REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 38 OF 2017

PAULINE GATHONI WABI .....PLAINTIFF/RESPONDENT

VERSUS

NGOIRI MUCHANGIRU.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **9th November 2020,** by the Defendant/ Applicant seeking for the following orders;

1. ***That the Law Firm of Messrs Muiruri Cheserek & Co Advocates be granted leave to come on record on behalf of the Defendant/ Applicant and replace the Law Firm of Messrs Muturi Njoroge & Co Advocates.***

2. ***That this Honourable Court be pleased to set aside its Judgment of the 9th March 2020, pending the hearing and determination of this suit.***

3. ***That the Honourable Court be pleased to set aside the proceedings of the 7th October 2020, and or re-open the Plaintiff's case and allow the Defendant through its Advocate on record to cross examine the Plaintiff's witness.***

The Application is premised on the grounds that the Defendant/ Applicant was served on **5th November 2020,** with an Order which indicated to have been issued on **8th October 2020,** being an eviction Order. That the Defendant/ Applicant had **no Notice** of the delivery of the Judgment, the hearing and or the resultant Application inviting the **Officer Commanding Station, Kamwangi Police Station,** to her homestead. That upon visiting offices of the then Advocate on record, the Defendant/ Applicant was dismayed to learn that the Order was genuine.

That the said Advocate informed her that the reason she was not contacted during the hearing to give her testimony and on the Judgment date is that they had mistakenly recorded her phone Number as **0704-489366** as opposed to **0704829366,** which is her actual phone number. That the Defendant/ Applicant had visited her former Advocates offices several times and she was informed that the office would call her if she was needed.

That her former Advocates erred in proceeding with the matter in her absence and her Advocates actions went against her express instructions when she wrote down her statement before her Advocate and in her witness statement dated **20th January 2016**. That as a result of her Advocate's error, she faces impending eviction from her homestead where she has called home for the last **48 years.** That it is just and fair and in compliance with the Rules of Natural Justice that parties are not condemned unheard. That the Judgment debtor has a strong **Defence** and credible **Counter- Claim** having been in the suit property for over 48 years.

In her Supporting Affidavit, **Ngoiri Muchangiru,** averred that she was shocked to learn that her Advocate proceeded without instructions as opposed to informing the Court of their inability to reach her and therefore no evidence was offered. That her former Advocates unilaterally abandoned her Counter Claim and conceded to the Plaintiff's/ Respondent's claim offering no witness or evidence to the Court. That she stands to suffer extreme prejudice in the event that the Judgment is not set aside. She urged the Court to find that excusing the mistake of her then Advocate on record shall afford a justifiable and expeditious and holistic disposal of the matter.

The Application is opposed and the Plaintiff/Respondent **Pauline Gathoni Wabi,** swore a Replying Affidavit on **10th December 2020,** and averred that the Application is baseless, brought in bad faith and is an abuse of the Court process. That the Defendant/ Applicant seeks Orders that have been overtaken by events. That the Orders of eviction in the instant case were executed by Court bailiff on **18th November 2020,** and the Plaintiff/ Respondent put in possession and a Court bailiffs report on the execution was filed on **3rd December 2020,** and the Court cannot be called to stay a Judgment whose effect has been accomplished.

That the Defendant/ Applicant seems to put blame on her Advocate and the same should not be attributed to the **Decree holder** as she

satisfied the Court at every step. That though the Defendant/ Applicant did not call any witness, the Plaintiff's/ Applicant's case was determined on merit. Further, that the suit was commenced in **2015** and the Defendant/ Applicant knew of the veracity of the case and was fully represented by an Advocate and should not have gone to slumber only to be woken upon by the **Decree Holder** on the date of the eviction. That the reasons as to failure to attend Court are not convincing for lack of supporting evidence. That every successful litigant is entitled to fruits of his/her Judgment, and the instant Application is baseless. The Court was urged to dismiss the Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered .The Court has also read and considered the Application, the Affidavits and the annextures together with the provisions of law and finds that the issues for determination are;

1. Whether the Defendant/ Applicant has met the threshold for setting aside Exparte Judgment.

2. Whether the Defendant/ Applicant is entitled to the orders sought.

1. <u>Whether the Defendant/ Applicant has met the threshold for setting aside Exparte Judgment</u>

From the onset, the Court will first deal with whether the Defendant's/ Applicant's Advocate should be granted leave to come on record for the Defendant/ Applicant.

Order 9 Rule 9 of the **Civil Procedure Rules, 2010 (CPR)** 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."***

In this instant, the Law Firm of ***Messrs Muiruri Cheserek & Co Advocates,*** having sought for leave, and there being no objection to the same, the Court finds that the said prayer is merited and therefore leave is granted.

The instant Application was brought under the provisions of ***<u>Order 12 Rule 7</u>*** **of** the ***<u>Civil Procedure Rules,</u>*** which provides that where under this Order, Judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the said Judgment. The power to set aside **ex parte orders** are discretionary and the Court must use its discretion to come to a conclusion, while also ensuring that Justice has been done. The Court in ***<u>Patel….Vs….E.A Cargo Handling Services Ltd (1974) EA 75,</u>*** held that:-

> ***"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to feter the wide discretion given to it by the Rules.''***

Further, it is this Court's considered view that in deciding on whether or not to grant the orders sought and exercise its discretion, the Court is also guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed and thereby prejudice occasioned to the Respondent. See the case of ***<u>Wachira Karani …Vs… Bildad Wachira (2016) eKLR,</u>*** in allowing an application to set aside an *ex parte* judgment, the Court held that:-

> ***"The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."***

In this instance case, it is not in doubt that the Defendant / Applicant was represented by the **Law Firm of Muturi Njoroge & Company Advocates,** who were served with the hearing Notice and when the matter came up for hearing, 0n **19th November 2018**, the said Law Firm of Muturi Njoroge & Company Advocates, was present in Court and indicated that it was intending to file an Application to cease acting and sought for an Adjournment. The said adjournment was denied and the matter proceeded for hearing. That further on **17th December 2018**, the said Law Firm of Muturi Njoroge & Company Advocates filed an Application to cease acting and on **2nd April 2019,** when the matter came up to confirm filing of submissions the said Law Firm of Advocates on record for the Defendant/ Applicant sought more time to file their written submissions and Judgment was delivered on **9th March 2020.**

From the above analysis there is no doubt that the Defendant/ Applicant through her Advocates was aware of the said Hearing date and that the Defendant/ Applicant was further aware of the Judgment date. It is the Court's considered view therefore that the Judgement that was entered was a regular Judgment.

The Defendant/ Applicant has sought for setting aside of the Judgment and in her Application, she has blamed her Advocates for failing to inform her of the said date. It is imperative to note that though the Defendant/Applicant's Advocate had sought to cease acting for the Defendant/ Applicant, the Application was never prosecuted and the said Firm of Advocates continued to make appearance for the Defendant/ Applicant. It is the Defendant's/ Applicant's contention that her former Advocates had wrongly indicated her phone number and that though she visited their offices severally, they had informed her that they would call her when she was needed.

The suit herein was heard in **2018**, the Judgment was delivered in **2019,** and the instant Application was brought on **9th November 2020** after the Defendant/ Applicant had been served with an **Eviction Notice.** Does it then mean that from the year **2018,** when the suit was heard, the Defendant/ Applicant did not follow up on the condition of her case? Was she interested in her case? What if the Eviction Notice had not been served would she be Interested in knowing the position of her case? Apart from the copy of a cover of an alleged File, that indicate the Defendant's/ Applicant's number, no further evidence has been adduced by the Defendant/ Applicant to show that she took any steps to try and find out the position of her case. In the case of ***Gerald Mwithia Vs Meru College of Technology & Another [2018] eKLR,*** the courts have held on several occasions before that; -

> ***"Clients cannot continue to hide behind the failure of their advocates to perform certain required actions on their part and that it is incumbent upon the clients to follow up the progress of their case, this premised on the fact that the case does not belong to the advocate but the client."***

Further in the case of ***Michael Kamau Gakundi vs Daima Bank Limited & Another [2012]eKLR,*** where Havelock J. at paragraph 10 by citing Kimaru J. Notes that;

> ***"it is duty of the litigant to keep in touch with his advocate so as to know the fate of the case. It appears that in this case, the Appellants were content to have the suit remain pending and must therefore bear the consequence."***

In this instant from the **year 2018**, when the matter came up for hearing, the Defendant/ Applicant did not make a follow up of a case and waited until she was served with an **eviction order** that she visited her Advocates. Her Advocates in seeking to cease from acting had in their Application stated that they were unable to reach her.

The Court has discretion to set aside ex parte Judgment in order to avoid injustice from an accident, inadvertent or excusable error, but not to aid a person who sought to delay justice. See the case of ***Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) e KLR,*** **t**he Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> ***"To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."***

In this instant case, the Court is not satisfied that there was an inadvertent or excusable mistake to warrant it exercise its discretion in the Defendant/ Applicant's favour. The Defendant/ Applicant had an obligation to follow up on her case and sat on her rights and only woke up when she was served with an **Eviction Notice.** It is the Court's considered view that this is a clear case of delaying justice. The Defendant/ Applicant has not shown the Court that she has even held her former Advocates liable for negligence and if indeed the said Advocates were liable for failing to take proper instructions and further prosecuting their client's case as instructed, they ought to be held liable for negligence. Given that no inadvertent mistake has been shown, the Court finds that this is not a case for setting aside the Judgment. See the case of ***David Kiptanui Yego & 134 Others V Benjamin Rono & 3 others [2021] eKLR*** where the Court held that;-

> ***"I note that the Applicants Advocate admits that the failure to enter appearance/file a defence was on their part, citing inadvertent mistake. It is a general law that Advocate's failure to execute his client's instructions amounts to professional negligence. This was the position in Water Painters International -v- Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR, where the Court stated that;***
>
> ***"…in the words of justice Ringera in Omwoyo vs African Highlands & Produce Co. Ltd (2002 J) KLR, time has come for the legal Practitioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the defendant's Advocates. This is a proper case where the Defendant's remedy is against its Advocate, while suing advocates for professional negligence and not setting aside the judgment."***

Consequently, the Court finds that the instant case is not one that warrants it to exercise its discretion in favour of the Defendant/ Applicant For the above reasons, the Court finds and holds that the Notice of Motion Application dated **9th November 2020,** by the Defendants/ Applicant is **not merited** and the same is dismissed entirely with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed and ***Delivered*** at ***Thika*** this **24th** day of **June 2021.**

L. GACHERU

JUDGE

24/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by

His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Magania for the Plaintiff/Respondent

Mr. Muiruri for the Defendant/Applicant

L. GACHERU

JUDGE

24/6/2021