



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C SUIT NO 450 OF 2013**

**RICHARD BARONGO OPANGA.....PLAINTIFF**

**VERSUS**

**SABINA KERUBO OGORI.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MARIERA OGORI.....2<sup>ND</sup> DEFENDANT**

**ANDREW GICHANA OGORI.....3<sup>RD</sup> DEFENDANT**

**SAMUEL ORANDO OGORI.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion dated 13<sup>th</sup> July 2021 the Defendants/Applicants seek the following orders:

a) Spent

b) That pending the hearing of the instant application, the Honourable Court be pleased to review/stay or set aside the ex-parte proceedings and orders of 9<sup>th</sup> June 2021 and issued on the same day.

c) That the Honourable Court be pleased to grant leave to file a response to the application dated 11<sup>th</sup> May 2021 which application was never served upon the advocates on record nor the Defendants/Respondents.

2. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Francis Mariera Ogori, the 2<sup>nd</sup> Defendant/Applicant sworn on the 12<sup>th</sup> July 2021.

3. The thrust of his affidavit is that the Defendants were not served with the application dated 11<sup>th</sup> May 2021 as the Hearing Notice and application served on their advocate relates to ELC Case No. 14 of 2019 which was coming up for hearing at Ogembo CM's court and which has no relation to this case. A copy of the said Hearing Notice is annexed to his affidavit.

4. The application was opposed by the Plaintiff through his Replying Affidavit filed on 22<sup>nd</sup> July 2021 in which he maintains that the Applicants were served with the application on 21<sup>st</sup> May 2021 by a Process Server called Elijah Gekonge Nyang'au whose Affidavit of Service is annexed to the Replying Affidavit. He further depones that the application has been overtaken by events as execution has been carried out and the Defendants' houses have been demolished.

5. In response to the said Replying Affidavit Elijah Gekonge Nyangau, the Process Server has sworn an affidavit refuting the claim that he served the Defendants with the application dated 11<sup>th</sup> May 2021. The 2<sup>nd</sup> Defendant also swore a Further affidavit dated 30<sup>th</sup> July 2021 denying that their advocate was served with the application. He depones that the Affidavit of Service dated 4<sup>th</sup> June 2021 is false. He admits that execution was carried out and that their houses were demolished but he states that the Defendants have erected temporary structures on the suit property which they are currently occupying. He depones that the execution was erroneous and the same ought to be set aside.

6. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

## ISSUES FOR DETERMINATION.

7. Having considered the Notice of Motion, rival affidavits and counsel's submissions, the only issue for determination is whether the orders issued on 9<sup>th</sup> June 2021 should be set aside.

## ANALYSIS AND DETERMINATION

8. In arriving at my determination, I am guided by the case of **Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others [2018] eKLR** the Court of Appeal stated as follows:

**“It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court. Ordinarily, when an application to set aside a default judgment and extend time for filing a defence is filed before a court, there are several factors that the court ought to take into account.**

In **Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75**, this Court held as follows:

**“There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”**

**The courts should also endeavor to ensure that the factors considered are in tandem with the overriding objective of civil litigation, that is, the just, expeditious, proportionate and affordable resolution of disputes before the court...”**

9. In the instant case, the hearing proceeded on the 16<sup>th</sup> November 2020. On the said date the Defendants and their advocates failed to attend court without any explanation. The case therefore proceeded ex-parte and judgment was entered in favour of the Plaintiff on 9<sup>th</sup> February 2021. The Defendants thereafter filed an application dated 24<sup>th</sup> March 2021 to set aside the ex parte orders but the said application was never prosecuted. The Plaintiff thereafter filed an application for eviction of the Defendants dated 11<sup>th</sup> May 2021, which was granted on 9<sup>th</sup> June 2021 and the Defendants were subsequently evicted. The Defendants have now filed an application seeking to set aside the orders of eviction issued on 9<sup>th</sup> June 2021 on the grounds that they were not served with the application dated 11<sup>th</sup> May 2021.

10. From the Supporting and Further Affidavit sworn by the 2<sup>nd</sup> Defendant as well as the affidavit of Elijah Gekonge Nyangau, the Process Server sworn on 28<sup>th</sup> July 2021 it would appear that the Defendants were not served with the application for eviction as the said Process Server has disowned the Affidavit of Service filed by the Plaintiff.

11. However, even if the orders issued on 9.6.2021 are set aside, the Defendants would still have to surmount the hurdle of explaining why they failed to attend court on the 16.11.2020, when case came up for hearing and why they failed to prosecute their application dated 24<sup>th</sup> March 2021 for setting aside the ex-parte judgment, not to mention that their defence was struck out. The other challenge is that eviction has already been carried out so the application has been overtaken by events.

12. The Defendants have not demonstrated that they are deserving of the court's discretion as they have not been diligent in prosecuting their defence. I agree with counsel for the Plaintiff that there has been a lot of back and forth in this matter with numerous applications being filed and it would appear that the Defendants seem not to be interested in having this case concluded.

13. In the interest of justice and in furtherance of the overriding objective of civil litigation which is to ensure a just, expeditious, proportionate and affordable resolution of disputes before the court, I decline to exercise my discretion in favour of the Defendants/Applicants.

Accordingly, the application is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF OCTOBER, 2021.**

**J.M ONYANGO**

**JUDGE**