REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 52 OF 2016

TULA CHEBET

(Suing as the Legal Representative of the Estate of CHEBET BARMALA, (Deceased).....1st PLAINTIFF

MICHAEL LIMO RUTO

(Suing as the Legal Representative of the Estate of CHEBET BARMALA, (Deceased).....2nd PLAINTIFF

VERSUS

THOMAS KIBET alias RUTO CHEBET.....DEFENDANT

RULING

[NOTICE OF MOTION DATED 5TH MAY, 2021]

1. By the Notice of Motion brought under **Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 15 of the Civil Procedure Rules**, **Sections 1A, 1B and 3A of the Civil Procedure Act**, dated the 5th May, 2021, the defendant seeks for orders that;

> ***(a) " That this application be certified urgent and the same to proceed in the first instance and service of the application be dispensed with.***
>
> ***(b) That leave be granted to the firm of M/S CHEBII & CO. ADVOCATES to come on record for the Defendant/Applicant.***
>
> ***(c) That there be stay of execution of the ex parte judgment and all consequential orders/decree issued on 18th July, 2019 pending the hearing of this application inter party.***
>
> ***(d) That this case be reopened and the same to start denovo.***
>
> ***(e) That costs of this application be provided for."***

The application is based on the seven **(7)** grounds marked **(a)** to **(g)** on the face of the motion namely;

> ***(a) That the plaintiffs/respondents filed suit vide Plaint dated 16th March 2016 against the defendant claiming interest on parcel No. Moiben/Kimnai/720 which is the property of the Defendant.***
>
> ***(b) That the matter proceeded in absence of the Defendant, hence entry of judgment and issuance of decree.***
>
> ***(c) That service of the hearing notice is disputed as no service was ever done.***
>
> ***(d) That there was gross misapprehension of facts by the Honorable court largely due to misguiding testimony of the plaintiffs.***
>
> ***(e) That it is trite Constitutional and Statutory principle that justice shall be administered without undue regard to technicalities as such, the greatest regard should lie with the substantive issues.***

(f) That the balance of convenience favours the defendant/ applicant.

(g) That the defendant/applicant defence raises triable issues."

The application is supported by the affidavits of **Thomas Kibet**, the defendant, sworn on 5th May, 2021 and 10th May, 2021 in which he reiterates the above grounds. He maintains that his then advocate, **Mr. Cheptarus** withdrew from acting for him without notifying him, or serving him with the application to cease acting. That he only got to know about the judgement of 18th July, 2019, and decree of 5th November, 2020 after receiving from the Assistant Chief a letter dated 29th April, 2021 notifying him that the surveyors would visit the land on the 6th May, 2021. That he became the first registered proprietor of the suit land in the 1970's, and has been in exclusive possession of the whole parcel. That his defence raises triable issues as the grant issued to the plaintiffs in **Eldoret High Court Succession Cause No. 286 of 2015**, and which they had relied on to file this suit, was revoked on the 13th September, 2019.

2. That on the 12th May 2021, the court gave directions on filing of a reply to the application and submissions in respect of the notice of motion. That though no replying papers have been filed up to now by the plaintiffs, the learned counsel for the defendant and plaintiffs filed their submissions dated the 27th May, 2021 and 13th September, 2021 respectively.

3. The following are the issues for the court's determinations;

(a) Whether the defendant has made a reasonable case for the setting aside of the exparte judgement and decree issued therefrom.

(b) Whether the defence filed raises triable issues.

(c) Who pays the costs of the application?

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the defendant, the submissions by the two learned counsel, the superior decisions cited thereon, and come to the following determinations;

(a) That **Order 10 Rule 11 of the Civil Procedure Rules** provides as follows:

> ***"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

The Court of Appeal in the case of ***James Kanyiita Nderitu & Another [2016] eKLR,*** held as follows;

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling Services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.***
>
> ***In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."***

The Court of Appeal went on and cited the Supreme Court of India which underlined the right to be heard as follows in the case of ***Sagram Singh -vs- Election Tribunal, Koteh, AIR 1955 SC 664,*** at 711**:**

> ***"There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

The defendant has on his submissions cited the case of ***E. A. Patel V. E.A. Cargo Handling Services Ltd (1974) EA 75*** *at 76,* where the court buttressed the above position in the following words;

"there are no limits or restrictions on the Judge's discretion except that if he does vary the judgement, 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 to it by the rules."

(b) The principles that guide the court in exercise of its discretion were discussed in the case of **James Wanyoike & 2 Others v. CMC Motors Group Ltd & 4 others (2015) eKLR** thus:-

"…The principles and tests for setting aside an ex-parte judgment can be summarized as follows;

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment.

2. That the tests for setting aside an ex-parte judgment are:

(a) Whether there is a defence on merits?

(b) Whether there would be any prejudice to the plaintiff?

(c) What is the explanation for any delay?"

This suit was filed in way back in early 2016. The hearing commenced on the 2nd March, 2017 when Julia Chebet, the 1st plaintiff, testified as PW1. Then on the 1st November, 2018 Michael Limo Ruto, the 2nd plaintiff, testified as PW2 followed by three witnesses who testified as PW3 to PW5. The record confirms that Mr. Cheptarus, learned counsel then on record for the defendant was present and cross examined PW1 after his evidence in chief. That the record further confirms that M/s Joseph C. K. Cheptarus advocates filed the chamber summons application dated the 4th November, 2017 on the 7th November 2017 seeking to cease acting for the defendant. That the court gave directions on the service and or hearing of the said application on the 21st March, 2018 and 14th May, 2018 but there is nothing on record to confirm that it was ever heard and or determined. That effectively, the said firm remained on record for the defendant until the 6th May, 2021 when the court granted prayer 2 of the notice of motion dated the 5th May, 2021 for M/s Chebii & Co. Advocates to come on record for the defendant.

(c) That it is clear from the record that the testimonies of PW1 to PW5 were all taken between the 2nd March, 2017 and 1st November, 2018. The judgement was subsequently delivered on the 18th July, 2019. That contrary to the defendant's claim that the hearing and determination of the suit took place during the Covid 19 pandemic, the true position as confirmed by the dates set out above is that PW1 to PW5 were heard, and judgement delivered more than one year before the prevailing Covid 19 pandemic was reported anywhere in the world, leave alone our country, Kenya.

(d) That though the defendant has claimed that his advocate on record then never informed him of the hearing dates resulting to the matter proceeding to hearing without his participation, and further that his advocate withdrew from acting for him without informing him, the finding of the court is that the counsel's chamber summons to cease acting was never heard and therefore the defendant was all along the duration of the hearing and determination of the suit with counsel on record.

(e) That as the judgement the defendant complains of was delivered on the 18th July 2019, and the application subject matter of this ruling was not filed until the 5th May, 2021 which is after one year ten months, the defendant had an obligation to explain the apparent delay thereof. The defendant has not offered any reasonable explanation for the delay in making the instant application for setting aside of the said judgment.

(f) That in my view the defendant's failure to attend court during the subsistence of this suit was intended to delay the hearing and determination of this suit. I do not think he deserves the orders he is seeking having found that there was inordinate delay in filing the instant application and that the judgement he challenges is a regular one. That the defendant should have considered taking the route of an appeal instead.

5. That in the circumstances, I find that the defendant's application dated the 5th May, 2021 is not merited and the same is dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 27TH DAY OF OCTOBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFFS: ABSENT

DEFENDANT: ABSENT

COUNSEL: ABSENT

CHRISTINE: COURT ASSISTANT.