REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 385 OF 2012

(Formerly Eldoret Hccc No. 162 OF 2007)

EDWARD MISOI ……..……..PLAINTIFF

-VERSUS-

FRANCIS K. MISOI……..…… DEFENDANT

RULING

[NOTICES OF MOTION DATED 22ND FEBRUARY, 2020 AND 9TH DECEMBER, 2020]

1. This ruling relates to two applications dated 22nd February, 2020 and 9th December, 2020. The application dated, 22nd February, 2020 is by the plaintiff, and seeks for the following orders;

> *i.* ***THAT*** *the County Surveyor Uasin Gishu County to visit and ascertain boundary of land Parcel No.* ***Kiplombe/Kuinet Block 9 (Asmara) 1 and 5****.*
>
> *ii.* ***THAT*** *the OCS Soy Police Station to provide security during the exercise.*

The application is based on the four **(4)** grounds on its face, and supported by the affidavit sworn by **Edward K. Misoi**, the plaintiff, on the 22nd February, 2020. That it is the plaintiff's case that he is the owner of ***Kiplombe/Kuinet Block 9 (Asmara) 1***, while the defendant owns ***Kiplombe/Kuinet Block 9 (Asmara) 5***. That the court had on 18th December, 2018 issued eviction order of the defendant from the plaintiff's land, that has been executed. That during the eviction the defendant destroyed the boundaries between the two parcels of land, and there is need to have it ascertained to enable the completion of the execution of the eviction order.

2. That in response to the application, **Francis K. Misoi**, the defendant, filed the replying affidavit sworn on 9th December, 2020 wherein he deponed that the claims contained in the application are untrue. That the plaintiff is engaging in a witch hunt since no survey has ever been done, and no boundary marks have been put on the ground as alleged. That the plaintiff is not the owner of the parcel of land claimed, and that he has since filed an application seeking to have the judgment sought to be enforced reviewed. That he could not have destroyed boundaries that have never been there in the first place, and he sought to have the application dismissed.

3. The notice of motion dated 9th December, 2020 is by the defendant. The application is premised under **Article 159 of the Constitution of Kenya, 2010**, **Order 51 Rule 1, Order 45 Rule 1 & 2**, and **Order 12 Rule 7 of the Civil Procedure Rules, 2010** and seeks for the following orders;

> ***(1) THAT this court be pleased to certify this application as urgent and service thereof be dispensed with in the 1st instance.***
>
> ***(2) THAT there be a temporary stay of execution or further execution and stay of further proceedings in this matter pending the hearing and determination of this application inter parties.***
>
> ***(3) THAT this court be pleased to review and to set aside the entire judgment, decree and subsequent orders herein and to allow the defendant to tender his evidence for the same to be taken into account at the determination of the suit on merit.***
>
> ***(4) THAT costs of this application do abide.***

The application is based on the eight **(8)** grounds on its face and supported by the affidavit sworn by **Francis Kiptum Misoi**, the defendant, on the 9th December, 2020. That it is the defendant's case that the suit herein proceeded to hearing in his absence, and judgement was delivered on 19th March, 2019. That his absence during the hearing was due to circumstances beyond his control. That the suit parcel herein was acquired through a family arrangement, and the proceeds of acquisition were contributed to by himself and his brother **Laban Kiptanui Misoi**, who is the plaintiff's father. That upon service of the pleadings, he engaged **Ms. Buluma & Co. Advocates** who filed the necessary documents, including his defence and other pleadings. That however, there was a breakdown of communication between himself and the advocates, and he was not updated on the progress of the matter or the hearing date. That he only got to know of the date the matter was being heard that same day, and it was too late for him to attend. That he later learnt from the record that his advocate had not attended court during the hearing. That he learnt of the judgement when the plaintiff attempted to execute it through subdivision and survey of the land. That he was not given an opportunity to be heard and his failure to attend court was caused by lack of communication from his advocates, who were his only source of communication. That by virtue of lack of communication from his advocate, an injustice had been occasioned as he had been denied an opportunity to be heard. That he has already moved the court to change his then advocates, and his review application should be allowed.

4. That directions were issued on the 3rd March, 2021 that the two applications be dealt with together through written submissions to be filed and exchanged within the timelines given. That thereafter, the learned counsel for the plaintiff and defendant filed their submissions dated the 12th April, 2021 and 16th April, 2021 respectively. The submissions are as summarized here below;

(a) The learned counsel for the plaintiff submitted in support of their application of 22nd February, 2020 and in opposition to the defendant's application of 9th December, 2020. The counsel submitted that the defendant's application was barred by the doctrine of laches. That the defendant's claim that he had not been afforded an opportunity to present his case was false, as his initial counsel had been afforded an opportunity to cross-examine the plaintiff and the plaintiff's witnesses. He stated that in fact, the defendant had been given time to testify, but had failed to appear in court for the same. That more than a year had lapsed between the passing of the judgment and the presentation of the defendant's application. That the court should dismiss the defendant's argument that his failure to attend court was due to breakdown of communication between him and his counsel, as no proof of such breakdown was tendered to court. The plaintiff denied the allegation that there were facts and court decisions that he had failed to disclose to the court. That the court had considered the other existing files and found they did not have any impact to the present case. That the application dated the 9th December, 2020 by the defendant should be dismissed with costs.

(b) The learned counsel for the defendant in their submissions restated the history of the dispute between the parties, and pointed that there were many facts that has been concealed by the plaintiff in his application of 22nd February, 2020. The counsel submitted that whereas the plaintiff in his application sought for a declaration that he was the absolute owner of the subject parcel of land, namely Kiplombe/Kuinet Block 9(Asmara)/1, and that he was entitled to exclusive use, those were not among the findings made by the court in its judgment of 19th March, 2019. That the existence of other suits that would have contextualized the defendant's defence were also not brought to the attention of the court. That the plaintiff's claim for mesne profits was not a fact raised through the substantive pleadings, but through an application, hence denying the defendant an opportunity to respond to them. That the court should find that the plaintiff's application misrepresented several facts, including that the judgement giving rise to the plaintiff's application being of 19th March, 2019 and not 18th December, 2018.

5. That having considered the nature of the prayers sought in the two applications, it is apparent that if that dated 9th December, 2020 by the defendant is allowed, the judgement that the plaintiff seeks to further execute through his application dated 22nd February, 2020 would be set aside. That such a finding would effectively settle the plaintiff's application, and it is therefore prudent to address the defendant's application first. That should the court find that the defendant's application has no merit, then the court will proceed to consider the plaintiff's application.

6. The issues for consideration in respect of the defendant's application dated the 9th December, 2020 are as follows;

(a) ***Whether the defendant has laid before the court reasonable ground(s) to review and set aside the judgment of 19th March, 2019.***

(b) Who pays the costs of the application?

7. That I have considered the grounds on the application, the affidavit evidence, submissions by the two learned counsel for the parties, and come to the following conclusions;

(a) That it is apparent that the defendant had filed his defence, and other accompanying pleadings, and also participated through his former counsel in the hearing of the plaintiff's case. That however, the defendant's case was closed, judgement prepared and delivered on the 19th March, 2019 without his testimony being heard due to the failure to attend court by him on the set date. That the defendant has brought his application under **Order 12 Rule 7 of the Civil Procedure Rules** among other provisions, seeking to have the said judgement reviewed and set aside, so as allow him to present his evidence. The defendant blames the predicament he finds himself in to a breakdown of communication between himself and his then advocates. That the provision of **Order 12 of the Civil Procedure Rules** provides for consequences of non-attendance on the day of hearing. That in particular, **Order 12 Rule 2 (a)**, provides that;

"If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the plaintiff attends, if the court is satisfied—

(a) that notice of hearing was duly served, it may proceed ex parte; …"

That provision applies in this case as the defendant's basis of his application revolves around his failure to attend the hearing on the appointed day to testify and present witnesses. That where that happens, recourse is set out under **Order 12 Rule 7** which provides for the setting aside judgment or dismissal order as follows: -

"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."

(b) That the question before the court therefore is whether there are justifiable reasons presented by the defendant upon which the court could exercise its discretion to set aside its judgment. That the court has a duty under **Article 159 of the Constitution**, **Sections 1B & 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya** and **Section 18 and 19 of the Environment and Land Court of Kenya Act No. 19 of 2011** to do justice to the parties expeditiously. That is the guiding principle in exercising the courts discretion as was held in the case of ***Patel Vs E.A Cargo Handling Services Ltd (1974) EA 75***, where the court stated 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 to it by the Rules.''

The Environment and Land Court sitting at Thika in ***Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & Another [2021] eKLR*** was faced with similar circumstances, wherein, the Defendant/Applicants had similarly failed to appear and testify despite having filed a defence, and cross examined the Plaintiff and her witnesses. Similarly, the Defendant/Applicants therein placed the blame on their counsel's door who was faulted for failing to communicate the hearing date. Judgment was consequently entered on 26th August, 2020. The Court undertook a two-stage test. One, it examined whether the judgement was entered regularly or irregularly within the interpretation of the Court of Appeal in the case of ***James Kanyiita Nderitu & Another [2016] eKLR.*** Two, it examined whether, in the case of a regularly entered judgment, there were justifiable reasons for the Court to exercise its jurisdiction. That on the first test, the Court of Appeal in ***James Kanyiita Nderitu (supra)*** stated that: -

"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 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 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." (emphasis added)

That in the instant case, the judgment of 19th March, 2019 was a regular one as summons had been properly served, the defendant indeed entered appearance and filed his defence, but was not heard or did not participate in the trial fully, before the judgment on record was prepared and delivered. That having ascertained that the judgement herein was a regular one, the next consideration is whether there are justifiable reasons for the court to exercise its jurisdiction in favour of the defendant.

(c) That in the case of ***James Kanyiita Nderitu (supra)***, the Court of Appeal gave guidance on some considerations that may be taken into account by a court invited to exercise its jurisdiction to set aside a regularly entered judgment. These includes;

(1) Whether the Defendant/ Applicants have good reasons for their failure to appear and whether the lapse of time in filing this application is excusable

In this case, the defendant blames his then advocates who failed to inform him in time of the hearing day, resulting in his failure to attend court for the defence hearing. In the case of ***Racheal Njango Mwangi*** (supra), the court while considering a similar reason stated that;

"This court is always skeptical of parties that seek to blame their Advocates and fail to produce any evidence that they have taken any steps to make the said Advocate liable for their negligence. The court recognizes that a case belongs to a party and it is upon that party to follow up on their case and once a party appoints an Advocate, the party then becomes liable for the actions of the said Advocates who was acting on their behalf."

That the logic expressed above is reasonable. Indeed, a trial is the responsibility of the parties and they cannot wholly abandon responsibility for its prosecution at the foot of advocates. Nevertheless, like in the ***Racheal Njango Mwangi (supra)*** decision, though this suit was commenced in 2007, the actual oral hearing started in July 2017, and the defendant's case was closed on 7th December, 2018 without him tendering his defence. That the proceedings of that day confirms that Mr. Okara, counsel for the defendant, while applying for adjournment informed the court that ***"… I am not ready. I have not been able to trace the defendant this month. We talked last night. I am forced to file an application to cease acting….."*** That following the objection by counsel for the plaintiff, the court declined to grant the adjournment application and ordered the defendant case to be closed. That the steps, if any, that the defendant took to follow up on his case, with his then counsel, or another one, until a year later when this application was filed, have not been disclosed. However, the disclosure by his counsel during the proceedings of 7th December, 2018 goes to confirm the defendant position that there was indeed a communication breakdown, during the period preceding the date for defence hearing, between him and his counsel.

(2) Whether the defence raises triable issues

That when considering whether a defence raises triable issues, the court's responsibility is not to look at whether the defence is valid, but whether it presents a prima facie case. The court in the case of ***Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR*** stated that: -

"And a triable issue need not be one which will succeed but one that passes the SHEDRIDAN J Test in PATEL V E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at p. 76 (Duffus P.) that "… a triable issue… is an issue which raises a prima facie defence and which should go to trial for adjudication."

That the court is inclined to find that the defendant's defence filed herein in answer to the plaintiff's claim raises triable issues.

(3) Whether the orders are warranted in light of the prejudice to be occasioned to the Plaintiff considering the interests of justice on the whole.

That the Court of Appeal in the case of ***James Kanyiita Nderitu (supra)*** held that 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, should be a consideration when called upon to set aside a regular judgment. That in the instant case, if the defendant's application is granted, the plaintiff stands to suffer delay in enjoying the benefits of a regularly entered judgment. The defendant on the other hand stands to lose his proprietary claim or interest to about 285 acres of land, without being heard in his defence. That when the court weighs the two competing situations in the circumstances of this case, the lesser prejudice of delay to be occasioned to the Plaintiff is better tolerable than placing the defendant to the loss he is likely suffer without having his day in court. That in coming to that finding, the court has noted that both parties had filed their pleadings, the trial in this matter was at an advanced stage with the plaintiff's case and witnesses having been heard and cross-examined, and that what remains is solely the testimony of the defendant and his witnesses. That the defence is likely to be heard within say one year, and the court is therefore inclined to allow the defendant's application.

(d) That having found that the application dated 9th December, 2020 is meritorious, it follows that the plaintiff's Notice of Motion dated the 22nd February, 2020 that primarily sought to further execute the judgement that has now been set aside has lost the foundation it was based on.

(e) That in view of the apparent close familial relationship between the parties herein, the court finds this to be a suitable instance where each party bears his own costs in both applications, the provision of **section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** notwithstanding.

8. That flowing from the findings above, the court orders as follows;

(a) That the plaintiff's notice of motion dated the 22nd February 2020 be and is hereby dismissed.

(b) That the defendant's notice of motion dated the 9th December 2020 be and is hereby allowed in terms of prayer 3.

(c) That each party do bear his own costs in respect of the two applications.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 6TH DAY OF OCTOBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF: ABSENT.

DEFENDANT: ABSENT.

COUNSEL: MR. NAMATSI FOR PLAINTIFF.

MR. TARIGO FOR KIPSEI FOR DEFENDANT.

CHRISTINE: COURT ASSISTANT