REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 109 OF 2015 (OS)

ERASTUS KIAMA GICHUKI..1st PLAINTIFF/ RESPONDENT

DAVID NGUNJIRI MUREITHI..2nd PLAINTIFF/RESPONDENT

(*Suing as* THE REGISTERED TRUSTEES OF THE UNITED MEMBERS SOCIAL CLUB)

-VERSUS-

JOHN MAREGWA...1st DEFENDANT/APPLICANT

JAMES NDERITU MUKUNDI...2nd DEFENDANT/APPLICANT

STANLEY KINYUA GAKURE...3rd DEFENDANT/APPLICANT

STEPHEN GICHUKI GITHAIGA...4th DEFENDANT/APPLICANT

PETER MWANGI MUTUYA..5th DEFENDANT/APPLICANT

JOSEPH NGANGA KAMENJU..6th DEFENDANT/APPLICANT

HARON MWANGI..7th DEFENDANT/APPLICANT

JOHN MWANZIA...8th DEFENDANT/APPLICANT

MAMA WAMUYU...9th DEFENDANT/APPLICANT

NJERI...10thDEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated the 17th July 2019 brought under *Section 1A & 1B, 3 & 3A of the Civil Procedure Act, Article 159 (2) (d) & (e)) of the Constitution and all enabling provisions of the law* where the Applicant seeks for orders that the Judgment delivered on the 2nd April 2019 and the consequential orders arising therein be set aside and there be stay of execution arising for the said Judgment so as to give the Applicants an opportunity to file their defence out of time and be heard on merit.

2. The said application was supported by the grounds on its face as well as the supporting affidavit sworn by the 9th Applicant on the 17th July 2019 on behalf of all the Applicants.

3. The application was orally argued wherein Counsel for the Applicants submitted that the same was based on the grounds on the face of the motion. That the failure to file a defence was occasioned by the previous advocate on the record. That the Applicants had been advised by the Nyeri County Government that it had instructed Counsel to defend them in the suit since the same suit property belonged to the Nyeri County Government. That subsequently they had been advised to await further development only to be served with an eviction order as the matter had proceeded in their absence wherein judgment had been entered ex-parte.

4. It was their submission that they depended on the suit property to earn their livelihood and had an arguable case. That further, the suit property was registered in the name of Umplosh Company Limited and not to the Plaintiff as purported. That the suit was 'fraudulent' as the Plaintiff purported to be the registered owner.

5. That during the pendency of the suit, there had been change of ownership of the suit land, which illegal transfer had been brought to the attention of the Land Registrar- Nyeri vide a letter dated 14th May, 2015 herein annexed as LWW 2(b).

6. That indeed they had an arguable defence to the effect that judgment had been obtained irregularly. They therefore sought that the same be set aside and parties be given a chance to file their defence so as to canvass the case on its merits.

7. The Application was opposed by the Respondent who had filed their Replying Affidavit dated the 25th July, 2014 and filed on the equal date. Their submission was to the effect that they had obtained judgment which was regular.

8. That during the hearing of the suit, the Applicants had had Counsel on record up to its conclusion.

9. That the Applicants had entered appearance on 25th April, 2015 by which time they ought to have filed their defence within the stipulated time.

10. That pursuant to Judgment having been entered on the 1st April, 2019, the Applicants ought to have filed an Appeal. That the present Application had been filed 3 months down the line as an attempt to deny the Respondents the fruits of their judgment.

11. They prayed that the Application dated the 17th July, 2019 be dismissed so that they could proceed to execute the decree issued on 17th July, 2019 to wit they had filed an application dated the 12th September, 2019.

12. In rebuttal, Counsel for the Applicant submitted that the provisions of Order 10 Rule 11 of the Civil Procedure Rules gave the court wide discretional powers to set aside judgment in default of defence provided that it is shown that there was an excusable mistake.

13. That the filing of their application was therefore not an attempt to deny the Respondents the fruits of its judgment. Counsel reiterated that the Applicants had not been aware that their alleged Counsel had not filed a defence, wherein upon having been served with the Notice of Eviction, they moved to court immediately.

14. That as pertaining the application dated the 12th September, 2019, it was Counsel's submission that he was not going to submit on the same because it had been filed despite the court having issued interim orders which were still in force and therefore it would be premature to seek for an eviction at the time as an attempt to circumvent the orders issued on the 25th July, 2019.

Determination

15. I have considered the Application herein as well as the Replying Affidavit and the oral submission by Counsel for the applicant herein.

16. I note that the present application has been brought under the provisions of Section *1A & 1B, 3 &* 3A of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

17. In the case of **Mumias Out growers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that when considering an application to set aside and/or vary a consent decree, that:

> *The applicant has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed.*

18. "Bosire J (as he then was) in the case of **Muchiri –vs- Attorney General & 3 others (1991) KLR 516** *stated at page 530 that:-*

> *"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."*

19. Also in **Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15, it was observed that:-**

> *"… a claim should be dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction……..and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."*

20. Having considered the Application herein to set aside the ex-parte judgment, the submissions for and against allowing the said application, I find that the law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules.

21. The provisions of Order 12 Rule 7 of the Civil Procedure Rules are clear to the effect that:

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

22. I have considered the reasons that were presented by the Applicants regarding their failure and the failure of their advocate file their defence to the originating Summons within the stipulated time frame. I have keenly perused the affidavits filed in support of the application to find out whether the Applicants had valid reasons for the said failure.

23. In their application to set aside the ex-parte judgment, the Applicants have stated that they was not aware of the proceedings in court as they were only tenants on the suit land wherein the Nyeri County Government informed them that they would instruct Counsel on their behalf. Subsequently as they awaited they only came to learn that judgment had been entered against them upon service of a Notice of Eviction.

24. The Court of Appeal for Eastern Africa in the case of ***Mbogo v Shah*** **[1968] EA 93**, held that for the court to set aside an *ex parte* judgment, the court must be satisfied about one of the 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.***

25. I have asked myself whether the failure to enter a defence by the firm of Muthoga Gaturu & Company Advocates on behalf of the Applicants and thereafter defend the suit notify his clients constituted sufficient cause or whether it was meant to deliberately delay the cause of justice.

26. As to what constitutes sufficient cause, to warrant the exercise of the court's discretion, the Supreme Court of India in case of **Parimal vs Veena** ***2011 3 SCC 545*** *attempted to describe what* **sufficient cause** *was* when it 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*

27. In the Court of appeal decision of **Gurcharn Singh T/A Kessar Singh V. Khudroad Rhan s/o Khudadad Construction Co. – HCCC NO. 1547 of 1969**, Hancox J (as he then was) was of the view:-

"………that the advocate's mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach to an application of this nature. As I said in Eldoret HCCC No. 14 of 1980 – The Municipal Council of Eldoret V James Nyakeno, "the court goes by the principle that such an ex-parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the court's power of revocation at its discretion." It is unfortunate that advocates' sins and omissions are sometimes visited on their clients who are left without the remedy they sought, but to sue the advocate for professional negligence, but where a litigant shows that his default has been due to the party's advocate's mistake in an application of this nature, unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understanding."

28. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the ex-parte Judgment herein and I am satisfied that the Applicants were not guilty of inaction as the turn of events was adequately explained. I therefore reject the Respondents' submissions as unconvincing and incapable of advancing the overriding objectives intended by the express provisions of Section 1A and 1B of the Civil Procedure Act.

29. Setting aside an *ex parte* judgment is a matter of the discretion of the court with the main aim of doing justice between the parties as was held in the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd*** **[2014] eKLR** where 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."*

30. Consequently and for the above reasons, I allow the application, with cost in cause, and set aside the ex-parte Judgment of 2nd April 2019 and the consequential orders arising therein and reinstate the case for hearing.

31. The Applicants shall file and serve their Defence within 14 days upon the delivery of this ruling. The suit is thus reinstated to be heard expeditiously.

Dated and delivered at Nyeri this 30th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE