



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 33 OF 2018

THOMAS JERRY KHAMISI (Suing as the Legal

Representative of the Estate of the late

CHARLES JUMA KHAMIS.....1ST PLAINTIFF

EDWARD MWAMUYE MWADZOYA.....2ND PLAINTIFF

VERSUS

1. AUSTIN SADALA KHAMISI

2. CATHERINE WAITHIRA NDAMBIRI

3. AGNES NYALE NYANGEMI

4. JOSPHINE MURINGO NDAMBIRI

5. MERCY ROSELINE NDAMBIRI.....DEFENDANTS

RULING

1. By this Notice of Motion dated 28th July 2020 as filed herein on 17th August 2020, the five (5) Defendants urge this Court to be pleased to set aside the Judgment herein dated 29th April 2020 and to allow the Defendants to defend the suit on merit.

2. The application which is supported by an affidavit sworn by Catherine Waithera Ndambiri (the 2nd Defendant) is based on the grounds: -

- i) That the Judgment was delivered on 29th April 2020 without prior notice to the Defendants or their Advocates on record;*
- ii) That due to the on-going corona pandemic, the Defendants only came to learn of the Judgment when they were served with a letter on 17th June 2020 which forwarded a copy of the intended draft decree;*
- iii) That the Defendants are aggrieved by the said Judgment given that the matter proceeded ex-parte.*
- iv) That the Defendants tried to set aside the proceedings before the Judgment could be delivered through an application dated 8th April 2019 but the Court did not hear or determine the application;*
- v) That the Defendants were unable to move the Court until Judgment had been delivered and the Respondents shall suffer no prejudice if the application is allowed;*
- vi) That the Respondents have already commenced execution as they have issued a draft decree which they intend to execute by evicting the Defendants and if the stay orders are not issued, the application shall be rendered null and void (sic); and*
- vii) That it is in the interest of justice that the application be allowed.*

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 25th September 2020, Edward Mwamuye Mwadzoya (the 2nd Plaintiff) avers that this case came up for pre-trial conference before the Deputy Registrar on 16th July 2018 and the Defendants sought to be given 21 days within which to file a List of Documents and Witness Statements.

4. The 2nd Plaintiff avers that the Defendants' request was granted and the matter was again fixed for another pre-trial conference on 3rd September 2018 but the Defendants' Counsel never showed up. It was then that the matter was certified fit for hearing. That notwithstanding and after the matter was fixed for hearing on 18th December 2018, the Defendants again applied for an adjournment and were granted 30 days to comply with the requirements of Order 11 of the Civil Procedure Rules.

5. The 2nd Plaintiff avers that the Court then issued orders of status quo after the Plaintiffs complained of on-going construction by the Defendants and the suit was fixed for hearing in the presence of both parties on 5th March 2019. On the said date however, the Defendants had not complied and again sought another adjournment to enable them comply. The Court declined the request and ordered the hearing to proceed.

6. The Plaintiffs aver that the issues being raised in this application are the same ones raised on 5th March 2019 when the Court declined the adjournment and the Defendants have not attached any communication from the previous Advocates in support of their statements herein.

7. I have perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

8. The power to set aside an *ex parte* Judgment entered in default is discretionary. The principles upon which such discretion is to be exercised were set out by the Court of Appeal in *Philip Kiptoo Chemwolo & Mumias Sugar Company Ltd –vs- Augustine Kubende (1982-1988) KAR 1036* where the Court cited with approval the English Case of *Evans –vs- Bartam (1993) AC 473* and stated as follows: -

“The discretion is in terms unconditional. The Courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the Judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie evidence.

The reason, if any, for allowing Judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard, in exercise of the discretion. The Principle is that unless and until the Court has pronounced a Judgment upon the merits or by consent it is to have the power to revoke the expression of the coercive power where that has only been obtained by failure to follow any of the rules of procedure.”

9. However, as was held in *Shah –vs- Mbogo & Another (1967) EA*: -

“The Court’s discretion to set aside an ex parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of action.”

10. In the matter before me, the Defendants' principal argument is that their failure to be heard on 5th March 2019 when the case proceeded in their absence was due to a breakdown of communication with their former Advocate- Messrs Mburu Kariuki & Company Advocates. To prove this contention, the Defendants aver that their former Advocate was sick and admitted in hospital far away in India and that the said Advocate did not tell them the progress of the case. They have attached a Letter dated 13th October 2020 in which the said Advocate takes blame for the said breakdown of communication.

11. A perusal of the record herein however reveals that in all instances when this matter came up in Court there was always an Advocate in Court holding brief for their previous Advocates on record. On 16th July 2018, the parties appeared before the Deputy Registrar of this Court for pre-trial. Ms Riziki Emukule Advocate who held the previous Advocates brief asked for 21 days to comply with the requirements of Order 11 of the Civil Procedure Rules. That request was granted and the matter was then fixed for mention on 3rd September 2018 to confirm compliance.

12. On the 3rd day of September 2018, there was no appearance on the part of the Defendants and the matter was certified ready for hearing. Subsequently on 13th September 2018 the matter came for hearing before this Court. On the said date Mr. Shujaa Wara Advocate held brief for the Defendants Advocates and sought to be granted another 30 days to enable them file their List of Witnesses and documents. The matter was then fixed for hearing on 5th March 2019 with an order that the Plaintiffs witnesses expenses which was assessed at Kshs 4,000/- be paid before that date.

13. On the said 5th March 2019 however, Mr. Shujaa Advocate appeared again for the Defendants and sought more time to file documents and witness statements on account that the Defendants were based out of the Country and had not been able to comply. That request was declined and the matter was hence scheduled for hearing at 10.30 a.m.

14. At 11.15 a.m. when the matter was called up for hearing however, there was no representation on the part of the Defendants and hence the matter proceeded *ex-parte*. As it were, this Court has not been told how the Advocates who were holding brief were being instructed and whether or not they had instructions to handle the case. Other than writing a letter stating he was unwell, the previous Advocate has not denied instructing the different Advocates who held brief herein. I was unable to see how the Advocates could be instructed while it was not possible to inform the clients to attend Court.

15. The Defendants had filed their Statement of Defence on 13th April 2018 and under the provisions of Order 7 Rule 5 the Civil Procedure Rules, they were required to file their statements and list of documents at the said time, concurrently and or at least 15 days before the pre-trial conference. No reason has been given why this was not done as the previous Advocate from their own Annexures is said to have become unwell in November 2018 some seven months later.

16. It follows therefore that the Defendants were aware of the suit and their failure to testify herein was out of their own lack of diligence and the failure to furnish the Court with the documents and statements they wished to rely on. Their conduct was reminiscent with that of a party who was out to deliberately mislead the Court and delay the trial and the cause of justice.

17. A party whose conduct discloses an intention to obstruct or delay Court proceedings and who takes Court directions for the disposal of a suit in a casual manner cannot expect the Court to exercise its discretion in their favour.

18. It follows that I find no merit in the Motion dated 28th July 2020. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE