REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC NO. 258 OF 2017

MICHAELA CHERRETT.....PLAINTIFF/RESPONDENT

-VERSUS-

CHRISTINE NARUMU LEPEDO.....DEFENDANT/APPLICANT

RULING

The application

1. The applicant moved the court through a Notice of Motion dated **21/09/2021** brought under **Section 3,3A** and **63(c)** and **(e)** of the **Civil Procedure Act Cap 21** Laws of Kenya and **Order 10 rule 11, Order 22 Rule 52, Order 45** and **Order 51 rules 1 and 3** of the **Civil Procedure Rules 2010** seeking the following orders:-

> ***1. …Spent***
>
> ***2. …Spent***
>
> ***3. …Spent***
>
> ***4. THAT this Honorable Court be pleased to issue temporary stay of execution of the judgment, decree and all consequential orders delivered on 18th May, 2021 pending the inter-parte hearing and determination of this suit.***
>
> ***5. THAT this Honorable Court be pleased to set aside the judgment and all consequential orders issued on the 18th May, 2021 in its entirety.***
>
> ***6. THAT this Honorable court be pleased to grant the defendant leave to file their defence and counterclaim in the instant suit.***
>
> ***7. THAT the cost of the application be provided for.***

2. The application is supported by an affidavit dated **21/09/2021** sworn by Christine Narumu Lepedo where she deposed that she is the widow to the late Harold William Blunt and that the suit property has been her matrimonial property; that the plaintiff/respondent herein is a daughter to Dr. Peter Blunt who is a son to her deceased husband from his previous marriage contracted in Britain; that she was not directly served with the pleadings but only informed by relatives of the posting on the Standard Newspaper of the substituted service and proceeded to instruct her advocates Kale, Maina & Bundotich and ever since she has not been informed of the progress of the matter.

3. She went on to depose that she has a pre-existing medical condition and that **covid-19** pandemic has rendered her a high risk individual hence unable to physically travel to the court registry to inquire about her case; that after being informed by a relative that the matter was finalized she followed up on the matter with her advocate who had not been attending court and that this was not the mistake of the defendant but that of the advocate and hence she should not bear the brunt for her advocates mistakes.

4. That there is imminent threat of enforcement of execution of the said judgement, decree and consequential orders therein; that the plaintiff/respondent obtained judgment in deceit by referring to her as a caretaker when she knew that she was the widow and a legal representative to the estate of the late Harry Blunt(deceased); that execution of such orders against the defendant/applicant will leave the family of Harry Blunt(deceased) destitute as that was her matrimonial home; that she only moved out of the suit property when it became apparent that her life and that of her children were in danger pursuant to the alleged eviction notice.

5. She further stated that she had registered a caution over suit property **Nakuru Municipality Block No. 17/291** given her overriding matrimonial interest. She finally deposed that it is just and equitable for her to be allowed the opportunity to ventilate her case as she has a strong defence which raises triable issues.

Response

6. There is no response to the application on record filed by the respondent.

Submissions

7. Upon perusal of the court record, there are no submissions filed by either of the parties.

Determination

8. After considering the application, the only issue for determination is whether the court should set aside the judgement issued on **18/05/2021** and grant the defendant leave to file her defence and counterclaim.

9. The applicant alleges that she was served by way of substituted service on **6/03/2018** and thereafter appointed the firm of Kale Maina & Bundotich to conduct the defence on her behalf. That her advocates failed to inform her of the progress of the matter and that she later came to learn that judgement in the matter had been delivered on **18/05/2021**.

10. Upon perusing the record, there is a Notice of Appointment of Advocates filed by Kale Maina & Bundotich, counsel for the applicant dated **3/07/2019** and filed on **8/07/2019**. There is also an affidavit of service on record sworn by Muhuyu Mwaniki sworn on **17/02/2021** which shows that the applicant's counsel was served with the hearing notice of the date when the matter came up for hearing.

11. In the case of **Rajesh Rughani –v- Fifty Investment Ltd. & Another (2005) eKLR** the Court of Appeal held that:

> ***"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not an excusable mistake which the Court may consider with some sympathy".***

12. The court also in the case of **Habo Agencies Limited –v-Wilfred Odhiambo Musingo (2015) eKLR** stated 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"***

13. Even though the applicant alleges that her advocate is at fault for failing to inform her of the progress of the matter, from the above authorities, it is clear that courts have from time to time held that a litigant has the obligation to follow up on both the progress and the outcome of a suit.

14. It must also be recalled that in other instances courts have come to the aid of hapless litigants when their counsel made mistakes and failed them. See the cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR; Belinda Murai & Others -vs- Amos Wainaina, [1981] eKLR.** In the instant case the counsel blamed for the mistake is not present to explain the circumstances in which the matters alleged by the defendant happened. This court is therefore inclined to grant the applicant the benefit of doubt.

15. Are there any other extenuating circumstances brought to the fore by the instant applicant?

16. I have examined the record and have found that the applicant has exhibited a copy of the certificate of marriage between her and Harry Blunt. The defendant describes the plaintiff as a daughter to Dr Peter Blunt who is a son to the defendant's deceased husband, Mr. Harry Blunt. There is a familial relationship between the parties of a consanguinity that is not distant. The family is the building block of the nation and as far as this court is concerned, disputes between members require to be settled in a satisfactory manner to enhance amity between members. The applicant describes the help she got from other relatives in finding out that there was a suit filed against her and this goes on to reveal how the interest in this matter may be spread over a far greater number of persons out there. However, to return to the issue of extenuating circumstances the defendant must be credited with at least filing the instant application within **4** months of the delivery of the judgment. The medical document she attaches to her application describes her as hypertensive and at her advanced age of **60** years this court may not doubt the veracity of the allegation that the discovery of a suit against her exacerbated her hypertensive status.

17. Also since courts are there for the principal purpose of providing substantive justice to the parties, the consideration as to whether there is some form of defence raising triable issues features in setting aside applications. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75** at page **76,** the court held:

> **"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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."**

18. The case of **Sammy Maina Versus Stephen Muriuki Nairobi Civil Case No. 1079 of 1980** is relevant. In that case the observed as follows:

> **"As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham.**

What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalised due to his advocate's faults (see Shabir Din v Ram Parkash Anand (1955) 22 EACA 48).”

19. In the case of **Richard Ncharpi Leiyagu vs IEBC & 2 others 2013 eKLR,** it was stated as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

20. The applicant has attached her draft defence and after perusing the said document this court finds that it raises triable issues. The applicant states that the suit land was purchased with, among others, the proceeds of sale of her Malindi house. Her claim is that the suit land formed part of her matrimonial property. These are allegations that can not be ignored and which raise triable issues that ought to be tried in a substantive hearing of the suit in order for the truth to be ascertained.

21. From the foregoing this court can see that there would be manifest injustice if the judgment entered in this case against the defendant was not set aside and the case set down for trial on the merits.

22. In this court’s view there is sufficient cause for the setting aside of the court’s judgement delivered on **18/05/2021** and therefore the applicant’s application dated **21/09/2021** succeeds. I grant **prayers Nos (5)** and **(6)** of the application dated **21/9/2021**. The defence of the defendant shall be filed and served **within 7 days** of this ruling and order.

23. I have considered that the plaintiff is faultless in the circumstances of this application and so I find that the costs of the instant application shall for that reason be borne by the applicant in any event. The instant suit shall be mentioned on **8th December 2021** for directions as to hearing.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF NOVEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.