



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. NO. 429 OF 2012

NANCY WAIRIMU KARENJU.....PLAINTIFF

VERSUS

LUCIA WANJIKU KAMAU.....DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 3rd July 2018 in which the Defendant/Applicant seeks to set aside the ex-parte judgment which was delivered on 28th September 2017. The Plaintiff /Respondent had sued the Applicant over LR No. Nairobi/Block 117/53 (suit property). The Applicant entered appearance and filed defence in person.
2. The Applicant later engaged the services of M/s mandala & Co. Advocates to act for her. M/s Mandala & Co. Advocates filed notice of appointment of Advocate. When this suit was set down for hearing, the firm of Mandala & Co. Advocate was duly served with a hearing notice but they or their client the Applicant did not attend court. The hearing therefore proceeded ex-parte which resulted in the judgment being sought to be set aside.
3. The Applicant contends that her Advocate did not inform her of the hearing date and that she only came to learn of what had happened after the Respondent's lawyer wrote to her enclosing a copy of the decree. Prior to this, the Respondent had gone around boasting on how she was going to evict the Applicant.
4. The Applicant visited the offices of Mandala & Co. Advocates but the Advocates could not even call her back. The Applicant then contacted her current lawyer who went and perused the court file and found that the case had proceeded to hearing after the court was satisfied that there had been proper service of hearing notice.
5. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 25th July 2018 in which she contends that the Applicant's application should not be allowed as the Applicant is out to deny her the fruits of her judgment which was obtained regularly. The Respondent contends that nothing prevented both the Applicant and her lawyer from coming to court for hearing.
6. The Respondent argues that the Applicant has presented her application as if it is an appeal against the judgment or a review in that she has introduced new evidence yet she did not have a counter-claim. The Respondent further contends that this case has been in court for a long time and should be let to end by dismissing the Applicant's application.
7. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions by the Advocates during the hearing of this application as well as the authorities relied on. The only issue for determination is whether the Applicant has made a case for setting aside the ex-parte judgment.
8. The Applicant states that her Advocates did not inform her of the hearing date. She blames her Advocate for acting negligently and pleads with the court not to allow the negligence of her Advocate to be visited upon her. She states that she has been staying on the suit property for over 30 years. She has established her home there and that is where she rears pigs.
9. The Respondent's father obtained title to the suit property while she was residing on the suit property and that the Respondent's father never brought a suit against her during his lifetime. This suit has only been brought by the Respondent after the process of succession of the Respondent's father. The Applicant contends that she has a strong defence to the Respondent's claim which she should be allowed to ventilate in court.
10. The parameters within which the court's discretion in setting aside an ex-parte judgment were well captured in the case of **Shah Vs mbogo 1967 EA** where it was held as follows:-

“ The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accidental , inadvertent or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

11. The factors to be considered while exercising the court’s discretion were well captured in the case of **Patel Vs EA Cargo Handling Services Limited** where it was held as follows:-

“ In considering an application to set aside an ex-parte judgment , the nature of the action should be considered the defence if any which has been brought to the notice of the court, however irregularly , should be considered . The question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally it should be remembered that to deny a litigant a hearing should be the last resort of a court”.

12. In the instant case, it is clear that the Applicant’s counsel did not inform the Applicant of the hearing date. Even when the Respondent filed her bill for taxation, the Applicant’s previous lawyers were served but they did not attend court. This is clearly the behavior of a negligent advocate. However be that as it may, should the negligent mistake of an advocate be visited upon a litigant?. The Applicant had a duty to follow up on her case. A litigant cannot instruct a lawyer and fail to follow up on the case. It was incumbent upon the Applicant to keep following up on her case.

13. I have considered the history of the suit property. The Applicant has had a long running dispute over the suit property. She should be given time to state her case. The Applicant has been on the suit property for over three decades. The provincial administration had tried to resolve the dispute in vain. It is fair that she be given an opportunity to be heard. The Respondent can always be given compensation for delay by way of costs.

14. I find that this is a suitable case for setting aside the ex-parte judgment. I allow the Applicant’s application to the extent that the ex-parte judgment delivered on 28th September 2017 together with all consequential orders are hereby set aside. The suit should be set down for hearing as soon as possible. The Applicant shall pay the Respondent costs of Kshs.50,000/= before the next hearing date .

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF NOVEMBER 2021

E.O.OBAGA

JUDGE

IN THE VIRTUAL PRESENCE OF :-

MR KAMATA FOR DEFENDANT/APPLICANTS

MR KERONGO FOR THE PLAINTIFF/RESPONDENTS

COURT ASSISTANT: MERCY

E.O. OBAGA

JUDGE