REPUBLIC OF KENYA

IN THE ENVIFRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 4 OF 2019

(FORMERLY HIGH COURT CONSTITUTIONAL PETITION NO. 20 OF 2012)

IN THE MATTER OF ARTICLES 19,23,40,50 AND 64 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) AND THE

LAND DISPUTE TRIBUNAL ACT (REPEALED)

AND

IN THE MATTER OF THE CONTRAVENTION OF THE RIGHT TO PROPERTY,

PROCEDURAL AND LEGAL ADMINISTRATIVE ACTION AND TO A FAIR HEARING

BETWEEN

BILASIO ODHIAMBO OGUTU)

Petitioning as the Administrator of the estate of the late)

OGUTU ONYANGA ONDIEGE).....PETITIONER/RESPONDENT

VERSUS

1. THE SENIOR PRINCIPAL

MAGISTRATE SIAYA LAW COURTS.....1ST RESPONDENT

2. VITALIS OTIENO OLOO.....2ND RESPONDENT/APPLICANT

RULING

VITALIS OTIENO OLOO, the 2nd Respondent/Applicant herein has filed an application (under certificate of urgency) dated and filed on 26/04/2019. The application is premised on sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1,3 & 15 of the Civil Procedure Rules, 2010. The applicant seeks the following orders;

1. That this application be certified urgent …. (Spent)

2. That this Honourable Court be pleased to stay execution of the orders of Hon. A.K Kaniaru made on 21st April 2016, pending the hearing and determination of this application.

3. That this Honourable Court be pleased to set aside judgement of Hon. A.K Kaniaru delivered on the 21st April 2016 and further have the petition heard a fresh with the full participation of the Respondent.

4. That a date for *inter-partes* hearing of this application be given.

5. That the costs of this application be provided for.

APPLICANT'S CASE

The application is supported by the affidavit of VITALIS OTIENO OLOO sworn on 26/04/19. The following grounds of the application can be deduced from the face of the application and the supporting affidavit;

a) This petition was heard and determined ex-parte in the absence of the 2nd Respondent (applicant herein) and thus the applicant was never afforded an opportunity to be heard and/or defend the petition that was decided against him on the 21st April 2016. That the ex-parte proceedings and the resultant judgement un-sat the applicant from the seat of justice.

b) That the applicant discovered that the petition had been allowed ex-parte when the petitioner and some armed hooligans stormed the respondent's properties on which he used to farm and chased away his workers and children who were at the time ploughing, claiming that the property had been transferred to them by the Court.

c) The Petitioner has since invaded the applicant's property and has put up permanent structures and continues to put up structures on the respondent's property in execution of the order of 21st April 2016 and to the prejudice and/or detriment of the respondent.

d) It became impossible to trace the file when the applicant wanted to have the orders set aside and two years down the line and having made frantic efforts to have the registry trace the file, the file could still not be found.

e) The applicant's failure to request for stay immediately was occasioned by the sudden disappearance of the original file in the court registry for close to two years hence necessitating the construction of a skeleton file to enable the court be moved.

f) The application has been brought timeously without inordinate delay and it is in the interests of justice that the prayers sought be granted otherwise the applicant will continue to suffer serious prejudice as the petitioner has erected and continues to erect structures to the applicant's farm unjustly.

RESPONDENT'S CASE

The application is opposed vide the petitioner's advocate replying affidavit sworn on 14/08/2019 and filed on 20/08/2019. The affidavit sets out the chronology of events as follows:

a) That the applicant was duly served with the Petition, Certificate of urgency, Notice of motion and supporting affidavit as per the affidavit of service attached and marked BOR 1.

b) That on 4/06/2012, the petitioner's advocate was served with a notice of appointment of advocates by M/s Ochanda Onguru & Company Advocates and grounds of opposition as per the attached copies.

c) That the petition came up for hearing on several dates but the same could not proceed for one reason or the other but substantially on account of the absence of the applicant and/or his advocate.

d) That on 18/03/2013, the applicant's advocate on record, M/s Ochanda Onguru & Company Advocates was served with a hearing notice for 27/06/2013 as per the attached affidavit and service and hearing notice dated 14/03/2013 marked BOR 3(a) and (b) respectively.

e) On 27/06/2013, neither the applicant's Counsel nor the applicant appeared in Court for the hearing of the petition, and which petition was fixed for mention on 23/01/2014. A mention notice to that effect was served on the applicant's counsel as per the affidavit of service and mention notice annexed and marked BOR 4(a) and (b) respectively.

f) On 20/01/2014, the petitioner's advocate was served with a notice of change of advocates by the firm of M/s Omaya & Company Advocates.

g) On 17/03/2014, Mr. Omaya and Mr. Onsongo (Petitioner's advocate) appeared before Justice Kaniaru for hearing of the petition but the same was adjourned at the instance of Mr. Omaya who sought leave to file a replying affidavit. The matter was then fixed for further mention on 05/05/2014 on which date the Court did not sit.

h) On 7/10/2014, Mr Omaya, Mr. Onsongo and Mr. Nyauma (advocate for the 1st Respondent in the Petition) appeared before Justice Kaniaru for hearing of the petition and when the parties consented to canvass the petition by way of written submissions and a further mention given for 3/11/2014 to confirm filing of the submissions. The petitioner's advocate served his submissions on Counsels on 08/10/2014.

i) That on 16/02/2015 when the matter came up for mention, Mr. Omaya applied to be given more time to file both his replying affidavit and his submissions and which application was allowed and matter fixed for mention on 24/03/2015.

j) On 24/03/2015, Mr. Omaya did not appear in Court and on which date counsel for the 1st Respondent (Ms Alingo) conceded to the petition and the Court fixed the petition for judgement on 21/04/2015 when the judgement was delivered and the petition was

allowed.

The petitioner's advocate further deposed that the 2nd Respondent/Applicant was duly served with all the relevant documents and hearing and mention notices and has never raised the issue of not having been served during any of the Court appearances. That the issue of the matter having proceeded ex parte is an afterthought and is against available evidence; and that it is trite law that an advocate on record for a party in a suit has the ostensible authority and powers to represent the party and that all that is done by the advocate are actions of the party in question.

On 9/11/2020, both Counsel agreed and the Court directed that the application be canvassed by way of written submissions.

APPLICANT'S SUBMISSIONS

The Applicant filed submissions on 18th March 2021. The following are the highlights of the submissions;

a) That the law on setting aside of ex-parte judgements/orders is now well settled. On this, the applicant relied on the case of **CMC Holdings v Nzioki- Nairobi Civil Application No. 329 of 2001** where the learned Judges held that in law, the discretion on whether or not to set aside an exparte judgement/order was meant to ensure that a litigant does not suffer injustice or hardship as a result of other things an excusable mistake or error.

b) That the applicant learnt of the ex-parte proceedings when some hired goons/hooligans stormed his property /land on which he used to farm.

c) That the hearing notice for the 21st April 2016 was served upon the applicant's advocates, Ochanda Onguru & Company Advocates who not only failed to attend the Court for hearing but also failed to appraise him of the progress of the matter.

d) That the Court in **CMC Holdings v Nzioki- Nairobi Civil Application No. 329 of 2001** held that in an application for setting aside ex-parte judgement, the Court must consider not only the reasons as to why the defence was not filed or why the appellant failed to turn up in Court, but also whether the applicant has a defence that raises triable issues.

e) That this petition emanates from the decision in Siaya District Land Disputes Tribunal Case No. SYA/303/97 and which decision was filed at the Siaya Principal Magistrate's Court vide SIAYA PMCC NO. 196 OF 1997 and that the said decision was adopted as the judgement of the Court on 17/02/1998. That the petitioner preferred an appeal against the same in the High Court at Kisumu being KISUMU HCCA NO. 52 of 2000. The appeal was dismissed for want of prosecution on 12/10/2005. Subsequent to the dismissal, the petitioner filed the instant petition.

f) By filing an appeal to the High Court, the petitioner/respondent failed to follow laid down procedures under the Land Disputes Tribunal Act No. 18 of 1990 (Repealed) which expressly provided that any litigant who was aggrieved by the decision of any Lands Tribunal was to prefer an appeal to the relevant Provincial Land Appeals Committee-Nyanza.

g) Alternatively, the Petitioner should have moved the Court for a judicial review Order in the nature of an order for certiorari to move into the Court and quash the proceedings and decision of the tribunal concerned.

h) That the Applicant herein has a tangible response/defence to the petition dated 16th April 2012 and he should therefore be given a chance to participate and defend the same.

RESPONDENT'S SUBMISSIONS

I have perused the Court record and have not seen any submissions by the petitioner. I will therefore assume that the same had not been filed.

DETERMINATION AND ANALYSIS

This is an application for setting aside a judgement and to have the petition heard a fresh with the full participation of the Respondent. From the application and submissions, the applicant has averred that the judgement he seeks to set aside is an *exparte* judgement on the basis that the petition was heard and determined *exparte* in the absence of the applicant and thus the applicant was never afforded an opportunity to be heard and/or defend the petition.

Though not indicated by the applicant, it is my view that the exparte judgement in this scenario is the on envisaged in order 12 of the Civil Procedure rules (which provides for hearing and consequence of non-attendance). In **FM v EKW Nairobi Civil Appeal No. 648 of 2011; [2019] eKLR,** the Court held that in such a case, the only thing the Court needs to look at is whether the applicant had given a good reason for failure to attend Court and depending on the finding, then consider whether the exparte proceedings would be set aside or not.

From the pleadings before this Court, and especially the Petitioner's Replying Affidavit and the annexures thereto, it is not in dispute that the applicant was served and consequently entered appearance through Ochanda Onguru & Company Advocates (annexure BOR- 2(a) to the Petitioner's replying affidavit) and later on changed advocates to Omaya & Company Advocates (annexure BOR-5 to the Petitioner's replying affidavit). The Petitioner's advocate deponed that when the petition came up for hearing on 7/10/2014 all the three advocates attended Court and it was agreed that the Petition be canvassed by way of written submissions, and when the matter came up for mention on 16/2/2015, Mr. Omaya Counsel for the 2nd Respondent/now applicant requested for more time to put in a replying affidavit and submissions. Mr. Omaya's application was allowed and the matter fixed for further mention on 24/03/2015, on which date neither Mr. Omaya, nor his

client appeared in Court and the matter was fixed for judgement on 21/04/2015.

The Court file was reconstructed and I am therefore unable to confirm the above averments from the Court record. The same have however not been denied by the applicants by way of a further affidavit or in the submissions. I am therefore convinced that the same are a true record of events.

As stated earlier, it is for this Court to look at whether the applicant has given a good reason for failure to attend Court and depending on the finding, then consider whether the exparte judgement should be set aside or not. In doing so, the Court has to be cautious while exercising its discretion as was held in **Stephen Ndichu v Monty's Wines and Spirits Ltd [2006] eKLR** where the Court stated;

> **'The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs- E.A. Cargo Handling Services Ltd (1974] E.A.75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah –vs- Mbogo [1969] E.A.116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration – vs- Gasyali [1968] E.A. 300). It also goes without saying that the reason for failure to attend should be considered.'**

While dismissing an application to set aside an ex-parte judgement, the Court in **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR** relied on the Courts' holdings in **Shah vs Mbogo** and **Ongom vs Owota** the court held that for such Orders to issue (setting aside exparte judgement), inter alia the court must be satisfied about one of the two things namely: -

> **a. either that the defendant was not properly served with summons; or**
>
> **b. that the defendant failed to appear in court at the hearing due to sufficient cause**

The Court in **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR,** in discussing what 'sufficient cause' entails relied on the Supreme Court of India case of **Parimal vs Veena** where it was 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"**

Service has not been disputed by the applicant. I have noted that in the application and the supporting affidavit the applicant has not given any reason or explanation as to why judgement was delivered without hearing the applicant's case. The applicant only avers that he was never afforded an opportunity to be heard and/or defend the petition and has concentrated much on the fact that the Court file went missing after the judgement and had to be reconstructed as the reason as to why the application was filed two years later.

I have noted from the petitioner's replying affidavit and which averments remain uncontroverted and unchallenged that;

> a) The petition came up for hearing on several occasions but the same could not proceed for one reason or another but substantially on account of the absence of the 2nd Respondent/Applicant and or his advocate; the same also being the case on 27/6/2013 when the petition came up for hearing.
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> b) That on 17/3/2014 when the Petition was slated for hearing, Mr. Omaya counsel for the 2nd Respondent/Applicant herein applied for an adjournment and leave to file a Replying affidavit and which application was allowed.
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> c) That on 07/10/2014, an order was made by the consent of all advocates, Mr. Omaya included that the petition be canvassed by way of written submissions and matter fixed for mention to confirm filing of submissions on 3/11/2014.
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> d) That on 16/2/2015, Mr. Omaya once again requested for time to file a Replying affidavit and submissions to the petition and which request was granted and matter fixed for mention on 24/03/2015. That on the said 24/03/2015, Mr. Omaya did not appear in Court and had also not filed the replying affidavit and the submissions. It is on the same date (24/3/2015) that the petition was fixed for judgement on 21/4/2015.

This court finds that the 2nd respondent/applicant was on more than one occasion afforded an opportunity and chance to file a replying affidavit and submissions to the petition but failed to do so. The applicant has not given any sufficient reason and/or explanation of such failure. I have however noted that the applicant has indicated in the submissions that his then advocates on record, M/s Ochanda Onguru & Co. Advocates failed to attend court for hearing and also failed to appraise the applicant of the progress of the matter. From the above facts which reveal that the applicant had indeed been given more than one chance to file the requisite documents and in view of the fact that no reason has been tendered for failure by the advocate to attend court and/or to file the documents, I am unable to make a finding that the non-

participation by the applicant in the proceedings resulted from accident, inadvertence or excusable mistake or error. This was purely inaction on the part of the applicant's then advocates on record.

The Court of Appeal in **Council, Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mbeera & 3 Others [2015] eKLR** thus stated,

> **'In this case, however, the applicant's advocates simply plead ignorance and consequential inaction which cannot avail them. This Court said so in Rajesh Rughani – Vs- Fifty Investment Ltd. & Another (2005) eKLR: - "If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy". In the case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR this Court also observed: - "It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences.'**

I also agree with the Court's holding in **Julius Mbaabu Marete v Tom Ayora & 3 others [2018] eKLR** that;

> **'A Case belongs to the plaintiff and it is his duty to take steps to progress it. Leaving a case to the Advocates without checking its progress is also negligence on the part of the plaintiff.**
>
> **Article 159(2) (d) of the Constitution is not a cure to all sorts of negligent commissions and omissions by parties, so long as their actions are not satisfactorily explained to the court's satisfaction. Justice demands that the courts process be vindicated from blatant negligence of parties and their advocates. Justice shall not be delayed - Section 1A, 1B and 3A of the Civil Procedure Act on the overriding objectives of the Act to achieve the just, expeditions, proportionate and affordable resolution of disputes.**
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> **I am minded that the process of judicial systems requires that all parties be given a chance to present their cases before a decision is made. On the other hand, it is public policy interest that the business of the court be conducted with expedition – AGIP(K) Ltd -vs- Highlands Tyres Ltd (2001) 630 KLR. To that extent, it is a balancing interest issue – what prejudices would be occasioned by a denial of the orders sought viz -a viz those that would be occasioned to the Respondents. It is trite that justice delayed is justice denied, and defeats equity'**

It has been shown that the hearing of the Petition failed to take off in many instances due to failure by the applicant and/or his advocate to attend Court, and even when they were given the chance to file a replying affidavit and submissions, they failed to do so. This goes against the overriding objectives in the Civil Procedure Act that require just and expeditious resolution of disputes. Justice must cut both ways.

The Applicant has also submitted that he has a tangible response/defence to the petition based on the procedure followed by the Petitioner to approach the Court. The applicant has however not attached a draft copy of a defence and/or a replying affidavit to the Petition to enable the Court make a finding as to whether the same raises triable issues. The Court in **CMC Holdings v Nzioki- Nairobi Civil Application No. 329 of 2001**(relied on by the applicants on this point) held that;

> **'…The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date, but also whether the applicant has a reasonable defence which is usually referred as whether the defence is filed already or if a draft defence is annexed to the application, raises triable issues.'**

The above Court also relied on the case of **Tree Shade Motors Limited v DT Dobie & Company (K) Limited & Joseph Rading Wasambo Civil Appeal NO. 38 of 1998** where the Court stated;

> **'The Learned Judge did not look at the draft defence to see if it contained a valid or reasonable defence to the Plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgement, the Court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff's claim…'**

The Court is unable to make a finding as to whether or not the applicant has a good response to the application from the submissions. The applicant ought to have attached a draft copy of the defence and/or response to this application. Based on the above I do find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16th DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE