of the **Civil Procedure Act** as read with **Orders 10 Rule 8, 22, and 53 Rule 3** of the **Civil Procedure Rules 2010** seeking the following orders;

1. That this Honorable Court be pleased to order the stay of execution of its decree issued herein on 10th January 2020.

2. That this Honorable Court be pleased to set aside its judgement in this case delivered on 11th December 2019, together with all consequential orders.

3. That this Honorable court be pleased to summon the court process server by the name David Njoroge Mburu to attend before it for purposes of being cross examined on his affidavit of service sworn on 9th July 2019.

4. Cost of this application be provided for.

The Application is premised on the grounds that the Defendant/Applicant was not served with the summons to enter appearance and learnt of the suit through a 3rd party. Further that the Plaintiffs/Respondents obtained Judgment against the Defendant/ Applicant through **fraud**, **misrepresentation** and **concealment of material facts.** Further that the Court has no jurisdiction to hear and determine the matter, since the matter is **Res Judicata**, as a similar case between the same parties was heard and determined by this Court being **ELC No. 111 of 2017 Muranga.** That the Plaintiffs/ Respondents are threatening to execute a fraudulent Judgment against the Defendant/ Applicant.

In her Supporting Affidavit, **Elizabeth Mugure Mukunya** averred that she learnt of the suit after she was summoned by the **DCIO Gatanga Sub County**, to record a statement concerning ongoing investigations over alleged threatening letters that she had written. That she instructed her son to honour the summons and that it was then she learnt of the existence of the instant suit when the officer accompanied her son to her home. Further that on **24th January 2020,** someone visited her home and served her with a copy of the Decree in **ELC 18 of 2019**.

That the suit property belongs to her late father's Estate and that she settled on the suit property **LR NO.LOC 1/KIUNYU/172,** in the year **2000** with the consent of her late father **Livingstone Mukunya Muriu,** with full knowledge of all family members. That her late father's purported Will was not brought to the attention of all beneficiaries except **Benson Mugo Mukunya**. She further averred that her father died on **31st July 2004,** and her brother **Benson Mugo Mukunya** without the consent of the other family members secretly applied for Letters of Administration intestate in the Chief Magistrate Court at Thika as **Succession Cause No.510 of 2004.** That before the same was confirmed, the said **Benson Mugo Mukunya** embarked on fraudulent sale and transfer of assets and sold property for his own benefit and as a result of the said intermeddling she went to the High Court in Nairobi vide **Succession Cause No. 397 of 2005** and obtained **Orders** restricting the said Administrator from intermeddling in the estate. That the cause is still pending before the High Court in Nairobi and is being prosecuted and the said administrator was ordered on **19th December 2019,** to render accurate account on how he has administered the estate which he has not yet complied with.

She contended that the plaintiff filed **Civil Suit ELC No. 33 of 2016,** at **Kerugoya Law Court,** which was later transferred as **ELC No.11 of 2017 Muranga**, and the matter was heard and determined. However, the Plaintiff filed a new suit instead of appealing the said judgement. She is advised by her advocates which information she believes is true that she has a reasonable defence to the suit.

The Application is opposed vide a Replying Affidavit filed on **24th February 2020,** sworn by **Winnie Wambui**. She contended that she had been duly authorized by the 1st Plaintiff/Respondent to act on his behalf. That **David Njoroge Mburu,** a process server swore a Return of Service Affidavit where he unequivocally stated that he served the summons and the Plaint on the Defendant/Applicant at her residence on **8th July 2019,** but was violently chased away while he was accompanied by one **Kamau Francis Muthiora,** who confirmed the same. She averred that she had properly and regularly served the Defendant/Applicant. She further averred that the Judgement was properly entered after the court heard the Plaintiffs/Respondent in the absence of the Defendant/Applicant who had been duly served with summons. That the Defendant/ Applicant belatedly applied to Court to be allowed to defend the suit and has failed to satisfy the court that she has a valid reason for nonattendance or that she has a reasonable Defence.

That the allegations set out in the instant proposed Defense are the same ones set out in **Suit No. ELC 11 of 2017,** which the Court dismissed as disclosing no reasonable ground. That the applicant is a vexatious litigant who delights in wasting judicial time.

The Defendant/ Applicant filed a Further Affidavit sworn on **6th March 2020,** by **Elizabeth Mugure Mukunya** and urged the Court to Summon the process server, the area chief for purposes of cross examination in their Affidavits. That she has always entered appearance in similar matters in respect to the suit property. That the Plaintiffs/ Respondents have filed multiple suits in respect to the suit property with the sole reason of evicting her. That the draft Defence raises triable and arguable issues. She further averred that the Rulings dated **31st July 2018,** and **24th January 2019,** do not apply nor attach to the instant proceedings.

The Notice of Motion Application and Preliminary Objection were canvassed by way of written submissions which the Court has carefully read and considered. As the Preliminary Objection is capable of disposing a suit the Court will deal with it first.

The Notice of Preliminary Objection herein relates to the compliance of **Order 9 Rule 7**, and **Rule 9** of the Civil Procedure Rules. The Preliminary Objection relates to a point of law and it is therefore a Preliminary Objection as described in the ***Mukisa Biscuits Manufacturing Co. Ltd…Vs…West End Distributors Ltd (1969) EA 696*** to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Further Sir ***Charles Nebbold, JA*** stated that:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

The Plaintiff/Objector averred that the Law Firm of **A.G Opiyo Advocates,** did not come properly on record as provided by Order 9 Rule 7 which provides:-

"Where a party after having sued a defendant in person appoints an advocate to act in the cause of the matter on his behalf, he shall give Notice of appointment and the provision of this Order relating to a Notice of Change of Advocates shall apply to a Notice of Appointment of an advocate with the necessary modication."

Indeed the Court has noted that the Law Firm of **A. G. Opiyo Advocates,** filed the application dated **6th February, 2020,** but had not filed a Notice of Appointment of advocates.

The Plaintiff/Objector filed a Notice of Motion dated **21st February 2020,** to have the said **A. G. Opiyo Advocate** not to have right of audience before the Court. However, the said application was not prosecuted and since there is evidence that the said **Opiyo Abert George Advocate** is now deceased, then the said application has been overtaken by events.

On **6th March 2020,** the Law Firm of **Gitamo Onsombi & Co Advocates** filed a Notice of Change of Advocates. That is in accordance with Order 9 Rule 7 of the Civil Procedure Rules.

Though **A. G. Opiyo Advocates** had not filed a Notice of Appointment, the current Advocates for the Defendant/Applicant did file a Notice of Change indicating that the Defendant has appointed **M/s Gitamo Onsombi & Co. Advocates** to act for her instead of **A. G. Opiyo Advocates.** Therefore, the Court finds **Gitamo Onsombi & Co. Advocates** are properly on record.

On whether the **Law Firm of Gitamo Onsombi Advocates** need leave of the Court to come on record after Judgement as averred by the Plaintiff/Objector, the Court finds as follows:-

Indeed ***Order 9 Rule 9*** of the **Civil Procedure Rules,** provides: -

"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected by order of the court:-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

It is clear from the proceedings herein that the Judgement in issue was entered after exparte hearing/proceedings of this matter. It is clear that **Order 9 Rule 9** of the **Civil Procedure Rules** applies where the parties were represented by advocates and would wish to change the advocates and act in person after the Judgment. The essence of **Order 9 Rule 9** of **Civil Procedure Rules** is to protect advocates from mischievous clients who wait until a judgment had been delivered and then sack the Advocates. See the case of **S.K. Tarwadi …Vs… Veronica Muehlemann [2019] eKLR.**

However, this Order 9 Rule 9 does not apply where there is an exparte Judgment and the party wishing to come on record was not a party in the exparte proceedings. I will concur with the findings of **Olga Sewe J**. in the case of ***K. Rep Bank Ltd Vs Segment Distributors Ltd (2017) eKLR*** held as follows:-

"For the reasons that the Defendant did not participate in these proceedings before the default judgment was entered, it is, to my mind a misnomer for the Defence counsel to seek leave to come on record, purportedly under Order 9 Rule 9 of the Civil Procedure Rules, as no such leave is required. In this regard, I note that reliance was placed by Counsel on the decision of Radido, J. in Kazungu Ngari Yaa vs. Mistry V. Naran Mulji & Co. [2014] eKLR, but in essence that decision does not support the Defence Position. To the contrary, the Court in that case expressed the view that:

"In the present case, the Respondent did not file a Response or participate in the proceedings and therefore there is no previous advocate that the firm which is coming on record, Musinga & Co. Advocates can seek written consent from. And even if the Respondent proposed to act in person, there is no other entity it could seek consent from. Order 9 Rule 9(b) of the Civil Procedure Rules, 2010, is consequently inapplicable ….Order 9 Rule 9(a) of the Civil Procedure Rules, 2010 is equally inapplicable. To hold otherwise would lead to an absurdity. There was no advocate on record previously engaged for the Respondent and the Respondent is not proposing to act in person, and there would be no logic in the Respondent's advocate giving notice to his client that he proposes to come on record for it and then seeking leave of court."

[7] I would be of the same view. Hence, all that was required of the Defence Counsel in the circumstances hereof, was to simply file a Notice of Appointment pursuant to Order 9 Rule 7 of the Civil Procedure Rules, notwithstanding that Default Judgement had been entered; and cause the same to be served on the Plaintiff. Accordingly, prayer 3 in the Defendant's Notice of Motion dated 5 October 2015 is untenable, if not altogether misconceived."

Being persuaded by the above findings of the Court and also taking into account the Defendant herein did not participate in the earlier proceedings then **Order 9 Rule 9** of the **Civil Procedure Rules** does not apply herein.

As was submitted by the Defendant's counsel the fact that **A. G. Opiyo Advocates** did not have a practicing certificate did not affect the validity of the legal documents drawn by him. See **Section 34(b)(2)** of the Advocates Act **Cap 16** which states:

> ***"(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.***
>
> ***(3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate."***

For the above reasons, the Court finds the Notice of **Preliminary Objection** dated **22nd May 2020,** is **not merited** and the **same is dismissed entirely with costs being the cause.**

The Court will determine whether the **Notice of Motion Application** is merited. The Court notes that the parties have set out to plead on whether the instant suit is Res Judicata or not at this stage. However, it is the Court's considered view that the issue on whether the Judgment delivered on **11th December 2019** ought to be set aside or not must first be dealt with and if the same is allowed, then the parties can raise the issue of Res Judicata.

The instant Application has sought to set aside the Court's Judgment delivered on **11th December 2019**. The Court further notes that the **Hon. Lady Justice Kemei** delivered the said Judgment but she has since recused herself from the mater. This Court however has the powers to hear and determine the same.

The Applicant has sought to have the Process server together with the area Chief and other people come to Court and be cross examined on whether they effected service to her.

Order 6 Rule 16 of the **Civil Procedure Rules** provides that where it is alleged that the service of summons to enter appearance was improper, the court may call the process server for cross examination. The Court has gone through the Affidavit of service dated **9th July 2019** by **David Njoroge Mburu** and notes that the same has indicated, how the process server knew the Defendant/ Applicant; how he was introduced to her, the time and that he gave her the purpose of the visit.

At this juncture, the Court finds and holds that the process server had given enough details and if any of the details given were not accurate, the Defendant/ Applicant could have rebutted the same. Other than indicating that she was not served the Defendant/ Applicant has not pointed out what is untrue about the Affidavit of service.

The Court therefore finds and holds that at this juncture it would be unnecessary to call the process server and that calling the said process server would only serve to waste Judicial time.

The guiding provision of the Law with regards to setting aside of Ex parte Judgment is to be found in **Order 12 Rule 7 of the Civil Procedure Rules which** provides:-

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

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

> ***"The court may set aside an order made ex parte"***

In the case of **Wachira Karani …Vs…Bildad Wachira (2016) eKLR** in allowing an application to set aside an *ex parte* judgment the court held that:-

> ***"The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."***

Order 12 Rule 7 **of** the ***Civil Procedure Rules*** provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in ***Patel….Vs….E.A Cargo Handling Services Ltd (1974) EA 75,*** held 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 feter the wide discretion given it by the Rules.''***

Further in the case of ***John Mukuha Mburu ….Vs…- Charles Mwenga Mburu [2019) eKLR,*** the Court held that:-

> *"It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a 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 case of* ***Mohammed & another —versus Shoka [1990] 1KLR 463***

Taking into account that the decision to set aside Exparte Judgment are discretionary, the Court is called upon to determine whether there is sufficient reasons that has been given to warrant it exercise its discretion. The Defendant/ Applicant has sought to set aside Ex Parte Judgment on the basis that she was not served with the Summons to Enter Appearance. However, the Plaintiffs/Respondents are categorical that the Defendant/ Applicant was served.

The Court having gone through the Process server, affidavit of service finds that there is prima facie evidence that the Defendant/ Applicant was served. However, there is contention that a similar suit had been file in the same Court and the Defendant/ Applicant had entered appearance. This Court finds that there is probable cause to also believe that the Defendant/ Applicant may or may not have been served. However, in exercising its discretion, it is the Court's considered view that as the instant suit involves the eviction of the Defendant/ Applicant and further since there is an allegation of the same being Res Judicata, the Defendant/ Applicant should be allowed to have her day in Court and the matter should be heard and determined on merit.

The Court is also called upon to determine whether there is a Defence on merit. In the case of **Patel – Vs – Cargo Handling Services** the Court of Appeal 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 'triable issue."***

The Court having gone through the Draft Defence notes that there is an allegation of fraud. The Court thus finds that the same raises triable issues and the Defendant/ Applicant ought to be given her day in Court so that the issues can be determined on merit. The Court further notes that the Application having been filed on 6th February 2020, there was no inordinate delay .

The Court is thus satisfied that the Applicant has satisfied it to warrant it exercise its discretion and allow the Application.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **6th February 2020,** is found **merited** and the same is allowed in terms of **prayer 3** only with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF APRIL 2021.

L. GACHERU

JUDGE

15/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the 1st Plaintiff/Respondent

No appearance for the 2nd Plaintiff/Respondent

Mr. Onsombi for the Defendant/Applicant

L. GACHERU

JUDGE

15/4/2021