



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC. NO 59 OF 2017

JOHN NDEDAPLAINTIFF/RESPONDENT

- VERSUS -

DAVID MUKANGULA SAIZIDEFENDANT/APPLICANT

R U L I N G

1. Vide an application dated 11/12/2019 brought under the provisions of Order 22 rule 22; Order 40 rule 7 and Order 10 of the Civil Procedure Rules, the defendant/Applicant prayed that he be granted orders:

1. Spent.

2. Spent.

3. That the arrest warrant and / or an order of Committal to civil jail issued herein against the applicants be and is hereby temporarily stayed and the judgement debtor discharged pending the hearing and determination of this application inter-partes.

4. That an order of injunction issued herein against the applicants either by himself, his agents, workers, personal representatives and/or assignees be restrained from entering, trespassing or in any other way interfering with the plaintiff quiet enjoyment of his L.R BUKHAYO/BUGENG'I/2084.

5. That judgment entered herein and all consequential orders be and are hereby set aside.

2. The motion was supported by the grounds on the face of it inter alia:

a. That the applicants instructed the firm of Wanyama & Co. Advocates to defend the suit but have now learnt that no steps were taken to safeguard their interests.

b. That mistakes of counsel has caused the applicants herein untold suffering and his mistake cannot be visited upon innocent litigants read the applicants.

c. That it is in the interest of justice that this matter be heard and determined on merit.

3. The application is supported further by the sworn affidavit of the defendant/applicant where he deposed that after receiving summons, he duly instructed the firm of Wanyama & Co. Advocates to file a defence on his behalf. That the said firm did not take any steps as he learnt of this on 15th September 2019 when a warrant was issued for his arrest. That he should not be made to suffer for the mistakes of his advocates since he has a good defence to the claim as shown in the annexed draft statement of defence.

4. The Respondent opposed the application by filing a replying affidavit sworn on 24th November 2020. He deposed that the Applicant was duly served with STEA as well as the amended plaint. That after the matter proceeded exparte, he extracted the decree and served upon the Applicant as directed by the court. That the Applicant was aware of the decree as he listed it amongst his documents in CMCC ELC No. 88 of 2019. The Respondent deposes that this application was made one year four months late which is undue delay. He urged for the application to be dismissed with costs.

5. The parties filed written submissions in arguing the application which submissions I have considered in this determination. The principles

of setting aside exparte judgements/orders were laid out in the Case of *Shah Vs Mbogo [1967] EA 116 at 123B*, that the application should be brought without undue delay; not to defeat justice and to avoid mistake or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person deliberate on evading or obstructing the course of justice. The Court of Appeal further noted that there is no limit or restriction on the judge's exercise of discretion.

6. The Respondent has deposed that the application was brought after undue delay which delay has not been explained. The Applicant did annex a copy of the impugned decree in a list of his documents dated 24/8/2018 and filed in Busia CMCC 88 of 2018 which is between the same parties herein. His main reason for applying to set aside this exparte judgment was because of mistake of his previous counsel but he does not explain steps he took immediately he learnt of the impugned decree in August 2018.

7. In spite of this delay, the court still has discretions to consider if the Applicant has shown a good defence to the claim. The claim before court is essentially boundary dispute/encroachment. The Respondent's parcel of land Bukhayo/Bugengi/2084 is neighbouring Bukhayo/Bugengi/12077 owned by the Applicant/defendant. The Applicant denies that he has encroached on to the plaintiff's parcel L.R. No. Bukhayo/Bugengi/2084. This presents a good defence since there is need to establish if there is any encroachment by either of the two parcels. It serves the interest of both parties on another's to have the dispute determined on merits and so the parties can live in peace. For this reasons, I grant **prayer 5** of the application.

8. Because of the delay in bringing this application, the plaintiff/respondent is entitled to be compensated by way of costs. The plaintiff/respondent shall thus retain Kshs.15,000 awarded as thrown away costs if taxed costs are already paid and refund the difference. If no payment has been made, the defendant/applicant shall pay to the Respondent Kshs.15,000 within 30 days hereof. In default execution to issue.

9. Since prayer 5 of the motion is granted, the arrest warrant/committal to civil jail is automatically set aside. The defendant is directed to file and serve his defence within 14 days of today. In respect of prayer No. 4, parties are directed to maintain the prevailing status quo pending hearing and determination of this suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 15TH DAY OF JUNE, 2021

A. OMOLLO

JUDGE