



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 168 OF 2016**

**JOHN WEKESA MATAFALI.....PLAINTIFF**

**VERSUS**

**KEFA KHAVERE LUTESHI .....DEFENDANT**

**RULING**

**The Application**

1. By Notice of Motion dated **18/2/2021** and filed in court on **19/2/2021** brought under **Section 1A, 1B & 3A** of the **Civil Procedure Act, Order 22 Rule 25** and **Order 12 Rule 7 of the Civil Procedure Rules, Article 159** of the **Constitution**, the plaintiff/applicant sought for the following orders:

1. ...spent

2. ...spent

3. That the *ex-parte* hearing and resultant judgment and decree dated **14/2/2020** be set aside and all consequential orders and the matter be heard on merit.

4. That the costs of this application be in the cause.

2. The application is supported by the affidavit of the plaintiff sworn on **18/2/2021**. It is further supported by a further affidavit sworn by the plaintiff on **5/3/2021**. The grounds in which the applicant relies are as follows: that the applicant's advocate failed to attend court and so the applicant was not heard; that the applicant has a strong defence that discloses triable issues; that the matter is emotive as it concerns land and that the mistake of counsel should not be visited upon the applicant. The applicant claims that he came to know of the decree in this matter when the County Land Registrar allegedly came to serve him with a notice. He states that his former advocates were served with a hearing notice, but they informed him that they inadvertently failed to diarise the matter hence the *ex parte* hearing.

**The Response**

3. The defendant filed his replying affidavit on **1/3/2021**. His response is that any orders setting aside the judgment and decree dated **14/2/2020** would be futile since a new hearing would not change the findings of the County Surveyor and the County Land Registrar which this court would in any event be required to follow. He states that the County Land Registrar and the County Surveyor visited the site of the dispute and made a report on the boundary dispute which was produced in court. Further, he states that without a

good reason the plaintiff failed to appear in court to prosecute his case. The respondent's further argument is that even if the plaintiff had been able to prosecute his case the same is bad in law as it violated various provisions of **Land Registration Act 2012**. Finally it is stated that the applicant is guilty of *laches* and has rushed to court to avert possible contempt of court proceedings.

### **Submissions**

4. The plaintiff filed his submissions on **8/3/2021** while the defendant filed his submissions on **15/3/2021**.

### **Analysis and Determination**

5. I have perused the application, the supporting affidavits, the replying affidavit and the submissions filed by the parties herein and the issues for determination are:

*(a) Whether the judgment and decree of this court dated 14<sup>th</sup> February 2020 should be set aside at the instance of the plaintiff.*

*(b) What Orders should issue as to costs?*

6. It is within the court's unfettered discretion to issue orders setting aside judgment but only in favour of applicants who demonstrate excusable error and that they have not attempted to delay the conclusion of litigation or obstruct the course of justice, and that there is a defence on the merits. See: the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75**. In that case the court had stated as follows:

**"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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."**

7. In the case of **Sammy Maina Versus Stephen Muriuki 1984 eKLR** the court (O'Kubasu J as he then was) observed as follows in an application to set aside *ex parte* judgment:

**"The court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence."**

8. Drawing from previous decisions the court in the **Sammy Maina** case further stated as follows:

**"In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (see **Shah v Mbogo & Another [1967] EA 116** at page 123 by Harris J and as approved by the Court of Appeal for East Africa in **Mbogo v Shah [1968] EA 93**)."'**

9. In **Kitale Land Case No. 22 Of 2015 Jackson Ekim Omaido vs Lucia Ngaira Omunga** this court declined a plea by the applicants (whose defences had earlier on been struck out) just like the applicant in the instant case, to the effect that their advocate had failed to inform them of the hearing date, and consequently dismissed their application for setting aside of the judgment and decree.

10. In the instant case the plaintiff filed suit on **21/11/2016** and alleged that there is a road running

parallel to his land intended to serve several other named portions of land. He claimed that the defendant and her son had uprooted his fence and trespassed on his land. following that event and a report to the police - in respect of which the plaintiff, being a Christian attending same church as the defendants courteously and conscientiously omitted to have them prosecuted-the plaintiff caused the County Surveyor to determine the boundaries to his parcel of land, whereupon the encroachment by the defendant was confirmed (in a report the defendant terms as “*unprocedural*” and “*not inclusive*”), hence the plaintiff’s claim for an injunction.

11. In the amended defence dated **17/3/2018** the defendant also stated that the plaintiff had rushed to court with dirty hands because “*the Land Registrar Trans Nzoia County has since issued summons/notice for solving a boundary dispute which all parties have been summoned for a demarcation of boundaries bordering a public road reserve.*”

12. The defendant also averred that she had filed a boundary dispute against **6 parcels** and not just the plaintiff’s. It appears that the boundary settlement had been conducted by the time of the filing of the amended defence because the counterclaim sought that the decision of the Land Registrar Trans Nzoia County dated **22/2/2017** be implemented.

13. This court stated as follows in its *ex parte* judgment:

**“4. I have examined D. Exhibit 1 and D. Exhibit 2, the reports prepared by the Land Registrar and the County Surveyor respectively. They relate to several parcels which include the defendant’s land parcel. They also reflect the defendant as the complainant. Her complaint is in respect of encroachment upon the road of access by her neighbour who is the plaintiff. The recommendation evident in the Land Registrar’s Report are that the trees and fence which encroach on the access road be removed to pave the way for a six metre road alignment. D. exhibit 2 the Surveyor’s Report also recommends that the six metre wide road be maintained. The road width being the main complaint of the defendant as per the contents of those reports I find no hindrance to granting her judgment as prayed in the counterclaim.**

**5. I therefore grant the prayers in the counterclaim and I order that the recommendations in the County Land Registrar’s Report produced as D. Exhibit 1 and those in the County Surveyor’s Report produced as D. Exhibit 2 be implemented as prayed.”**

14. It is the Land Registrar’s report that was produced in court as **D. Exhibit 1; D. Exhibit 2** was the report prepared by the County Surveyor. These are the same officials who would be asked to redo the exercise perchance the plaintiff’s case was to be reheard and he challenged the produced expert reports. However I have not heard him to challenge the said reports in the instant application; the defendant’s statement in the replying affidavit opposing the setting aside application is that “*...that this court can not make a determination on a boundary dispute without a report from the Surveyor and Land Registrar*” and also that “*...setting aside the judgment herein will be an exercise in futility... and delay ... a fair trial.*”

15. Without any challenge raised by the plaintiff to those expert reports I find no force in the instant application. That is not all; on **27/8/2018** the advocates for the defendant astutely applied for judgment against the plaintiff for want of a defence to the counterclaim and the Deputy Registrar having diligently done her duty confirmed lack of such pleading and ordered the matter to be set down for formal proof. As things stand, there is no defence to the counterclaim on the record and, the counterclaim being a claim separate from the plaint, this lack of defence goes contrary to the established rule on setting aside espoused in the case law set out herein above. Besides, the lack of such a pleading threatens to take the parties back to the re-opening of the exchange of pleadings stage which would a must if the plaintiff were to ably defend himself against the counterclaim which he cannot do in the prevailing regime of pleadings.

16. Further, this court can not deem the counterclaim to have been answered by the plaint even if that were to be suggested which it has not, because the material non-disclosure and misleading statements of the plaintiff in his pleading defy that course of action. It may be true that his advocate failed him, but it is also incumbent on a client to follow up on an advocate’s activities in his case as closely as possible, for it

still remains his case and the advocate remains a mere knowledge-endowed agent to prosecute or defend it.

**17.** The upshot of the foregoing is that I agree with the defendant that the plaintiff has not established sufficient ground for setting aside the judgment and decree, and that such setting aside would in the circumstances of this case be futile.

**18.** Consequently I dismiss the application dated **18/2/2021** with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 8<sup>th</sup> day of June, 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**