



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 1154 OF 2015

LUCY WANJIRU NJERU.....PLAINTIFF

=VERSUS=

JOSEPH OKWARO OLENDO.....DEFENDANT

RULING

1. This is a Ruling in respect of a notice of motion dated 29th July 2020 which seeks setting aside of a Judgement which was delivered on 14th November 2019 and recalling of the Plaintiff and her witness for cross-examination. The Applicant contends that he instructed his former Advocates to file a defence against the Plaintiff/Respondent's claim. The Advocates duly filed a defence without other documents. The Applicant kept on visiting his former Advocates office for briefing but the Advocate always promised to call him in vain.

2. On 27th July 2020, the Applicant was served with a decree in this matter. When he went to his Advocate's office to be explained the implication of the decree, his advocate gave him his file. He went and engaged another law firm which filed the present application and obtained a consent to act for the Applicant from his previous Advocates. The Applicant blames his former Advocates for failure to inform him about the hearing of this matter.

3. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 17th September 2020. The Respondent contends that what the Applicant is saying about his former Advocate may not be true as the Applicant was at liberty to engage another Advocate once his former Advocates exhibited reluctance to represent him. The Respondent further contends that she will be prevented from enjoying the fruits of the judgement if the case herein was to be re-opened.

4. The Respondent argues that there are no compelling grounds shown for re-opening the case herein and that the Applicant has not annexed the documents which he intends to rely on and that he did not file the documents which he intended to rely on when he first filed his defence.

5. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. The only issue for determination is whether the Applicant has demonstrated that there is reason for this court to exercise its discretion to set aside the judgement delivered on 14th November 2019.

6. The Applicant says that he was let down by his former lawyers who did not inform him of the hearing. He states that the mistake of his Advocate should not be visited upon him. There are numerous decisions which set out the principles for setting aside an ex-parte judgement. In **Patel Vs E A Cargo Handling Services Ltd (1974) EA**, it was held as follows:-

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte Judgement 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 to fetter the wide discretion given to it by the rules” (Emphasis Supplied)”.

7. In the case of **Richard Ncharpi Leiyagu Vs Independent Electoral Boundaries Commission & 2 Others (2013) e KLR** the Court of Appeal stated as follows:-

“We agree with those noble principles which go further to establish that the court's discretion to set aside an ex-parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice “ (Emphasis Supplied)””.

8. In the instant case, it is clear that the Applicant was let down by his former Advocates. The court record shows that it is only in one occasion that they attended court. In all other instances, they did not attend though they were served on each occasion. The question which

this court asks is whether this conduct by the Applicant's former Advocates should be allowed to affect the Applicant.

It is clear that once the Applicant was served with the decree, he went to his former Advocates' office where he was given his file so that he could engage the services of another lawyer. The decree was directly served upon him on 27th July 2020. He went and engaged his current Advocates who filed this application on 29th July 2020. This clearly indicates that the Applicant is keen to have his evidence heard. I therefore allow the Applicant's application. The Judgement which was delivered on 14th November 2019 together with any consequential orders is hereby set aside. The plaintiff and her witness who had testified shall be re-called for cross-examination. To expedite the hearing of this case, the Applicant is directed to file his witness statements and bundle of documents including statements of witnesses he intends to call if any within 14 days from today. The Applicant shall pay the Plaintiff Kshs.20,000/= to cover her costs for travel including her witnesses. The Amount should be paid before the next hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MARCH 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Ochieng for Defendant/Applicant

M/s Njoki for Mrs Matata for Plaintiff/Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE