REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 174 OF 2014

WILFRED KWEMOI DAVID SIMATWA.....PLAINTIFF

VERSUS

DORCAS MUNABI SAIKWA.....DEFENDANT

RULING

(On setting aside judgment entered due to

Non-attendance of party)

The Application

1. The Application that I am tasked to determine is a Motion dated **11/6/2021.** It is brought under **Section 1A, 1B, 3 & 3A** and **63** of the **Civil Procedure Act** and **Order 10 Rule 11** of the **Civil Procedure Rules.** It seeks for the orders:

(1) THAT the *ex-parte* judgment entered herein on 29/1/2019, together with all its consequential orders be set aside.

(2) THAT the defence case be re-opened.

(3) THAT the defendant/applicant be allowed to defend the case.

(4) Spent.

(5) Costs be provided for.

2. The grounds upon which the Applicant relies are that she was led by the Plaintiff to believe that they would amicably settle the matter; that she has a good Defence; and that it is in the interest of justice that the orders sought in the application be granted. The Applicant swore an affidavit on **11/6/2021** in support of the Application. In it she averred that she sold the parcel of land measuring about 2 acres to the Respondent; that a third party trespassed on a portion of it but the plaintiff retains three quarters (¾) of it; that when the suit was filed she sought audience with the Plaintiff so as to know why she had been sued yet she was not on the wrong; that she was advised by him that they would settle the matter out of court; that she waited for him to initiate discussions on the matter in vain; and that she has a good defence. She prays for the *ex-parte* judgment be set aside.

The Response

3. The Application is opposed. The Respondent filed a Replying Affidavit sworn on **28/7/2021.** His response is that the Application lacks merit; it has been brought in bad faith; he denies the allegations that he made a proposal to the Applicant to settle the matter out of court; that the defendant/applicant was served with a hearing notice but failed to attend court; that the Defendant never contacted him before judgment was delivered but was only awakened when she was served with the plaintiffs' taxation notice for party and party costs and that there is no reason why judgment should be set aside.

Directions and Submissions

4. This Court directed that the parties canvass the Application by way of written submissions. Thus, on **13/10/2021,** this court gave the Applicant's counsel **Seven (7)** days within which to file their submissions. He filed them on **19/10/2021.** Counsel for the Respondent opted to rely on the Replying Affidavit and indicated as much on **13/10/2021** when the Application came up before the Court for taking a date for Ruling.

Analysis and Determination

5. Having carefully considered the Application, the affidavits both in support and opposition to the Application, the submissions and the case law relied on by learned counsel for the Applicant, it is my considered view, that the issue for determination is whether or not the Applicant has made out a case for setting aside a judgment regularly obtained against her. Therefore, the ultimate question to answer is whether or not the Application dated **11/6/2021** is merited.

6. Order **12 Rule 7** of the **Civil Procedure Rules** provide as follows:

> **"Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just"**

7. Therefore, the power of a court to set aside its judgment is discretionary. It is wide. However, in exercising its discretion, the Court has to be alive to the intent and purpose of the discretion. Regarding the appreciation of the extent of the discretion and its limits, if any, a number of authorities will guide this court. The case of ***John Mukuha Mburu v Charles Mwenga Mburu (2019) eKLR*** cited with approval the case of ***Shah vs Mbogo (1979) EA 116*** which case held that the discretion of the Court in setting aside a judgment is very wide. In the holding the Court stated thus:

> ***".....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."***

8. In ***Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75,*** cited with approval in the case of ***Stephen Wanyee Roki vs K-Rep Bank Limited & 2 Others (2018) eKLR*** the Court held as follows:

> ***"There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."***

9. In the case of ***Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR,*** the learned Judge, citing the case of ***Stephen Ndichu vs. Monty's Wines and Spirits Ltd [2006] eKLR***, held as follows:

> ***"The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel vs. E.A. Cargo Handling Services Ltd [1974] E.A 75). 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah vs. Mbogo [1969] E.A 116). 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 [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."***

10. Justice Mativo, in the case of ***Wachira Karani v Bildad Wachira [2016] eKLR*** *cited the case* ***Ongom vs. Owota*** where it was held that for an order of setting aside of an *ex-parte* judgment to issue, the court must be satisfied with two things namely:

> ***(a) Either that the Defendant was not properly served with summons; or***
>
> ***(b) That the Defendant failed to appear in court at the hearing due to sufficient cause.***

11. What amounts to sufficient cause was defined by the Supreme Court of India in the case of ***Parimal vs Veena*** which also was cited in the case of **Wachira Karani v Bildad Wachira (2016) eKLR.** In the case, where the Supreme Court observed that:-

> ***"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"***
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> **The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was**

called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

12. On the first limp regarding service, I find that in the instant Application, the Applicant does not dispute having been served with the hearing notice of **24/9/2018.** However, what is not clear is whether the Applicant/Defendant was present during the hearing of the Plaintiffs' case on the material date. That uncertainty seems to stem from the manner in which service appears to have been effected on her on the date material the one when the suit proceeded to in her absence.

13. On that particular day, the Plaintiff and his witness testified. It seems to me that she was absent on the date of hearing because the Coram does not indicate whether the defendant was present or absent. Secondly, if this court was to assume that the non-indication of whether she was present or absent was an omission or an error of the court, and assuming that she was present in court, there is no indication that she was accorded an opportunity to cross examine the Plaintiff but failed to. I am left with no other conclusion than to give her a benefit of doubt that she was not present at the hearing of the plaintiffs' case, and that she was absent for reason of not being served with a hearing notice for that purpose. I arrive at that conclusion because of the close examination of the service that was purportedly effected for that day vindicates my view. I analyze it below.

14. The Affidavit of service sworn by **Jackson Nyongesa Simiyu** on **11/9/2018** and filed on **24/9/2018** falls short of proper service in terms of **Order 5** of the **Civil Procedure Rules.** In it, the deponent states that on the material date, this court shall not reproduce all the contents of the Affidavit that was sworn on **11/09/2018** regarding the service of the hearing notice for material date. However, here below is a taste of the verbatim excerpt of **Paragraph 3** thereof: *"…on the same day at around 10:30 am I proceeded to defendant's home located at standard area opposite St. Joseph Boy High School and upon arrival at the homestead, I found a boy at the said homestead upon I introduced myself and mission to an inquired from him the whereabouts of the defendant herein but he informed me to call the defendant personally on her mobile number 0722xxxxxx so that she could authorize him to acknowledge service on her behalf but upon calling her she only said we leave a copy with the boy at home as she works on locating her advocate to act in the matter, I left one copy of the hearing notice with the boy who acknowledged service by retaining a copy…*". Note that the errors- grammatical or otherwise - in the excerpt are not mine.

15. In my view the Affidavit completely fails to measure to the requirements of proper service as contemplated by law. It does not show how the process server came to know the whereabouts of both the home and mobile number of the defendant; it does not show how the deponent way led or found his way to Standard Area; it does not mention the name of the boy through whom service was effected on the Defendant; of great importance, it does not give the boy's age: supposing the boy was two years old or thereabout or less, what would he know about any paper given to him? He could even eat it or use it for lighting children's fire when they are playing father-mother game or keep it a place where he does not remember when they are playing hide and seek game, and it could not get to the Defendant; it does not give the relationship of the anonymous boy with the Defendant; and I can go on listing the many other missing links here. This raises doubt as to whether the defendant was ever served. With such defective service the Court has more reason to believe that the Defendant was absent on the date of hearing. Again, the mere filing a return of service does not of itself prove service. The return has to be accompanied by evidence of what was actually served. There is none here. The Affidavit of Service does not give the date of the hearing notice that was given to him on **11/09/2018**.

16. Regarding the subsequent days when the matter came for further hearing, the record speaks for itself. On the **2/10/2018, 22/10/2018** and **9/11/2018** when the matter was before this court for both mentions, the defendant was absent. Counsel for the Plaintiff did not indicate in the proceedings whether he served the defendant. He did not explain to the Court why he chose to exclude the Defendant even assuming that she failed to attend court on the date of **24/9/2018** for when the impugned above service was effected. The defendant was not present on the date were taken and even when the case was closed whereas there is no evidence of service adduced by the Plaintiff or his advocate that the defendant was served.

17. In my considered view therefore, I find that the defendant was kept in the dark, only for her to be served with a notice of taxation, necessitating filing of the instant application. The defendant was plainly condemned unheard.

18. Has the defendant proved that sufficient cause to warrant this court to set aside its judgment? Besides the findings above, in the application, the defendant has explained that the Plaintiff had promised her that they would settle the matter out of court. However, the Plaintiff went ahead to prosecute the case without involving her. This is evidenced by the Plaintiffs' conduct of failing to serve the defendant, especially for the dates subsequent to **24/09/2018**. The Plaintiff only swore an Affidavit on **28/7/2021** in rebuttal to the Defendant's deposition regarding the above, that, in **Paragraph 4**, *"… the allegations that when I filed this suit the Defendant asked me why I filed the suit and I told the defendant not to worry since we would discuss an out of court settlement of this suit are false."* He does not respond to the other issues such as the allegation that land was actually sold to him by the Defendant and that third parties actually trespassed onto it and settled on it. These are issues fit for trial. In my view, the denial by the Plaintiff is a bare one and it is true made her to believe that they would agree and settle the matter out of court but proceeded with the hearing of the matter behind her back. I would not have allowed the application if the defendants' failure to attend court was solely attributed to her neglect to attend court. In the instant case, however, the Plaintiff contributed to the defendants' failure to attend court by failing to serve her with the hearing notices thus proceeding *ex-parte* and thereby denying the defendant the right to be heard.

19. This court is called upon to strike a balance in regard to the interests of both parties: that of the plaintiff of enjoying the fruits of litigation on the one hand, and that of the defendant of the right to be heard on the other hand. The right to be heard goes hand in hand with the right to fair trial which no citizen of this country can be deprived of however hopeless their case might be. I shall exercise my discretion to give the Defendant the right to be heard, which the fathers and mothers of this country fought for prior to independence and which after being Kenya independent was denied to the free beings of this great land of Wanjiku and others like Otieno, Wafula, Chebet, Matoke, Parsimoi, Mwajuma, Wambura, among others. The defendant has proved that she has a good defence which, although not exhibited, raises triable issues which can only be articulated by hearing both parties.

20. For the reasons above and for the interest of justice, I hereby exercise further my wide discretion to and grant the Applicant's

application dated **11/6/2021** save for **Prayers 4** and **5**. The matter shall proceed as a defended suit upon payment of throw away costs of **Kshs. 10,000/=** to the Plaintiff within **30 days** from the date of this ruling. Also, the Defendant is given leave of the Court to file both her defence and all accompanying documents in terms of **Order 7 Rule 5** of the **Civil Procedure Rules**, within **fourteen (14) days** of this Ruling. This being an old matter, this Court makes further orders that, failure to comply with any of the two conditions above, the orders setting aside the judgment shall lapse automatically, the judgment shall be reinstated without further Application of the Plaintiff and he shall be at liberty to execute.

21. In order to hasten the matter to compliance with the Rules, each party herein is directed to file and serve within **21 days** an indexed and paginated bundle of documents it will rely on. The witness statements to be cross-referenced with the list of documents intended to be exhibits, if any.

22. Lastly, this court notes from the proceedings of **21/7/2015** that **Counsel** now acting for the defendant herein by virtue of the Notice of Appointment dated **11/6/2021** filed on **14/06/2021** had declared conflict of interest in this matter. However surprisingly, she has come on record post judgment representing the same defendant without declaring whether the conflict of interest ceased. This court directs that the matter be mentioned on **9/12/2021**, for counsel to address the court on that issue, confirmation of compliance, and for further orders.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10TH DAY OF NOVEMBER, 2021.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE