



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 3 OF 2017

PHILIP WANJOHI KARIUKI.....PLAINTIFF

VERSUS

KENNEDY NJENGA NYAMBURA.....1ST DEFENDANT

STEPHANIE NJERI NJOGU.....2ND DEFENDANT

LEONARD N. NJAU T/A KINYANJUI & NJAU ADVOCATES.....3RD DEFENDANT

AND

LAZARUS SANKORI KARINO.....INTERESTED PARTY

RULING

What is before Court for determination is the Defendants/Applicants Notice of Motion dated the 30th October, 2020 brought pursuant to Order 51 Rule 1, Order 12 Rule 7, Order 22 Rule 22, Order 9 Rule 9 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The Applicants seek the following orders:

1. Spent.
2. That the firm of Ondabu & Co. Advocates be granted leave to come on record for the Applicants in place of Aunga & Co. Advocates.
3. That the judgement delivered by this Honourable Court on the 29th January, 2020 be set aside and the Defendants case reopened.
4. That a temporary order of stay of execution of the judgement of the court dated 29th January, 2020 be issued pending the hearing and determination of this application.

The application is premised on the grounds on the face of it and the supporting affidavit of the 3rd Applicant LEONARD N NJAU where he deposes that they had instructed the firm of messrs Aunga Omwenga & Co. Advocates to defend this suit wherein they entered appearance and filed a Defence on their behalf. He confirms that Mr. Aunga advocate attended court on the 12th July, 2018 and 4th March, 2019 when the Plaintiff's evidence was taken. He explains that the Plaintiff was further cross examined and re examined on 4th March, 2019. Further, that the Defence hearing date was scheduled for 16th July, 2019. He avers that messrs Aunga Omwenga & Co. Advocates did not inform him or his co applicants that the Defence hearing was slated on 16th July, 2019. Further, that together with his co applicants, they are obligated to attend court and give evidence in defence of the suit. He reiterates that it is only after the Plaintiff's Advocates served the Applicants' in person with Misc. Application No. 12 of 2020 for taxation that it came to their notice that the matter had been finalized. Further, he has perused the court file and noted that the court ordered for closure of the Defence case when their advocate failed to appear in court. He states that they have appointed the firm of messrs Ondabu & Co. Advocates in place of messrs Aunga Omwenga & Co. Advocates to represent them. Further, the firm of messrs Aunga Omwenga & Co. Advocates have consented to the said firm to take over the conduct of this matter from them. He insists mistakes made by messrs Aunga Omwenga & Co. Advocates should not be visited upon them. He further states that they have a good defence and prays for a chance to be heard and judgement made on merit. Further, that the Bill of Costs has been taxed and the Plaintiff will take out execution proceedings at any time.

The Plaintiff opposed the application and filed a replying affidavit where he contends that the same is laced with total dishonesty and misrepresentations. He insists that the application is filed by a stranger as no notice of appointment or notice of change or consent to come on

record was ever filed. Further, that the Applicant has no authority from the alleged co applicants and is pure waste of time including distraction meant to avoid as well as derail ongoing execution. He avers that the application is scandalous, vexatious and a gross abuse of the court process; defeats the oxygen principle; offends section 3 and 3A of the Civil Procedure Act; inordinately late; is a pure afterthought and defeats equity of justice. He proceeds to highlight proceedings within the court records dated the 12th July, 2018; 19th November, 2018; 4th March, 2019; 16th July, 2019 and 24th September, 2019 demonstrating that the Defendants were granted audience by the court. He explains that the Defendants failed to file submissions despite being served with the Plaintiff's submissions as well as a mention notice. Further, they failed to appear in court on the date the matter was slated for judgement. He states that when the matter came up for taxation of costs, a Misc File Number 12 of 2020 was opened and the Bill of Costs severally served upon the Defendants personally but they chose to abscond. He reiterates that the Defendants were aware of the Judgement and all proceedings herein. Further, that the court considered their defence and the relevance of the questions posed during his cross examination in arriving at the judgement thus the case cannot be reopened and the Defendants have the avenue to appeal.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Defendants'/Applicants' Notice of Motion dated the 30th October, 2020 including the rivalling affidavits and submissions, the following are the issues for determination];

- Whether the firm of messrs Ondabu & Co. Advocates should be allowed to come on record for the Defendants in place of messrs Aunga Omwenga & Co. Advocates.
- Whether the judgement delivered by this Honourable Court on the 29th January, 2020 should be set aside and the Defendants case reopened.

As to whether the firm of messrs Ondabu & Co. Advocates should be allowed to come on record for the Defendants in place of messrs Aunga Omwenga & Co. Advocates.

The Defendants have sought for leave for the firm of messrs Ondabu & Co. Advocates to be allowed to come on record on their behalf. Order 9 Rule 9 of the Civil Procedure Rules 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.'

The Plaintiff insists the application has been filed by a person not properly on record. I have had a chance to peruse the application and the supporting affidavit of the 3rd Defendant who confirms issuing instructions to messrs Ondabu & Co. Advocates to come on record on their behalf. The Plaintiff has not demonstrated what prejudice he starts to suffer if the said firm came on record on behalf of the Defendants. Since the Defendants have sought for leave to allow messrs Ondabu & Co. Advocates to come on record in place of messrs Aunga & Company Advocates and having confirmed in their supporting affidavit that they have instructed the said law firm while noting that the judgement in this matter had already been delivered and in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules as well as Article 159 (2) (d) of the Constitution, I will proceed and allow the firm of messrs Ondabu & Co. Advocates to come on record for them.

As to whether the judgement delivered by this Honourable Court on the 29th January, 2020 should be set aside and the Defendants' case reopened.

The Defendants have sought to set aside the judgement delivered on 29th January, 2020. In their submissions they have reiterated their claim and contended that mistake to advocate should not be visited upon them. They aver that they have a valid defence. To buttress their averments, they have relied on the cases of **Maina V Muriuki Civil Appeal No. 1079 of 1980 and Patel V E A Cargo Handling Services Ltd (1974) EA at page 76**. The Plaintiff opposed the application for setting aside of the judgement and insisted there is no sufficient cause shown to disturb the said judgement. He has highlighted the proceedings herein and insist the Defendants were granted ample opportunity. To support his arguments, he relied on the case of **Habo Agencies Limited V Wilfred Odhiambo Musingo (2015) eKLR**. He reiterates that the application has been brought after a delay. Further, that the only reason the Defendants came to court is because his accounts were attached.

In the case of **Wachira Karani v Bildad Wachira [2016] eKLR** the Court while dealing with the issue of setting aside of a judgement observed that: '**The well established principles of setting aside interlocutory judgements were laid out in the case of Patel vs East Africa Cargo Handling Services[12]where Duffus,V.P. stated; "The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"**

The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "Sufficient cause" mean. 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.'

In the current case, the Defendants blame their erstwhile Counsel in dealing with this matter culminating in the judgement being entered in favour of the Plaintiff. They contend that their Defence is merited and the judgement should be set aside and the Defence case reopened. I wish to make reference to the various proceedings in this court dated the 12th July, 2018; 19th November, 2018; 4th March, 2019; 16th July, 2019 and 24th September, 2019. I note from the Court records the Defendants' Counsel was granted audience several times to be able to represent the Defendants but he failed to do so. Even when the Plaintiff testified the Counsel sought for time to obtain instructions from the Defendants. I further note that the Defendants participated in the Plaintiff's case and even cross examined him. Further, before the Defence case, they entered into a consent judgement on 19th November, 2018 in favour of the Interested Party for the sum of Kshs. 19,700,000 and the said Interested Party accepted to remove the restriction on the suit land Kajiado/ Kaputiei North/ 59924 once he received Kshs. 3,000,000/=. I note the Sale Agreement between the Plaintiff and the Defendants was for the purchase of five acres from the suit land belonging to the Interested Party, of which the Plaintiff had already paid the Defendants Kshs. 6, 250,000/=. I further note on 19th November, 2018, the Defendants sought to adjourn the matter, which application was allowed and the matter slated for hearing on 4th March, 2019. On 4th March, 2019, the Plaintiff closed his case after cross examination by the Defendants' Counsel and the matter was adjourned for defense case on 16th July, 2019 which was a mutually agreed upon date but the Defendants' counsel never appeared in court despite the file being placed aside, culminating in the Defence case being marked as closed. From the court records, I find that the Defendants were granted ample time to prepare and participate in their case. In the Defendants supporting affidavit except for blaming their Counsel, the Defendants have not demonstrated sufficient cause why the judgement should be set aside. In the case of **ROSE KAIZA Vs ANGELO MPANJU KAIZA (2009) eKLR** the Court while dealing with the issue of setting aside held that: **' In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.'** In associating myself with the two decisions as well as the legal provisions cited above, I find that there was remissness on the part of the Defendants to participate in this matter. Further, from the facts and circumstances of this case, insofar as the Defendants did not present their defense case, I note it is actually the Plaintiff who is prejudiced in this matter. It is my considered view that this was a regular judgement and no sufficient cause has been demonstrated to set it aside as it is the said Defendants who acted in a negligent manner, failed to be diligent and remained inactive in certain instances where they had audience of the court. It is against the foregoing that I decline to exercise my discretion to set aside the judgement delivered by this Honourable Court on the 29th January, 2020 and reopen the Defendants' case.

In the circumstances, I will only allow prayer No.2 Notice of Motion dated the 30th October, 2020. The costs of the application is awarded to the Plaintiff.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH MAY, 2021

CHRISTINE OCHIENG

JUDGE