



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 376 OF 2014

ROSE CHEPKOECH ROTICH.....PLAINTIFF

VERSUS

ELIAS KIPLAGAT BUSIENEL.....DEFENDANT

RULING

1. **Elias Kiplagat Busieni**, the Defendant, moved the Court through the Motion dated 3rd October, 2019, brought under **Sections 1A, 1B, 3A of the Civil Procedure Act**, seeking for setting aside of the exparte proceedings of 2nd October, 2019 and all consequential orders arising therefrom and costs. The application is based on the ten (10) grounds on its face marked **(i) to (x)** and supported by the affidavit sworn by Sambu Isaac, Advocate on the 3rd October, 2019.

2. The application is opposed by **Rose Chepkoech Rotich**, the Plaintiff, through her replying affidavit sworn on the 18th October, 2019.

3. The application came up for hearing on the 13th November, 2019 when Counsel for both parties agreed to file and exchange written submissions. That subsequently, the Learned Counsel for the Plaintiff and Defendant filed their written submissions dated the 29th November, 2019 and 18th February, 2020 respectively.

4. The following are the issues for the Court's determinations;

(a) Whether the Defendant has made a reasonable case for setting aside the exparte proceedings of 2nd October, 2019.

(b) Who pays the costs of the application?

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence, written submissions by both sides, and come to the following conclusions;

(a) That judgment in this suit was delivered on the 26th January, 2016 dismissing the Plaintiff's suit with costs, upon the court making a finding that the Defendant had **"demonstrated that he has title to the property as absolute proprietor"**. That the Plaintiff filed the Motion dated the 22nd May, 2018 seeking for among others, leave for M/s Morgan Omusundi, Law Firm Advocate to come on record for the Plaintiff and temporary order of stay of execution of decree, pending hearing of the intended appeal. That application was dismissed on the 23rd July, 2018 but reinstated on 31st May, 2019 after the Court allowed the application dated 19th September, 2018. The Court then fixed the Motion dated 22nd May, 2018 for hearing on the 2nd October, 2019 in the presence of counsel for both parties. That come the 2nd October 2019, only Counsel for the Plaintiff was in Court and he submitted that the application had been served and no replying papers in opposition had been filed. That the Court then allowed the application dated the 22nd May, 2018 in terms of prayer (3), with costs to abide the outcome of the appeal. The Defendant then filed the Motion dated the 3rd October, 2019 which is the subject matter of this ruling.

(b) That the Defendant's grounds in support of the application are primarily that the Counsel did not diarize the matter, and that being a mistake of Counsel should not be visited upon the innocent litigant. That the Defendant would greatly be prejudiced and his constitutional right to be heard be prejudiced if the application is not allowed to enable him be heard on the application dated the 22nd May, 2018. That in response, the Plaintiff has deponed that the application has not been brought under the right provisions of the law. That the Defendant will not suffer any prejudice as the *status quo* of the date of judgment will not change. That having considered the submissions by both Counsel and the decided superior Court's decisions cited therein, and considering the determination vide the judgment of the 26th January, 2016 and the un rebutted deposition that Counsel failed to come to Court because the matter was not diarized, and in view of the Court's obligation to do justice to the parties, the Court finds this is a good case where the exparte proceedings should be set aside to enable both sides be heard.

(c) That as this application was occasioned by the absence of Counsel for the Defendant on the hearing date, they will pay the costs of the application to the Plaintiff.

6. That flowing from above, the court finds merit in the Motion dated 3rd October, 2019 and orders as follows:

(a) That the ex parte proceedings and order of 2nd October, 2019 are hereby set aside and a date for inter partes hearing of the Motion dated 22nd May, 2018 be fixed.

(b) The Defendant's Counsel do meet the costs of the application to the Plaintiff in any case.

Orders accordingly.

Dated and delivered at Eldoret this 7th day of May, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy Registrar through the online media given by Counsel/Parties.

Christine: Court Assistant