REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 411 OF 2017

(FORMERLY NAKURU ELC CAUSE NO. 185 OF 2012)

KUYIAMO OLE MOSOMPE.....PLAINTIFF/ RESPONDENT

VERSUS

KAIKAI OLE KARBOLO.....DEFENDANT/ APPLICANT

RULING

A. INTRODUCTION

1. By a Notice of motion dated 5th August, 2019, pursuant to Section 1A,1B,3, 3A, & 63 (e) of the Civil Procedure Act, Order 10 Rule 4,10, &11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules 42 Rule 6 of the Civil Procedure Rules, 2010 the Applicant sought the following orders; -

a) Spent.

b) THAT there be a **stay of execution** of the Decree on record arising from the ex-parte judgment and any other orders or notices arising therefrom pending the hearing and determination of this Application inter- partes.

c) THAT the ex-parte judgment and the consequential decree on record against the Defendant/ Applicant herein together with all other consequential and subsequent Orders, Notices and other process arising therefrom **be reviewed, varied, discharged and or set aside**.

d) THAT the Defendant/ Applicant herein be granted leave to file and serve his statement of defence and counter-claim out of time and that the draft statement of defence and counter-claim hereto attached be deem as properly filed and served upon the Plaintiff/ Respondent herein subject to payment of the requisite Court fees.

e) THAT this Honourable Court be leased to issue such other and or further Orders that it may deem fit and just in the interest of justice.

f) THAT costs of this application be provided for

2. The Application is based on the 5 grounds thereof and the Supporting Affidavit sworn on the 5.08.2019. The applicant avers that the ex-parte judgment was entered without affording him a fair hearing on his defence and thus he stands to suffer irreparable loss and damage in the event of execution of the decree.

3. It is his assertion that the effect of the ex-parte judgment was the cancellation of the title deed issued to him over the suit property Cis-Mara/ Lemek/ 3485 and seeking his eviction from the said parcel. He further maintains that from a perusal of the court proceedings and pleadings, the Plaintiff/ Respondent did not disclose that there was a sale agreement between them and the same therefore amounts to non-disclosure which is a good ground for setting aside the ex-parte judgment entered.

4. He also averred that he had never been served with a hearing notice by the named process server on any of the dates mentioned and thus all the affidavits on record filed were false. He also maintained that his annexed draft statement of defence and counter-claim raises triable issues and the suit should therefore be heard and determined on merit.

5. It was also his contention that the Plaintiff/ Respondent failed to disclose to the court that he was in occupation and possession of the suit parcel where he has erected a residential home and carried out tremendous improvements, amounts to dishonesty and concealment of material information.

6. The application was opposed. The Plaintiff/ Respondent filed a Replying Affidavit dated 24.09.2019 in response to the Application dated 05.08.2019. It is the Respondent's assertion that the allegations by the Applicant of being unaware of the existence of the suit are false; he was duly served and a Memorandum of Appearance and subsequently a Notice of Intention to act in person filed on diverse dates.

7. He also did contend that the orders sought are untenable since the execution has already taken place, the parcels illegally acquired had been cancelled and transferred to him pursuant to the decree of the court. He maintained that the defendant was properly served but deliberately chose not to instruct an advocate or personally follow up on the matter and has come 8 later since the institution of the suit. And urged the court to dismiss the Application.

8. The application was canvassed by way of written submission. The Respondent filed their submissions dated 16/12/2019. However, on a perusal of the record, I have not seen the Applicant's submissions. Be that as it may, I will proceed and deliver my ruling.

9. I have read and considered the Notice of Motion Application and annexures, the responses thereto and the submissions in this case together with the authorities cited in support of the respective case and I have taken the same into account in arriving at my decision.

B. DETERMINATION AND ANALYSIS

10. I am of the considered opinion that the issues for determination arising from the Application are as follows: -

i. Whether there was proper service of a hearing notice,

ii. Whether the judgment on record was regular or irregular

iii. Whether the applicant is entitled to stay of execution of the decree and order of the court

iv. Whether the Defendant/ Applicant has made out a case for setting aside the ex parte judgment and decree dated 20th December, 2018 and all consequential orders.

A. Whether there was proper service of the Hearing Notices

11. The issue of service goes to the root of any ex-parte judgment; where the court is satisfied that there was no proper service, it has the discretion to set aside and/or vary any ex-parte judgment entered and all the consequential orders thereto.

12. I have taken the liberty to carefully peruse the Affidavits of Service filed on diverse dates and the contents thereon. I have noted that the Process Servers; though they had no prior knowledge of the Defendant/ Applicant, would be accompanied by the Plaintiff/ Respondent's son to the Applicants homestead; a fact which remains unchallenged by the Applicant. He has also not challenged that the area indicated on the return of service is not his home area but has only given blanket denials.

13. In view of the foregoing; I find that the Applicant was duly served with the various Hearing Notices on the diverse dates and therefore had sufficient notice on the conduct of the case.

B. Whether the Judgment on Record was a regular or an Irregular judgment

14. In **James Kanyiita Nderitu & Another =Versus= Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)**, the learned Judges of Appeal had this to say;-

> *"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. EA. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173).*
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> *In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456)'.*

15. I seek to rely on the reasoning above in finding that the judgment in the present case is a regular judgment, Summons were served upon the Defendant and he subsequently filed his Memorandum of Appearance and Grounds of Objection in response to the Plaintiff's Application. The mater was fixed for hearing on numerous occasions. On the 29.10.2018, after the several adjournments and the matter being a 2011 matter, the court upon being satisfied that there was proper service upon the Defendant directed that the same do proceed ex-parte. The Plaintiff testified and produced his exhibits in support of this case. In arriving at the judgment, I took into account the totality of the pleadings filed in court and the exhibits produced in court.

16. It is therefore clear that the judgment of the court dated 20/12/2018 is a regular judgment owing to the fact that both the Summons were served and Memorandum of Appearance was filed by the Defence. The Defendant/ Applicant has not demonstrated or advanced a reasonable excuse for his failure to file his statement of defence and counter-claim within the prescribed timelines even though it is common ground that he was fully aware of the existence of the case.

C. Whether the Applicant is entitled to Stay of Execution of the Decree and Order of the Court

17. The Respondent's response to an order of Stay of Execution of the judgment and decree is that it has been over-taken by events since the Land Registrar has already effected the order of this Court. I have looked at the Respondent's annexures which are copies of Title deeds of land parcels certificates of search in respect to the said two parcels and they confirm that indeed after this Court delivered its judgment, the two parcels of land reverted back to the names of the Plaintiff/ Respondent. This prayer is therefore not available to the defendant/ Applicant as it has been over-taken by events.

D. Whether the Applicant has made out a case for setting aside the ex-parte judgment and decree dated 20/12/2018 and all consequential Orders.

18. The grounds for setting aside an ex-parte judgment are well settled. The grant of the order of setting aside an ex-parte judgment is discretionary in nature and the court in determining the same ought to exercise such powers judicially taking into account the circumstances of the case.

19. This Court retains unfettered discretion in determining whether or not to set aside such a judgment. In so doing, the Court will consider the length of time taken, any defence filed and if it raises triable issues and also the prejudice that may arise and, generally, the broad interests of justice in the matter. That discretion is however not to be exercised in favour of a party that is un-deserving of such a remedy which is an equitable one. This was held by **HARRIS J.** in ***SHAH VS MBOGO 1967 E.A*** 116 and approved in ***MBOGO VS SHAH 1968 E.A 93:***

> ***"This 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"***

20. Even though the grant of stay of existing orders can be quite desirable in the obtaining circumstances. The same cannot be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch; ***see the Court of Appeal decision in Malindi Law Society of Kenya v Law Society of Kenya Nairobi Branch and 5 others Civil Application No. 20 of 2017 (2017) eKLR***.

21. The maxims of Equity; '*Equity assists the vigilant and not the indolent'* and '*he who comes to equity must come with clean hand*s' are applicable in the present case. Since 10/10/2012, the defendant has never attended court despite the numerous dates fixed for either mentions or hearings as fixed by the court. He cannot now be seen seeking the court audience on the pretext that he was never notified that the case had been transferred to Narok ELC. Had he been keen on defending the claim against him and prosecuting the counter- claim as alleged, he would have known of the said transfer. The matter was transferred to Narok in the year 2017. His last court attendance was in 2012, this is 5 years later before the transfer and hence sufficient opportunity for the Applicant to put his house in order.

22. I have also noted that even when the matter was being heard in Nakuru; and the defendant was fully aware of the existence of the case, he did not appear in court to prosecute his case or made attempts to file his statement of defence and counterclaim. He who comes to equity must come with clean hands. The Applicant has further failed to fully disclose that he had attended court in Nakuru and had the opportunity of prosecuting his case or appointing an advocate to act on his behalf.

23. On 10/10/2012 when the matter came up before Hon. Lady Justice H. Omondi; counsel for the plaintiff made an application to have the matter transferred to the Land and Environment Court since the same was a land matter. The defendant was present in court, acting in person and even signed in agreement that the file be transferred. Since then, he never attended court again.

24. The applicant also avers that before applying for an order for his eviction from the suit property, the Plaintiff/ Respondent ought to have served him with a Notice to Show Cause why the decree passed by the court in his favor should not be executed against him as the registered proprietor as well as the person in occupation and possession of the suit piece of land. I find that this position taken by the Applicant is a clear misinterpretation/ misrepresentation of the provisions in law. Order 22 Rule 18 outlines the instances when a Notice to Show Cause should be issued upon execution of the decree. It is my considered view that the impugned decree in the present case does not fall within the category stated under Order 22 Rule 18.

CONCLUSION

25. The Upshot is that the Notice of Motion dated 10th September, 2020 lacks merit and I accordingly dismiss the same with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

In presence of;-

Mr. Mutai for the Applicant

Mr. Kilele for the Respondent

Tom Maurice – Court Assistant