



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 177 OF 2017

(Formerly NYERI HCC NO. 31 OF 2006)

JANE WANGECHI KARIUKI.....PLAINTIFF

-VERSUS-

GRACE RUGURU THUMBI.....1ST DEFENDANT

ANTONY THUMBI.....2ND DEFENDANT

RULING

1. Before me for determination is a notice of motion dated 7th November, 2017 filed by the defendant (hereinafter referred to as the applicant) seeking orders *inter alia* that this honourable court be pleased to issue a prohibitory order pending inter-parties hearing of the the suit; set aside the judgment delivered in this case and the subsequent orders issued; allow the 1st defendant/applicant to defend her interest of the suit land and costs of this application be costs in this cause.

2. The application is expressed under the provisions of **Order 51 Rule 3 and 4** the Civil Procedure Rules 2010; is premised on the grounds on the face of the application and is supported by the affidavit of Grace Ruguru Thumbi sworn on 7th November 2017 in which she avers *inter alia* that she has never been served with any pleadings and notices after she filed her defence and replying affidavit; that the hearing date was taken ex-parte; that she learnt that the matter had been heard, judgment delivered and the land registered in the name of the plaintiff when she was served with a letter by the firm of Waweru Kiragu & Associates to vacate the suit premises; that upon perusing the court file, she confirmed that the matter proceeded *ex-parte* after the court satisfied itself that she and the 2nd defendant had been duly served.

3. The application is not opposed.

4. Despite being served, the defendant did not file any documents opposing the application and neither did he or his advocate attend court for hearing of the application.

5. When the application came for hearing, the applicant chose to rely on her pleadings as filed which I have duly considered.

6. **Mativo J**, in the case of **Wachira Kerani vs Bildad Wachira** Civil suit No. 101 of 2011 set down the principles courts should consider in an application to set aside an ex-parte judgment. He states;

“Essentially, Setting aside an *ex parte* judgement is a matter of the discretion of the court. In the case of Esther Wamaita Njihia & two others vs. Safaricom Ltd[3] the court citing relevant cases on the issue held *inter alia*:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.[4]) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see Shah vs. Mbogo[5]). 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.[6])It also goes without saying that the reason for failure to attend should be considered."

Counsel for the Respondent referred to the case of Shah vs Mbogo.[7] Also relevant is the case of Ongom vs Owota[8] where the court held *inter alia* that the court must be satisfied about one of the two things namely:-

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to sufficient cause.”

7. On sufficient cause, the honourable judge in the aforesaid case stated;

“The Supreme Court of India in the case of Parimal vs Veena observed that:-

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient"

embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.[13] The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. [14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

8. In applying the above principles to the circumstances of this case, I find the applicant has offered a convincing explanation why she did not attend court. I say this because first, the hearing date was taken *ex parte* and the notice served has been disputed. Upon perusal of the record, I noted that the certificates of postage show that the notices were sent to Anthony Mathu of P.O. Box 782 Naivasha. Secondly, the invitation letters to take a hearing date for hearing of the suit are addressed to both defendants using P.O. Box 221 Mweiga. It is noteworthy that the 1st defendant's address as per the court record is P.O. Box 211, Mweiga and that of the 2nd defendant is P.O. Box 782, Naivasha. Thirdly, Samuel Wachira Mbuthia, a licensed process server, in paragraph 3 of his affidavit sworn on 2nd December 2013, although he deposes that the applicant was served personally at 9.35 a.m at her residence in Mweiga; that she accepted service but declined to sign on the copy, I find this curious because the 1st defendant had been served before, acknowledged service and filed her defence giving her address as P.O. Box 211, Mweiga. Fourthly, in the affidavit sworn on 2nd December 2013, service on the 2nd defendant is said to have been effected on a son of the defendants, one Mwaura who accepted service on behalf of the 2nd defendant but declined to sign for the hearing notice. The applicant has denied having a son by the name Mwaura and stated that she and the 2nd defendant have only one son by the name Naftaly Mwangi.

9. This court has a fundamental duty to do justice between the parties and each party should be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle of natural justice, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his/her case.

10. Having considered the facts of this case, the affidavit filed by the applicant and the relevant law, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I exercise the inherent jurisdiction of this court under **Sections 1A, 1B and 3A** of the Civil Procedure Act and set aside the *ex parte* judgement delivered on 11th day of December, 2014 and all the consequential orders and order that this suit proceeds for hearing afresh as a defended case.

11. Each party to bear their own costs for this application.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 3rd day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiffs

N/A for the defendants

Court assistant - Esther