REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 385 OF 2017

HOTENGA NJERI MUNGA.....PLAINTIFF/RESPONDENT

VERSUS

CELINA WAIRIMU..... 1ST DEFENDANT/APPLICANT

WANGUI JOSEPH ..... 2ND DEFENDANT/APPLICANT

GEORGE NDOTONO.....3RD DEFENDANT/APPLICANT

RULING

1. The Defendants/Applicants moved the Court on the vide a Notice of Motion dated 30/10/2020 premised on Order 10 Rules 9&10, Order 51 Rules 1 &13(2) of the Civil Procedure Rules and Sections 1A, B,3 and 3A of the Civil Procedure Act filed by the Defendants seeking Orders that;

a. Spent.

b. There be temporary stay of execution of the judgment of the Court delivered on 24th September 2020, the judgment be and is hereby vacated to enable the Defendants participate in this case.

c. Costs of this Application be awarded to the Applicant.

2. The application is premised on the grounds annexed to the application alongside the affidavit of support deponed by Joseph Wangui, the 2nd Respondent herein. That they were not given the opportunity to be heard, a situation he takes responsibility for on the ground that he was unreachable at the time of the hearing. In addition, the deponent avers that they have a solid defence based on bonafide purchasers of the plots.

3. Further that they stand to suffer substantial loss if the orders are denied and that the application has been made without nay unreasonable delay.

4. The Plaintiff opposed the Application vide her Replying Affidavit sworn on 4/12/2020. She deponed that the averments contained in the Supporting affidavit of the Motion are untrue, unsubstantiated and meant to mislead this Honorable Court. That indeed the Defendants entered appearance and filed their statement of defence and despite being served with the requisite notice of the hearing date through their firm of Advocates, they refused to attend Court. Further she argued that no reasonable ground for stay of execution of the judgment had been advanced. In demonstrating that the Defendants were aware of the suit, she annexed a copy of the hearing notice duly served and received by the Defendants' firm of Advocates alongside an Affidavit of Service marked "**HNM2**".

5. The Application was canvassed by way of written submissions.

6. On behalf of the Defendants/Applicants, the firm of Kimani Kahete & Co. Advocates filed their inelegant submissions dated 20/6/2020 (*sic*). It was submitted that the failure to attend Court was because the contact person namely Wangui Joseph was unreachable and asserted that their statement of defence is not a mere denial of issues but raises triable issues. That as advocates they were helpless as their frantic efforts to trace their clients were futile. Reliance was placed on the **Nyahururu ELC Case No. 89 of 2017 John Kimini Kamutu v Joseph Macharia Ngunjiri & others**.

7. They urged the Court to exercise its unfettered discretion and set aside the ex parte Judgement as it was held in **Patel v E.A Cargo Handling Services Ltd [1974] EA 75**.

8. On the other hand, the Respondent filed her submissions dated 15/3/2021 through the firm of Muturi S.K & Co. Advocates. She faulted the provisions of Order 10 Rules 9 and 10 cited by the Applicants as being inapplicable to the case at hand because the Defendants entered appearance and filed their defence. That the same firm of Kimani Kahete Advocates was acting for the Applicants and was fully aware of the hearing date. Therefore the deposition that their client was unreachable and at the same time denied an opportunity to be heard does not hold any water. Several cases were cited including **Edney Adaka Ismail v Equity Bank Ltd [2014] eKLR**, **Richard Murigu Wamai v Attorney General & Anor. [2018] eKLR** and implored the Court not to exercise its discretionary power in favour of an indolent litigant who had lost interest in their case.

9. There are two issues in my view which if answered will dispose of the application. Firstly, whether the judgement entered on 24/9/2020 should be set aside and secondly whether the Applicants are deserving of the orders of stay of execution of the said judgement.

10. This suit was filed on the 20/9/2016 by the Plaintiff against the Defendants seeking orders for vacant possession and a permanent injunction restraining the Defendants from trespassing transferring leasing or in any other way alienating the suit land – Ruiru/Ruiru East Block 2/703.

11. The 1st and 2nd Defendants denied the Plaintiffs claim vide their statement of defence filed on the 17/5/2016. They contend that they are the lawful owners of the suit land pursuant to a purchasers right having purchased the same in 2003. In their counterclaim they sought interalia declaratory orders that they are bonafide owners of the plots excised out of the suit land.

12. According to the record the 3rd Defendant did not defend the suit.

13. On the 4/11/2019 the matter was heard exparte in the absence of the Defendants despite service of hearing notice upon their counsel on record.

14. Thereafter the Court delivered its judgement on the 24/9/2020 in favour of the Plaintiff.

15. It is this judgement that is the subject of this application.

16. Order 12 Rule 7 of the Civil Procedure Rules, 2010, provides that "where under this order judgment has been entered or the suit has been dismissed, the Court on an application, may set aside or vary the judgment or order upon such terms as may be just."

17. The Civil Procedure Rules donate the power to the Court to set aside judgments. The Court has unfettered discretion to do so but under certain principles. Order 12 Rule 7 of the Civil Procedure Rules states that where judgement has been entered or the suit has been dismissed, the Court, may set aside or vary the judgement or order upon such terms as may be just.

18. It is not in dispute that the Applicants filed a statement of defence in response to the Plaintiffs claim. It is also not in dispute that at the material date of the hearing the Defendants were served with the hearing notice but elected to absent themselves. It is also on record that the Applicants counsel was present on the 4/3/2020 when he undertook to file written submissions in the matter post hearing. The record holds no evidence of such filing.

19. The Court of Appeal in the case of **James Kanyiita Nderitu & Another [2016] eKLR**, stated thus:

> "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 and 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**

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 justiae, 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."

20. The Court must then first determine whether Judgment entered herein was a regular or irregular judgment. The judgment the subject of this application therefore is a regular judgement. Where a regular judgment has been entered the Court would not usually set aside the judgment unless it was satisfied that there was a triable issue.

21. It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether the defence has a triable issue (s); secondly whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the Court of Appeal in the case of **Mohammed & Another v Shoka (1990) KLR 463.**

22. In deciding whether or not to set aside an ex parte judgement the Court is meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error and it would not be proper use of such discretion if the Court were to turn its back to a litigant who has demonstrated such an excusable mistake inadvertence accident or error. See the case of **Shah Vs Mbogo (1979) EA 116** on guidelines on how the Court should exercise its discretion.

23. The application was filed on the 30/10/2020, 6 days after the delivery of judgment and therefore it was filed timeously.

24. Do the Applicants have a defense that raises triable issues? In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited** and **Joseph Rading Wasambo CA 38 of 1998**, the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an ex parte judgement. It is on record that the Applicant has attached a draft defence and counterclaim.

25. In the case of **Patel – Vs – Cargo Handling Services** the Court of Appeal considered the meaning of a triable defence and held that;

> "In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue'.

26. The Defendants have averred in their defence and counterclaim that they purchased the plots excised from the suit land from third parties and commenced occupation since 2003. It is the Court's view that whether the defence has merit is best left to the trial Court to test its veracity at the hearing of the case. The Court however is satisfied that indeed there is a defence with triable issues.

27. What prejudice will the respondent suffer? A successful litigant should have the liberty to enjoy the fruits of his judgement. In this case the respondent stands to be prejudiced if the judgement is set aside in terms of time lost but on the other hand he stands to benefit from a hearing anchored on merits. Having said so, I am of the view that the prejudice to be suffered by the Plaintiff respondent can be compensated with costs. I will make the appropriate orders at the end.

28. As to whether the Applicants have explained the reasons for non attendance at the hearing, I concur with the respondent that they have failed in that regard. Notwithstanding their failure to offer a satisfactory explanation, I am satisfied that there is no evidence to show that the Applicants conduct was intended to delay or pervert the course of justice.

29. With respect to the application of stay of execution of judgment, having granted the orders to set aside the said judgment, I find that determining the 2nd issue will be a mere academic exercise. I see no justiciable reason to take that route.

30. In the end having considered the facts of the case, the affidavit evidence filed by both parties, the submissions of counsels and the relevant authorities, I find that this is a proper case for this Court to exercise its discretion in favour of the Applicants on the following terms;-

a. The Judgement delivered on the 24/9/2020 and all its consequent orders be and are hereby set aside in its entirety.

b. The parties are directed to take steps to fix the matter for hearing on a priority basis.

c. The Applicants shall pay throw away costs in favour of the Respondent in the sum of Kshs 30,000/- payable within a period of two weeks from the date hereof. In default the orders shall lapse automatically.

31. It is ordered.

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 14TH DAY OF OCTOBER, 2021.

J. G. KEMEI

JUDGE

In the presence of:-

Mr. Maina for the Plaintiff

No appearance for the Defendants/Applicant

Ms. Phyllis Mwangi – Court Assistant