



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 67 OF 2017

ESTHER KERUBO OSORO.....PLAINITFF/RESPONDENT

VERSUS

WILFRED ONSOMU.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Defendant/Applicant herein filed an application dated 18th October, 2021, seeking the following orders:
 - a) Spent
 - b) That the judgment entered in this case on 13th March, 2020 be reviewed and set aside.
 - c) That pending hearing of this application and thereafter pending the hearing of this case, the Honorable Court be pleased to stay execution of the Decree dated 5th October, 2020 and all consequential orders.
 - d) That costs be provided for.
2. The application is based on the grounds set forth in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 18th October, 2021.
3. The main reason advanced by the Applicant is that he was never served with Summons to Enter Appearance as he alleges that he was away for treatment in Nairobi.
4. He depones that in July 2017, he learnt that the Respondent had obtained a title in respect of land parcel No. SOUTH MUGIRANGO/BOSINANGE/3299 where the Applicant stays. He then instructed the firm of Reuben Masese & Co. Advocates. To represent him. However, he later discovered that the said advocates never entered appearance nor filed a Defence on his behalf.
5. He avers that the firm of Bob Okumu & Co. Advocates who purportedly took over from the firm of S.M. Sagwe & Co. Advocates are not properly on record as there was no Notice of Change of Advocates after judgment had been entered. He therefore avers that all execution proceedings and orders applied for by the said firm are a nullity and should be expunged from the record.
6. It is the Applicant's contention that his mother Lisper Magoma Aoro was married to Respondent's mother in a woman to woman marriage and he is therefore entitled to a share of ancestral land which is now registered in the name of the Respondent alone.
7. He further contends that the Applicant is facing imminent eviction from his family land and he is likely to suffer irreparable loss. It is his contention that he has a good Defence that raises triable issues.
8. The Plaintiff/Respondent filed a Replying Affidavit sworn on 24th November, 2021 in response to the application. She averred that the Defendant/Applicant's application was an abuse of the court process and the same was a mere ploy to obstruct and/or delay the cause of justice and prevent her from enjoying the fruits of her judgment.
9. She faulted the Applicant for failing to explain the delay in filing this instant application given that judgment was entered on the 13th of

March, 2020.

10. She pointed out that the Applicant was represented by the firm of M/S Rueben Masese & Co. Advocates, who participated in the proceedings and was therefore aware of the judgment that was entered against him on the 13th of March, 2020.

11. She averred that the Applicant's claims that that he was away for medical reasons and that he was not properly served were far-fetched and unfounded, since all pleadings were served upon his advocate.

12. She deponed that the Applicant could not blame his indolence on his former advocates as he was under a duty to exercise vigilance in the prosecution of his cause.

13. She contended that there is no evidence whatsoever that has been adduced before the court to show that the Applicant had a medical emergency.

14. It was her further contention that the Applicant was undeserving of the orders sought as he was a serial contemnor who had disobeyed court.

15. She added that since the instant application does not seek a review of the judgment and/or the resultant decree, nor is it an appeal, the Court must reject the invitation to set aside a regular judgment, without any sound reason being advanced by the Applicant.

16. The court directed that the matter be disposed of by way of written submissions and both parties filed their written submissions.

ISSUES FOR DETERMINATION

17. There are two issues for determination:

- a) Whether the Applicant is entitled to setting of the *Ex parte* judgment dated 13th March 2020 together with;
- b) Whether there should be a stay of execution.

ANALYSIS AND DETERMINATION

Whether the court should set aside the ex parte judgment dated 20th February 2015.

18. The principles for the setting aside of ex parte judgment were considered by the predecessor Court of Appeal for East Africa in *Mbogo v. Shah* (1968) EA 93, 95 referred to in *Pithon Waweru*, as follows:

***“Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.*”**

19. The first question I must determine is that of establishing reasons advanced by the Applicant that would warrant me to exercise my discretion to set aside the *Ex parte Judgement*. The object of the court's discretion to set aside an ex parte judgment is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See the case of **Shah V Mbogo 1968 E.A 93**.

20. Although the Applicant alleges that he was not served with Summons to Enter Appearance, it is clear that he was aware of the suit and he instructed the firm of Reuben Masese & Co. Advocates who appeared in court on several occasions though they neither entered appearance nor filed a Defence.

21. However, Mr. Reuben Masese Advocate avidly participated in the proceedings of this case and was even present on 25th May, 2019 when the hearing date was taken in open court. Furthermore, there is no evidence supplied by the Applicant that he was away for medical reasons. The Applicant cannot blame his indolence on his former advocates because this suit was filed against him and he is required to show that despite being represented he exercised vigilance in the prosecution of his cause and not to wholly heap blame entirely on his former advocates.

22. I therefore find that the reasons supplied by the Applicant are not sufficient for this court to set aside the judgment entered in favor of the Plaintiff and therefore the said prayer is denied.

Whether there should be a stay of execution and all consequential orders.

23. Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) provides that:

***“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an 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.”

24. It is the Applicant’s contention that the firm of Bob Okumu and Co. Advocates is incompetent, because the Advocate who has filed this application is not properly on record. The Applicant contends that the said Advocate took over from the firm S.M. Sagwe & Co. Advocates without filing an application seeking to come on record for the Applicant after judgment had been entered as required under Order 9 Rule 9 of the Civil Procedure Rules, 2010. The Applicant argues that all execution proceedings and orders applied for by the said Advocates are therefore a nullity and should be expunged from the record.

25. It is important to note that the mischief that rule 9 sought to cure were instances where clients changed advocates after judgment was entered with a view to denying such an advocates their legal fees from the judgment. This was aptly captured by **Justice Okwany** in the case of **Mombasa Highway Transport Limited -v- Gulf Africa Bank Limited [2019] e KLR** thus:

“Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs. Veronica Muehlmann [2019] e KLR** where the judge observed as follows:

“...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

26. However, it important to state the non-compliance with the above provisions of the law has in some instances been considered as a mere technicality as was held by **Mutungi, J** in the case of **Ngitimbe Hudson Nyanumba** where the learned Judge rendered himself thus:

20. “Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”

27. As noted hereinabove, it is my view that the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The question therefore is whether the instant case falls within the said circumstances. It is apparent to me that there is no prejudice suffered by the Applicant at all by reason of such change of advocate.

28. From the foregoing therefore, I am not persuaded that sufficient cause has been given to warrant an order for stay of execution and all consequential orders.

29. The upshot is that the application is without merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF FEBRUARY, 2022.

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J.M ONYANGO

JUDGE