REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 8 OF 2007

JOSPHAT KAZUNGU ZIRO (Suing through

CHRISTINE ZIRO MWATELA Vide Power of Attorney).....PLAINTIFF

VS

JOHNSON KAVIHA THOYA.....DEFENDANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED.....THIRD PARTY

RULING

This ruling is in respect of an application by the defendant/applicant seeking for the following orders:

a) THAT the court be pleased to grant leave to the firm of M/s Lewa & Associates to come on record for the defendant herein in place of the firm of m/s Aboubakar Mwanakitina & Co. and the notice of change of advocates filed herewith be deemed to be properly on record.

b) THAT pending the hearing and determination of the application herein, the Honourable court be pleased to stay the execution of the decree of the court pursuant to the judgment delivered on the 30th July, 2021 and all consequential orders thereto.

c) THAT the court be pleased to set aside the judgment of the court delivered on the 30th day of July, 202, the decree of the court and all consequential orders thereto.

d) THAT upon the grant of prayer (d) hereinabove, the Honourable court be pleased to re-open the Defense case.

e) THAT the costs of the application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel gave a brief background to the suit and submitted that the applicant only came to know of the judgment delivered on 30th July 2021 from one Ibrahim Kaniki after which he made efforts to get in touch with his previous advocate but his efforts were in vain as, Mr. Aboubakar who had the conduct of the matter was said to be unwell.

Counsel further stated that on 5th November, 2020, the Defendant's case was closed without him having testified in defence of the suit and in support of his Counterclaim against the Plaintiff. The previous Defendant's Counsel did not file final written submissions on the suit. Counsel relied on the excerpt from the court record for 5th November 2020 as follows:-

Coram: Hon Justice Olola

Ms Mango for the Plaintiff and the 3rd Party

Mr. Atiang h/b for Aboubakar for the Defendant Ms Mango: I am ready for hearing of the case

Mr. Atiang: Mr. Aboubakar is not ready to proceed. He is before

Justice Njoki in Mombasa and also has a case virtually before Justice Nyakundi.

He says there was confusion in his Mombasa and Malindi offices in fixing the dates and prays for another date.

Ms. Mango: We object to the application for adjournment. We served hearing notice upon him way back in July 2020. We are ready to proceed.

Court: I have considered the application for adjournment. I am not

satisfied that any sufficient grounds have been adduced as to why the matter should not proceed today. This case is 13 years old. Accordingly, I hereby(sic) fix the matter for hearing at 10.30am

SIGN 5/11/2020

10.30AM

Mr. S.M. Kimani: Mr. Aboubakar informs me his clients are on the way. They pray for an hour.

Court: Application for any adjournment rejected.

SIGN 5/10/2020

Court: In the absence of the Defendants their case is equally closed.

Parties to file and exchange submissions within 21 days from today. Mn on 5/11/2020 for a judgment date

SIGN 5/10/2020"

It was counsel's submission that the applicant's failure to be in court when the matter came up for defence hearing was as a result of the failure and or omission by his previous advocates to inform him in good time that the suit was coming up for defence hearing hence he was condemned unheard.

Counsel further submitted that the applicant has a strong arguable defence on record and that it would be in the interest of justice that the application be allowed as prayed. Counsel relied on the case of **Philip Keipto Chemwolo & Anor. v Augustine Kubenda [1986] eKLR,** where the Hon. Apaloo JA, (as he then was) held thus; -

"I think a distinguished equity judge has said:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."***
>
> ***I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

Counsel also cited the case of **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1KAR 171,** the court held that; -

> '…….. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case.'

Counsel therefore urged the court to exercise its discretion and allow the application as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the applicant swore a replying affidavit and stated that Plaintiff testified in the matter on 18th May, 2011 and thereafter several applications for adjournment were made by the Defendant with a view to amend the Defence and due to the Defendant having changed Advocates acting on his behalf thrice and on other occasions on account of illness.

Counsel stated that the Plaintiff's last witness testified on 12th June, 2018 and the Defence case was scheduled for 16th July, 2018 when it was not heard and when the matter came up for Defence hearing on 5th October, 2020 the defence case was closed on account of the absence of both the Defendant and his counsel.

It was counsel's further submission that it is over one year since the Defence case was closed and no steps were taken to reopen the case and that the Defendants Advocates participated in all proceedings thereafter with knowledge that the Defence case had been closed.

Counsel also submitted that this is a 2007 matter which has taken 14 years to be determined. Further that the applicant has not demonstrated inadvertence or excusable mistake or error that caused them not to take the necessary steps after the hearing on the 5th day of October, 2020.

Counsel submitted that the respondent will be greatly prejudiced if the orders are granted as this matter has been in court for more than 14 years and litigation must come to an end at some point. Counsel also relied on the case of Rachael Jango Mwangi (Suing as personal Representative of the Estate of Mwangi Kabaiku) vs Hannah Wanjiru Kiniti and Another ELC No. 283 of 2017 where the court discussed at length the distinction between a default judgment that is regularly entered and one which is irregularly entered. That the court does not 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.

Counsel therefore stated that the issues for determination are as to whether the judgment was a regular or irregular judgment, whether the Defendant/ Applicant has given a justifiable cause for non-attendance and lastly, whether the defence raises any triable issue.

Counsel submitted that the Defendant/ Applicant has admitted that his advocate was aware of the hearing scheduled for the 5th day of October, 2020 but failed to advise him on time and he had arrived in court when the matter had been called out and already dealt with and therefore the Defendants Advocate was aware of the date hence the judgment was a regular judgment.

On the second issue counsel relied on the case of **OMBUI ONYANGO V KUNGA MORUMBASI [2009]** eKLR where the court in quoting ***John Ongeri Mariara & 2 Others vs Paul Matundura Civil Appeal No. 301 of 2003 (2004) 2 EA 163*** held that*:*

> 'Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequence of careless and leisurely approach to work by the Advocates must fall on their shoulders…Whenever a Solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him Whenever it is true that the Court has unfetterd discretion,
>
> ***like all judicial discretion must be exercises upon reason not capriciously or sympathy alone….justice must look both ways as the rules of procedure are meant to regular administration of justice and they are not meant to assist the indolent."***

Counsel submitted that clients must learn at their costs that the consequence of careless and leisurely approach to work by the Advocates must fall on their shoulders and whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him. That the inordinate delay in bringing the instant application since October, 2020 is clearly an after thought and a bid by the Defendant to further delay the determination of the matter.

On whether the Defence raises any triable issues, counsel submitted that the Defence and the Counterclaim as drawn does not raise any triable issues against the Plaintiff, that the Plaintiff's suit was for vacant possession against the Defendant having purchased the suit property from an Auction sale. That in any event, there is no defence on merit as the Plaintiff did not offer any mortgage facility to the Defendant nor sell the property but purchased the property after the same was sold vide an auction. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination in an application for setting aside judgment were well captured in the case of **Esther Wamaitha Njihia & two others vs. Safaricom Ltd** the court citing relevant cases on the issue held *inter alia*: -

> *"the discretion is free and the main concern of the courts is to do justice to the parties before it* ***(see Patel vs E.A. Cargo Handling Services Ltd****.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see* ***Shah vs. Mbogo.*** *The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."*

The applicant blames his previous counsel on record who did not notify him of the defence hearing date hence neither of them attended court on 5th November 2020. The record shows that this matter came up for defence hearing on several occasions namely, 21.9. 2017, 5.12.2017, 07.02.2018, 12.06.2018, 20.09.2018, 13.03.2019 and 05. 11.2020 whereby the matter was adjourned.

On 5th October 2020 the matter came up and proceeded in the absence of the defendant and his counsel. No reason has been given why both defendant and counsel did not attend court.

In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR,** cited in **Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR,** it was held that;

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always ***emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

In the case of ***Kimani -v- MC Conmell (1966) EA 545***, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in the case of ***Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) eKLR***, the Court stated that the purpose of clothing the court with discretion to set aside judgment is:

> "To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

The court has the discretion to set aside judgment upon such terms that may be just. The terms must not cause injustice to either the applicant or the respondent. **Mulla, The Code of Civil Procedure** has illuminated the grounds for setting aside an *ex parte* decree and what constitutes sufficient cause for setting aside an *ex parte* judgement/decree. Essentially, setting aside an *ex parte* judgement is a matter of the discretion of the court.

The court is guided by the constitutional principles of the right of a party to be heard but this right should not create injustice and prejudice to others. This is a 2007 matter that has been packed in court for 14 years. This being an adversarial system, litigation must come to an end where a party can win or lose. There was inordinate delay in filing the application for setting aside the judgment. No explanation has been given for not filing the application in good time.

Similarly in the case of **Jaber Mohsen Ali & another v Priscillah Boit& another [2014] eKLR** the court stated that unreasonable delay depends on the circumstances of the case. The court stated:

> "*The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of* **Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012** *the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."*

I have considered the application, the submissions by counsel and come to the conclusion that the application lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED ATMALINDI THIS 30TH DAY OF NOVEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.