



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 378 OF 2017

RAMPAU OLE NKORIOMPAI.....PLAINTIFF

VERSUS

KASAINI OLE SAOLI.....1ST DEFENDANT

ALFRED MPATINGA SAOLI.....2ND DEFENDANT

RULING

By a Notice of Motion dated 6th October, 2020 the Plaintiff/Applicant sought the following orders:

1. Spent
2. That there be stay of execution of the decree on record arising from the ex parte judgment now on record together with all other consequential and subsequent orders, notice and other processes issued or made in purported execution of the aforesaid decree now in force against the defendants/applicant herein and or further proceedings herein pending the hearing and determination of this application on merit.
3. That the ex parte judgment and the consequential decree now on record against the defendants/applicants herein together with all other consequential and subsequent orders, notices and other processes issued or made in execution of the aforesaid decree be reviewed, varied, discharged and or set aside.
4. That the defendants/applicants herein be granted leave to file and serve their statement of defense out of time and that the draft statement of defense and hereto attached be deemed as duly filed and served upon the plaintiff/respondent herein subject to payment of the requisite court fees.
5. That this honourable court be pleased to issue such other and/or further orders that it may deem fit and just in the interests of justice
6. That costs of this application be provided for

The Application is based on the grounds that the ex parte judgement and decree has effectively determined the suit herein that there was concealment of material facts on the part of the plaintiff and that the defendant stand to suffer irreparable loss and damage if the decree is executed against them and further that there are weighty and important issues of law which raises an arguable defence.

The application is based on the grounds that the defendants did not participate in the trial owing to a failure on the part of their previous advocates who entered appearance and failed to inform them of the hearing dates of the suit herein.

The 1st Defendant/Applicant stated that he is elderly and suffers from serious medical condition leading him to suffer from mild strokes provoking paralysis and if the instant Application is not allowed he will suffer loss and damage as his failure to attend court was excusable and thus the court should exercise its discretion and accord him an opportunity.

The application was further supported by the affidavit of the 1st Applicant/Defendant in which he deposed that he was not accorded an opportunity to be heard since his previous advocate on record did not attend court or inform him of the hearing date of the suit. He states that he is a purchaser for value of the suit land he prays that he be allowed to come to court and defend the suit.

The Application was opposed by the Respondent by way of a Replying Affidavit. The Respondent states that upon service of the summons the Defendants entered appearance but failed to file a defence and the suit was heard and determined with finality on 9/3/2018 and

consequently a decree was extracted and served upon the registrar who proceeded to cancel the defendants title to the suit land and issued the Defendants with a new title. He further stated that the defendants have given him vacant possession of the suit land after the Applicant was served with an eviction notice.

The respondent states that the applicant had brought the instant Application after 2 years since the Judgement was entered even though the Defendant knew that the suit herein was determined and judgement entered against him and thus there was undue delay on the part of the applicants.

I have considered the application before me and the written submissions filed by the parties and the issues for determination are:-

- i. Whether the Applicant has satisfied the conditions to set aside a judgement
- ii. Whether the defence raises triable issues on the first issue

It is the Applicant's contention that his inability to defend the suit was occasioned by his advocate who failed to file a defence and informed him of the hearing date of the suit. The Applicant in his submission argued that every accused person has a right to fair trial under Article 50 (2) of the Constitution. However, I must state that this particular Article has no relevance to the instant application as the same relates to Criminal cases. The Applicant further stated that the court should exercise its discretion taking into the circumstances of the case and the issue raises in the defence.

The respondent in his submissions contends that the applicant seeks a stay of execution and review of the Judgement as provided under order 22 Rule 22 of the CPR. He argued that there is no decree that was sent to this court for execution as envisaged under order 22 Rule 22 and hence the provisions of order 22 which the instant application has been brought under are inapplicable.

The Respondents argued that the Applicant has not given any reason why they delayed in the filing of the defence and why the instant application was made without delay.

From the above it is clear that the applicant having given no other reasons than to blame his advocates for his predicament our courts have stated numerous times that cases are ordinarily owned by the litigants themselves and with that ownership comes the responsibility to ensure that they follow up on the status of the stages cases have reached at any given time. The applicant in my mind has not discharged that responsibility effectively thus leading to the current state of affairs. Further to the above, I have not seen any affidavit from the previous advocates on record to explain their failure to file any defence and having stated so I find that the undue delay in bringing the instant application closes the door on the applicant on the discretion.

The upshot of the above is that the Notice of Motion dated 6/10/2020 lacks merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAROK VIRTUALLY ON THIS 21ST DAY OF JULY, 2021

MOHAMED N. KULLOW

JUDGE

21/7/2021

In the presence of: -

CA:Chuma

Mr Kamwaro for the plaintiff/Respondent

Mr Kambo for the defendant/applicant