REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 40 OF 2011

ANNAH KAKUVI MWANIA.....PLAINTIFF/RESPONDENT

VERSUS

ALPHONCE MBITHI MALOMBE.....1ST DEFENDANT/APPLICANT

SOLOMON KYALO MUTISO.....2ND DEFENDANT/APPLICANT

KYALO ISIKA.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 12th October, 2020, the Defendants have prayed for the following orders:

a. That the firm of J. Kamanda & Co. Advocates be allowed to come on record in place of Anthony M. Mulekyo & Co. Advocates.

b. That pending the hearing and determination of this Application this Honourable Court do stay the execution of the Judgment dated 18th September, 2020 and any consequential orders in this matter.

c. That an order do issue setting aside the Judgment dated 18th September, 2020 and any other consequential orders issued thereafter.

d. That the 1st and 2nd Defendants be granted leave to participate in the trial proceedings and the case be set down for hearing on merits.

e. That the cost of this Application be provided for by the Plaintiff.

2. The Application is supported by the Affidavit of the 1st Defendant who has deponed that they appointed the law firm of Anthony M. Mulekyo & Co. Advocates to represent them in this matter; that the 2nd Defendant entered appearance through the said law firm on 15th March, 2011 and filed a Defence on 27th October, 2011 and that although the advocate was served with a hearing notice for 15th October, 2019, he failed to attend court.

3. It was the deposition of the 1st Defendant that herself and the 2nd Defendant failed to attend court on 15th October, 2019 for hearing of the suit because they were not informed of the date and that they were informed on 30th September, 2020 about their advocates failure to attend court.

4. The 1st Defendant finally deponed that they are desirous to prosecute their claim; that the Defence filed on 27th October, 2011 raises triable issues and that it is only fair that the issues raised in the Defence are ventilated at trial.

5. In opposition to the Application, the Plaintiff filed Grounds of Opposition in which she averred that the Defendants have failed to tender an explanation as to why they did not attend court on 15th October, 2019 when the matter came up for hearing and that the conduct of the Defendants is indicative of parties who had no interest in the suit.

6. The Plaintiff averred that the Defendants ought to have made a follow-up of the matter; that the Defendants were aware of the Application filed by their advocate to cease acting filed on 12th March, 2019 and that the Defendants have not satisfied the principles for setting aside Judgment.

7. In his submissions, the Defendants' advocate submitted that the fundamental duty of the court is to do justice to parties in a suit; that this court has unfettered discretion to set aside an ex-parte Judgment in order to avoid injustice and that the Defendants did not participate in the proceedings because of the mistake of their advocates.

8. The Defendants' advocate finally deponed that the mistakes and in-action of the former advocate should not be visited on the innocent Defendants and that the right to a fair hearing is sacrosanct. Counsel relied on numerous authorities including the cases of ***Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited (2014) eKLR; Wachira Karani vs. Bildad Wachira (2016) eKLR*** and ***Peter Kiplagat Rono vs. Family Bank Limited (2018) eKLR.***

9. On his part, the Plaintiff's advocate submitted that the Defendants failed to appear in court during the hearing; that the Defendants were aware that their former advocate had already ceased acting for them and that the Defendants took over two (2) years to peruse the court file. Counsel relied on numerous authorities which I have considered.

10. The record shows that when this matter came up for hearing on 19th September, 2017, the Defendants' advocate informed the court that the Defendants had not furnished him with instructions. The Defendants' counsel further informed the court that he would be filing an Application to cease acting for the Defendants.

11. When the matter came up for hearing on 15th November, 2018, neither the Defendants nor their advocate were in court. On 12th March, 2019, the Defendants then advocates filed a Chamber Summons dated 11th March, 2019 in which they sought for leave to cease acting for the 1st and 2nd Defendants. The said Application was fixed for hearing on 28th May, 2019.

12. When the Application to cease acting for the Defendants came up for hearing on 28th May, 2019, the Defendants' advocates were not in court to prosecute the Application, and the Application was dismissed for want of prosecution. The matter was then fixed for hearing of the main suit on 15th October, 2019. The firm of Anthony M. Mulekyo was duly served with a hearing notice of 15th October, 2019 which was received without any reservation by the said firm on 9th August, 2019.

13. It is on the basis of the Defendants' advocates having been served with the hearing notice that the Plaintiff proceeded to testify on 15th October, 2019. The record shows that after the Plaintiff was heard on 15th October, 2019, the Defendants' counsel sought to have the Application to cease acting for the Defendants reinstated, which Application was allowed by consent on 14th July, 2020.

14. The evidence before me shows that the Defendants' advocates were duly served with the hearing notice of 15th October, 2019, which is the date that the Plaintiff testified and closed his case.

15. In the case of ***Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR*** the learned Judge quoting with approval the case of ***Stephen Ndichu vs. Monty's Wines and Spirits*** held as follows:

> *"The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it* ***(See Patel vs. E.A. Cargo Handling Services Ltd [1974] E.A 75).*** *The discretion is intended 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 cause of justice* ***(See Shah vs. Mbogo [1969] E.A 116).*** *The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.* ***(See Sebei District Administration vs. Gasyali [1968] E. Way. 300).*** *It also goes without saying that the reason for failure to attend should be considered."*

16. Further and in the case of ***Shah vs. Mbogo and Ongom vs. Owota*** cited in ***Gideon Mose Onchwati vs. Kenya Oil Co. Ltd & Another*** *(supra)* the court held that for an order of setting aside of an ex-parte Judgment to issue, the court must be satisfied with two things namely:

> *"a. either that the Defendant was not properly served with summons; or*
>
> *b. that the Defendant failed to appear in court at the hearing due to sufficient cause.*

17. The court defined what constitutes sufficient cause and in this respect as follows:

> *"Once the Defendant satisfies the court on either, the court is under duty to grant the Application and make the order setting aside the ex-parte Decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a Defendant from appearing in court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.*
>
> *Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omission of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."*

18. The evidence before this court shows that since the Defendants appointed their former advocates to file a Defence, which he did on 27th October, 2011, they neither gave him instructions nor made a follow-up to know the position of the suit.

19. Indeed, there is no evidence that has been placed before me to show that the non-attendance of the Defendants during the hearing of the suit was occasioned by their advocates' acts and omissions.

20. To the contrary, it is the Defendants who failed to instruct their advocates appropriately or made an effort to ascertain the position of the suit. The Defendants in this matter were privy to the default of their advocates in not appearing in court on 15th October, 2019 and failed to give their advocates instructions in this matter.

21. For those reasons, it is my finding that although the Defendants were served with summons, they failed to appear in court when the matter came up for hearing. The Defendants have not given sufficient reasons why they did not attend court on 15th October, 2019 and 14th July, 2020 when the Application to cease acting was heard and determined.

22. In the circumstances, I find the Defendants' Application dated 12th October, 2020 to be unmeritorious. Other than prayer number (a), the Application dated 12th October, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21ST DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE