



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 45 OF 2019

MAGDALENE WAMBUI MBUGUA MUHIA.....1ST APPLICANT/RESPONDENT

MICHEAL WANYOIKE KUNGU.....2ND APPLICANT/RESPONDENT

STEPHEN MWAURA MWIHIA.....3RD APPLICANT/RESPONDENT

VERSUS

CHARLES KING KIGWE.....1ST RESPONDENT

JOSEPH KANGETHE CHEGE.....2ND RESPONDENT/APPLICANT

TIMOTHY KIGURU GACHERU.....3RD RESPONDENT/APPLICANT

REGISTRAR OF TITLES, NAIROBI

CENTRAL REGISTRY.....4TH RESPONDENT

RULING

Through a Notice of Motion Application dated 20th August 2020, brought under Article 159, of the Constitution, Sections 1A,1B, Sections 63(e) of the Civil Procedure Act, Order 50 Rule 1, of the Civil Procedure Rules, the 2nd and 3rd Respondents/Applicant sought for orders that;

- 1. The Ex Parte Judgement entered against the Respondents be set aside.**
- 2. The 2nd and 3rd Respondents/Applicants be granted unconditional leave to defend this suit.**
- 3. That an order be granted by the Honorable Court to the 4th Respondent herein to revert back the ownership of the parcel of land known as LR 10823/2267, LR 145845/1, to the original owner pending the hearing and determination of this suit.**
- 4. Costs be in the cause.**

The Application is premised on the grounds set on the face of the Application and on the Supporting Affidavit of **Timothy Kiguru Gacheru** and **Joseph Kangethe Chege**, who averred that they have never been served with pleadings in this suit, and that they came to the knowledge of the suit when they received a letter from the Ministry of Lands and Physical Planning dated **23rd February 2020**. Further, that the Affidavits of Service dated **17th April 2019**, and **13th March 2019**, do not indicate service on them and the process server was not duly qualified.

They also contended that they have an arguable Defence to the suit and it will be prejudicial to them if they are not offered a chance to adequately defend the suit and present their side of the case to Court.

It was their further contention that they stand to suffer irreparable damage if the **exparte Judgement** herein is **not set aside**, as they are purchasers for value of the subject suit land from the 1st Respondent. That it is in the interest of justice that the Application be allowed as prayed.

The Application is opposed through the 1st Applicant's/Respondent's Replying Affidavit dated **5th October 2020**, and a Further Affidavit dated **22nd February 2021**, by **Charles King Kigwe**. He averred that there is nothing to be stayed as the **caveat** lodged by the Applicants on **LR No.10823/22667**, in this Application were removed and the transfer has been effected in the names of the Applicants in the Originating Summons.

He further averred that the Application is without merit as no draft Defence has been annexed. Further, that the Applicants have not shown what prejudice they will suffer if prayers sought are not granted. That the caveats have been in place for more than **2 years**, thus abusing the very intention and purpose of a caveat. That the **2nd and 3rd Respondents/Applicants**, have not objected or denied service of the pleadings and that the delay in bringing this Application is unexplained and as such, they are guilty of laches.

The Application is also opposed through a Replying Affidavit dated **1st October 2020**, sworn by **Mathew Musotsi**, who averred that he is an authorized process server and he was instructed to serve the original pleadings comprising of Originating Summons dated **4th March 2019**, and other annexures. He further averred that prior to effecting service, he made enquiries and was informed that the **2nd and 3rd Respondents/Applicants** were represented by the Law Firm of **Andrew Loketo Kariu Advocates**, located at Occidental Plaza and the said Law Firm accepted service. Further, that on **15th April 2019**, he served a Hearing Notice to the said Law Firm. Further, the Hearing Notice dated **25th June 2019**, to the Applicants was also served by registered post.

The Application is further opposed through a Replying Affidavit dated **2nd October 2020**, of **Stephen Mwaura Muhia**, who has been authorized to swear by the 1st and 2nd Applicants/Respondents He averred that the Application was served on **21st September 2020**, and there was no time service was refused/rejected. That it is clear that the **2nd and 3rd Respondents/Applicants** did not comply with the Registrar of Titles letter dated **22nd February 2020**, of removing the said caveat, within a period of 45 days.

That he has been advised by his Advocates on record, that an application for review must be filed without unreasonable delay. That without a draft Defence annexed, the Court cannot be called upon to imagine that such a Defence exists.

The Applicants further filed a Supplementary Affidavit dated **27th October 2020**, and reiterate all the averments in their Application dated **20th August 2020**, and the Supporting Affidavit.

The Court directed that the instant Application be canvassed by way of written submissions. The Respondents/Applicants filed their written submissions dated **1st March 2021**, through the **Law Firm of S.M Muhia & Co. Advocates**, while the **2nd and 3rd Applicants/Respondents'** written submissions are dated **16th April 2021**, filed through the **Law Firm of L.Njoroge Mugo & Co. Advocates**. The 1st Respondent also filed his written submissions dated **10th March 2021**, through the **Law Firm of Andrew Loketo Kariu Advocates**. The 4th Respondent did not file any response to the Application.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination are; -

I. Whether the ex parte judgement delivered on 29th November 2019, ought to be set aside.

II. Whether the Applicants' deserve unconditional leave to defend the suit.

III. Whether parcel of land known as LR 10823/2267, LR 145845/1, should revert to the original owner.

(i) Whether the ex parte judgement delivered on 29th November 2019 ... ought to be set aside.

The power to set aside ex parte orders or Judgement are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in Patel....Vs....E.A Cargo Handling Services Ltd (1974) EA 75, held that:-

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. 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.”

Order 12 Rule 7 of the Civil Procedure Rules provides that;

“where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment or order upon such terms as may be just.”

In deciding whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

The Application is premised on the fact that the Respondents/Applicants were never served with pleadings in this suit and that they came to the knowledge of the suit when they received a letter from the Ministry of Lands and Physical Planning dated **23rd February 2020**. The Applicants/Respondents have denied these allegations and

have averred that the pleadings were served on **21st September 2020**, and there was no time service was refused/rejected. The Court has seen and considered the Return of Service of **Mathew Musotsi**, the process server dated **1st October 2020**.

The Court is satisfied that on **15th April 2019**, the Process Server served a Hearing Notice on the said Law Firm. Further, hearing notice dated **25th June 2019**, was served upon the Applicants by Registered Post, and the same were duly accepted. After such consideration, the Court finds the said service was proper.

As the Court noted earlier, the setting aside of an ex parte Judgment is at the discretion of the Court, and in so doing, such discretion is unfettered, but the same should be exercised judiciously and not capriciously – see the case of **Shah Vs Mbogo (1967) E.A. 166**, where the Court held that:

“This discretion to set aside as ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. However, the discretion of the Court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

It is this Court’s considered view that the Applicants had an obligation to satisfy this Court that they have a sufficient cause. The same has not been explained and what is on record is the fact that they received a letter from Ministry of Lands, which to the Court understanding, prompted the filing of the instant Application.

While the Applicants have denied that there was ever, service upon them, they have not produced before this Court any evidence denying service of the suit papers.

In light of the above, the Court further notes that the impugned Judgement was delivered on **29th November 2019**, and the Instant Application is dated **20th August 2020**. **There is a delay of more than 8 Months, which delay has not been explained.** Whereas delay of more than **8 Months** appears to be unreasonable, failure to explain the delay may nevertheless cause the delay to be construed as more unreasonable. Thus, the Applicants have not given satisfactory explanation for the delay, in

filing the instant application for setting aside the Judgement on record.

(ii) Whether the Applicants deserve unconditional leave to defend the suit.

The Applicants have sought to have the **Ex parte Judgment** entered on **29th November 2019**, set aside. As already held above, the Court has already found that the pleadings were properly served upon the Applicants.

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides: -

“The Court may set aside an order made ex parte”

From the above provisions of law, it is very clear that the Court has discretion to set aside or not to set aside an exparte judgment. Such discretion must be exercised judiciously.

As the Judgment was regular, the Court must then determine whether or not the draft Defence or Defence annexed raises any triable issues. It is sad to note that the Applicants have not attached a draft Defence to welcome this Court’s in-depth intervention.

This Court is of the considered view that there remains no issue in dispute and therefore no triable issues have been raised as no draft Defence has been annexed. Therefore, the Applicants’ do not deserve leave to defend the suit.

(iii) Whether parcel of land known as LR 10823/2267, LR 145845/1 should revert to the original owner.

It will not be in the interest of Justice for this Court to set aside a regular judgment and ventilate on ownership issues and what parcel of land should revert to who.

The Upshot of the foregoing is that the Applicants’ have not met the threshold to warrant the Court to exercise its discretion in their favour and consequently, the Applicants’ are not entitled to the setting aside of the Ex parte Judgment entered on **29th November, 2019**.

Having now carefully read and considered the instant Application, the affidavits and annexures thereto, together with the rival written submissions, the Court finds and holds that the **Notice of Motion Application** dated **20th August 2020**, is **not** merited and the same is dismissed entirely with costs to the Applicants/Respondents.

It is so ordered.

Dated, signed and Delivered at Thika this 30th day of September, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki