REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 112 OF 2015

JOHN MAINA (SUING FOR

AND ON BEHALF OF THE

ESTATE OF MAINA THUO-DECEASED).....PLAINTIFF

VERSUS

SAMUEL KIOI THUO.....DEFENDANT

R U L I N G

1.The defendant/applicant by a Notice of Motion application dated 1st February 2021 expressed to be brought under Articles 20,25,48,50,159 and 259 of the Constitution and sections 1A,1B 3 and 3A of the Civil Procedure Rules prays for the following orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. That the honorable court be pleased to review, vary/or set aside the judgment delivered on 7th March,2019 and the decree issued in favour of the plaintiff/Respondent against the defendant/applicant.

6. That this honourable court be pleased to order that the suit herein instituted vide plaint dated 13th April 2015 and filed on court on the 15th April 2015 be heard de novo.

7. That costs of this application be provided for.

2. The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the defendant on 1st February 2021. Interalia the applicant avers that he had instructed the firm of Gitonga Mureithi & Company Advocates to represent him in these proceedings. The said firm entered appearance and filed a defence on his behalf in May 2015. He stated that having engaged an advocate he waited for them to advise him of the date the matter would be fixed for hearing. The Applicant further stated that around March 2019 his advocate issued him a copy of the judgment given by the court and advised him the judgment was entered in his favour and he sat pretty up to August 2020 when he said he wanted to subdivide the land and as a consequence required the services of a surveyor . He stated the survey or while attempting to obtain a search discovered his (the applicant's title had been cancelled. The applicant stated further that on or around December 2020 when he obtained a copy of the Green card he discovered the suit land had been subdivided pursuant to the judgment of the court and that contrary to the advise he had received from his advocates, the judgment delivered on 7th March 2019 was in favour of the plaintiff /respondent and not in his favour as advised by the advocate.

3. The applicant stated that his efforts to find ut form his previous advocate what transpired such that a judgment had been rendered without him being called to testify bore no fruits and that prompted him to engage the services of his present advocate on record to follow up and advise him on what transpired. It is after his current advocate perused the court record that she advised him the case was heard on 6th March, 2018 exparte in his absence and in the absence of his former advocate. The applicant averred he had not been notified of the hearing date of the case by his former advocate judgment was delivered by the court on 7th March 2019 against him without him being afforded an

opportunity of being heard. The applicant placed blame on his previous advocate who he claimed never kept him appraised of what was happening in the case. He maintained he had a viable defence and that of he had been heard, the court may have most probably have reached a different decision. He prayed that the judgment be set aside and the suit be heard de novo for the ends of justice to be met.

4. The plaintiff filed a replying affidavit dated 25th May 2021 in opposition to the application by the defendant. The plaintiff averred that the applicants application was incompetent, misconceived, bad in law and an abuse of the process of the court. The plaintiff averred that the application though crafted as one for review is essentially one for setting aside what otherwise is a regular judgment of the curt. The plaintiff averred that the application is an after thought and the same had not been brought without undue delay. The plaintiff maintained the defendant had not proffered any good reason to warrant the curt to set aside a valid and a regular judgment of the court.

5. He stated the defendant had a habit of not attending court and there was no indication that he was ever interested in keeping abreast of the progress of the case. There was no demonstration of the efforts the defendant made to find out form his advocates the status of the case. The plaintiff deposed that the defendant lacked any interest and was indolent in regard to the prosecution and was underserving of the court's discretion. The plaintiff stated that the judgment has been executed and the subdivision as ordered by the court under taken and hence the application has been overtaken by events.

6. The parties canvassed the application by way or written submissions. The applicant filed his submissions on 19th April 2021 while the plaintiff respondent filed his on 3rd June 2021. I have read and considered the pleadings and the submissions of the parties and the singular issue for determination is whether the applicant has made out a case to warrant the curt to exercise its discretion to review and/or set aside the judgment delivered on 7th march 2019. The defendant/applicant has predicated his application on order 45 of the Civil Procedure Rules which provides for review of orders judgment/decrees and constitution provisions that primary deal with access to justice fair hearing and administration of justice. The main trust however is whether a basis to review and or vary the judgment has been established. The basis of the applicant's application simply put is that he had no notice of the hearing of the case, the case was heard in his absence and he did not testify to give his side of the story and a judgment was given that went against him. The plaintiff's position being that his advocate who was on record for him did not notify him or inform him of the date of the hearing.

7. The court record shows the court on 24th September 2015 made a reference of this matter to mediation. The mediation apparently did not materialize and on 1st October 2018 the matter was mentioned before Munyao, J in the presence of counsel for both parties. The case was fixed for hearing on 4th March 2019. On 4th March 2019, only the plaintiff and his counsel attended. The defendant and his counsel did not attend. The court noted the hearing date was taken by consent and hence allowed the hearing to proceed, the absence of the defendant and his counsel notwithstanding. The plaintiff and his testified and at the conclusion of the testimony the court reserved judgment for delivery on 7th March 2019 when the same was duly delivered .

8. On the basis of the record the Court was perfectly entitled to proceed with the hearing as it is evident the defendant advocate was present in Court when the hearing date was taken and hence had notice of the hearing date. The advocate was the duly appointed agent of the defendant and consequently the defendant was equally deemed to have had notice of the hearing. Without any reason being proferred for the non attendance of the defendant and his advocates the court had no basis not to proceed with the hearing of the matter as scheduled. In the premises the court is satisfied the court after hearing the plaintiff and his witness made a valid and regular judgment.

9. Order 45 Rules 1 of the Civil Procedure Rules provides for review as follows;-

> *. Application for review of decree or order [Order 45, rule 1.]*
>
> *(1) Any person considering himself aggrieved—*
>
> > *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
> >
> > *(b) by a decree or order from which no appeal is hereby allowed,*
> >
> > *and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

10. The applicant in his submissions has urged the court to exercise its discretion in his favour and make an order reviewing the judgment so that the defendant may be heard in his defence. The defendant has placed reliance on the case of ***Patriotic Guards Ltd -vs- James Kipchirchir Samba (2018) eKLR*** where the court states:-

> ***" It is settled law that whenever a court is called upon to exercise its discretion, it mut do so judiciously and not on caprice, whim likes or dislikes. Judicious because the discretion to be exercised is Judicial Power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain, principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit"***

11. Order 45 of the Civil Procedure Rules sets out the parameters under which an application for review mut be considered . An applicant for review to succeed must demonstrate:-

> *(i) There has been discovery of new and important matter or evidence, which after the exercise of due diligence was not within the*

knowledge of the applicant at the time the order/decree was made; or

(ii) There was some mistake or error apparent on the face of the record or

(iii) There was some other sufficient reasons; and in any event;

(iv) The application must be made without unreasonable delay.

12. The applicant submitted that there was sufficient reason to justify a review of the judgment. She submitted that after he had instructed his previous advocate M/s Gitonga Mureithi & Co Advocates he suffered poor heath that did not allow him to follow up with the advocates the progress of the case as would have been expected of him. He submits that would satisfy the condition "for any other sufficient reason". The applicant cited the case of ***Republic -vs- Public Procurement Administrative Review Board & 2 others (2018) eKLR*** where the Court considered what could constitute any other sufficient reason. The court stated :-

> *" Review can also be allowed for any other sufficient reason. The expression 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rules. Any other attempt except an attempt to correct an error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgment."*

13. The defendant further submitted that under Article 50 (I) every party is entitled to a fair hearing before the curt and as in the present case he was not afforded the opportunity of being heard there was a breach of natural justice as no person should be condemned without being given a hearing. In support of his submissions the defendant relied on the cases of ***Mutiscope Consulting Engineers -vs- University of Nairobi & Another (2014) eKLR and Mbaki & others -vs- Macharia & Another (2005)EA 2006***. In the latter case the court of Appeal stated:-

> ***" The right to be heard is valuable right. It would offend all notions of justice of the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard"***

14. The applicant finally submitted that having regard to the attendant circumstances he had made the application without unreasonable delay. The applicant attributed the blame to his ersthwhile advocate which he claimed did not give him notice of the hearing. He explained he had been unwell for quite some period and that when his previous advocate notified him of the judgment he erroneously informed him the judgment was in his favour which advise he accepted as correct. The applicant urged the court to allow the application to enable substative justice to be meted out to the parties.

15. The plaintiff respondent in his submission argued that the judgment delivered by the court on 7th March 2019 was a regular and valid judgment and no good reason had been advanced by the applicant for the court to review and/or set aside the said judgment. The respondent reiterated that the applicant had not satisfied any of the conditions upon which a review may be granted and thus urged the court to disallow the application. The respondent cited various judicial decisions to illustrate the considerations to be made in exercise of judicial discretion in applications to set aside exparte judgment to wit; ***James Wanyokie & 2 others -vs- CMC Motors Group Ltd & 4 Others (2015) eKLR; and Gideon Mose Onchwati -vs- Kenya Oil Company Ltd & Another (2017) eKLR*** where the court expressed itself thus:-

> *" setting aside an exparte judgment is a matter of the discretion of the court, as was held in the case of* ***Esther Wamaitha Njihia & 2 others -vs- Safaricom Ltd*** *where the court citing relevant cases on the issue held interalia:-*
>
> *" The discretion is free and the main concern of the courts is to do justice to the parties before it* ***(see Patel -vs- EA Cargo Handling Services Ltd)*** *the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct orderlay the cause of justice* ***(see Shah -vs- Mbogo).*** *The nature of the action should be considered , the defendant if any should also be considered and so should be 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- Gasyall****. It also goes without saying that the reason for failure to attend should be considered."*

16. It is clear that the considerations for setting aside a default judgment for non appearance and filing of a defence, and a judgment arising from an exparte hearing following non-attendance by a party, would more or less be the same. The court would be called upon to evaluate the reason for no appearance and/or for failure to file a defence. Equally the court in the case of an exparte judgment arising from an exparte hearing would be required to consider the reason and/or explanation for non attendance during the hearing . If the reason and/or explanation is good, probable and/or plausible the court would be entitled to exercise its discretion to set aside the judgment albeit on terms if the situation so demands. In both instances the court would be expected to consider whether any prejudice would be occasioned to the plaintiff and in case of any delay, the reason for the delay and if the plaintiff could be reasonably compensated by an award of costs for any such delay.

17. The plaintiff in responding to the prayer for review of the judgment by the applicant submitted that the applicant had not satisfied any condition upon which review could be granted under Order 45 Rule 1(a) & (b) of the Civil Procedure Rules. He submitted there was no discovery of new and important evidence error on the face of the record and/or any other sufficient reason demonstrated by the applicant and further that the applicant having made the instant application nearly 2 year's from the date of the judgment had not made the same without unreasonable delay. The plaintiff respondent argued that owing to the unexplained delay of nearly 2 years, the applicant cannot properly invoke the court's review jurisdiction Under Order 45 Rule 1 of the Civil Procedure Rules . The plaintiff placed reliance on the case of ***Muthoni Nduati -vs- Wanyoike Kamau & 5 others (2004) eKLR*** where Ochieng, J held that inordinate delay would disentitle and applicant to an order of review.

18. The plaintiff submitted the applicant was indolent as he learnt about the judgment way back in March 2019 and did not bring the instant application until 10th February 2021. To fortify his argument the plaintiff's counsel referred to ***" Snell's Equity by John McGhee QC 31st Edition page 99*** where the author states as follows:-

> *" the court of equity has always refused to aid stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence where these want, the court is passive and does nothing"*

19. On the issue of the overriding objective of the court to do, justice to the parties, the plaintiff submitted that the court has to strike a delicate balance noting that justice cuts both ways. In the present matter the judgment that the applicant seeks to have reviewed or set aside has been executed and the subject land subdivided in conformity with the judgment. In the case of from ***Investment Ltd -vs- GS Security services Ltd (2015) eKLR Gikonyo,*** J stated as follows:-

> *"It is well understand in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed expeditiously, which is founded upon the old adage and now an express constitutional principle under Article 159 of the constitution, that justice delayed is justice denied. Here I am reminded that justice is to all parties and not only the plaintiff."*

20. In the present matter having evaluated the material presented before the court including the submissions of the parties, I am not satisfied any reasonable explanation was offered by the applicant why neither he nor his advocate attended the court on 4th March 2019 when the matter was scheduled for hearing. Further there is no plausible explanation given why it took the applicant almost 2 years from the date the judgment was delivered to bring the present application yet by his own admission he was furnished a copy of the judgment in the same month of March 2019 when it was delivered. The applicant has endeavoured to explain why he did not keep in regular touch with his advocate by stating he had become sickly. The medical records the applicant annexed to his affidavit shows he had CT scan of the head on 17th September 2020 at Jalaram Medical Centre Nakuru which indicated " mild generalized brain atrophy likely age related. No acute infarct, mass lesion or hemorrhage seen"

21. The other report dated 22nd January 2021 was from St. Mary's Mission Hospital. The reports do not indicate the applicant was not in a position to undertake his daily routine and/or functions. There is no indication that in 2018 and 2019 he was suffering from any incapacitating ailment that would have prevented him from being able to liaise with his advocate. From the mpesa statements attached it is evident he had the telephone contact of his advocates and could have contacted them whenever he wished. Although the applicant's previous advocates signed a consent on 14th January,2021 to allow the applicant's current advocates to come on record for him in their place, they did not see it fit to swear an affidavit to explain why they failed to attend court on 4th March 2019 when the matter was heard. The said advocates were the applicant's agents and were under an obligation not only to notify the applicant of the hearing but also to attend court. Their failure and their client's non-attendance remains un- explained. Parties are bound by the procedures of the court and non observance of the process and procedures cannot be without consequences. Though the applicant has contended he had no notice of the hearing and he was not notified by his advocate of the date of hearing date, there is nothing in the conduct of the applicant suggesting he had done anything to try to find out the status of the case. There is no evidence he at any time contacted his advocates and/or wrote to then to be advised of the status of the case, The applicant's conduct appears to have been of one who had no interest in the care or didn't case whatever happened in the case.

22. It is further intriguing that the applicant stated his advocate advised him judgment had been delivered and it was in his favour and even forwarded a copy of the judgment to the applicant in March 2019. If the applicant was really concerned about the case he would have sought to understand how the judgment got to be delivered, yet he was not called to give evidence. That it took the applicant upto December 2020 to discover the judgment was not in his favour as he had supposedly been made to believe, and yet he had a copy of the judgment is unbelievable. The findings / decision of the court contained at pages 9 and 10 of the judgment was highlighted in bold and clearly all the findings were against the defendant. I do not believe the assertions by the applicant that he was advised by his advocate that the judgment was in his favour. He had a copy of the judgment which boldly was to the contrary.

23. The applicant has strongly submitted there was sufficient reason to justify a review of the judgment . The reason as I can decipher from the submissions was that he was not notified of the hearing date by his advocate, he was misadvised respecting the judgment that it was in his favour whilst the contrary was the case and that he had fallen into bad health that did not enable him to follow up with his advocates . As I have discussed elsewhere in this ruling, the hearing date was consensual as the applicant's advocate was in court when it was taken. The date was taken in October 2018 and the hearing was on 4th March 2019 . The advocate as the agent of the applicant was duty bound to inform the applicant. The court in the absence of any explanation for the absence of the applicant and his counsel properly proceeded with the hearing. The conduct of the applicant after judgment was delivered was that of a person who did not care about the outcome . The delay of nearly two years to make the instant application from the time a copy of the judgment was availed to the applicant in my view was inordinate and inexcusable .

24. In the premises I am not satisfied that the applicant had demonstrated that there was a sufficient reason to warrant the exercise of discretion in his favour. Besides the present application was not made without undue delay. The delay was inordinate and was unexplained .

25. The upshot is that I find that the defendant applicant's application dated 1st February 2021 lacks any merit and the same is ordered dismissed with costs to the plaintiff/respondent

Orders accordingly

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE