



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 53 OF 2013

CONCEFUTA KEMUNTO MAGATA.....PLAINTIFF/RESPONDENT

VERSUS

DORCAS KWAMBOKA OYARO.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. What is before me is the Defendant's Notice of Motion dated 8th October 2019 brought pursuant to the provision of section 1A, 1B and 3A of the Civil Procedure Act, Order 22 Rule 25 and Order 12 Rule 7 of the Civil Procedure Rules 2010, Article 159 of the Constitution of Kenya and the inherent powers of this Honourable Court. The said application seeks the following orders:

- a. Spent
- b. That there be a stay of execution and further execution of the judgment and decree herein pending the hearing and determination of this application
- c. That the ex-parte hearing and resultant judgment and decree dated 19th October 2019 be set aside together with all consequential orders and the matter be heard on merit.
- d. That costs be in the cause

2. The application is anchored on the grounds stated on the face of the affidavit and the supporting affidavit of Dorcas Nyanchama Oyaro sworn on the 8th October 2019 and the supplementary supporting affidavit of Vincent Nyakoe Maobe also sworn on the same date. In her affidavit the applicant deposes that even though the judgment and decree are being executed against her, she is not the person who has been sued as indeed the person sued is Dorcas Kwamboka Oyaro. She further deposes that her advocate's clerk was served with a hearing notice but he forgot to diarize the same hence her failure to attend court. This averment is reiterated by the said clerk in his affidavit though he has indicated the hearing date as 19th October instead of 19th May 2017. The applicant deposes that she has a strong defence which raises triable issues and adds that the mistake of her advocate should not be visited on her.

3. In opposing the application, the Respondent filed a Replying Affidavit on the 11th November 2019 in which she deposes that the applicant went to sleep for 3 years and was only awoken by the taxation notice. She further contends that the orders sought by the applicant are discretionary and should not be exercised in favour of a party, who seeks to frustrate the plaintiff from enjoying the fruits of her judgment.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION:

5. The following issues fall for determination:

- i. Whether the Applicant was aware of the hearing date
- ii. Whether the Applicant's failure to attend court has been explained to the satisfaction of the court

iii. Whether the Applicant's Defence raises triable issues

ANALYSIS AND DETERMINATION

6. I will deal with the first and second issues jointly.

It is not in dispute that counsel for the Applicant's advocate was served with a hearing notice. Indeed, one Vincent Nyakoe Maobe a clerk in the firm of Zablon Mokua & Company Advocates admits that he was served with a hearing notice but he forgot to diarize it. As a result of this lapse, the defendant was not informed of the hearing date hence her failure to attend court. Counsel for the applicant has submitted that the mistake of the advocate in failing to diarize the hearing date due to his clerk's inadvertence should not be visited on his client. He has cited the case of **Maina v Mugira (1983) KLR** where the court relied on the case of **Shah v Mbogoh (1967) E.A 116** for the proposition that the judge's discretion to set aside is intended to be exercised to avoid injustice resulting from accident, inadvertence, excusable mistake or error but it is not intended to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. It is therefore my finding that the applicant's failure to attend court was not deliberate and has been satisfactorily explained as having resulted from the mistake on the part of his advocate.

7. The other issue I must determine is whether the applicant has a defence that raises triable issues. As held in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75**:

"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 to 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"

8. I have considered the pleadings and rival affidavits herein. The respondent accuses the applicant of having fraudulently transferred the suit property to her name. In her Defence the applicant denies any knowledge of the sale of the suit property to one Esther Kemunto Obaga. Furthermore, she claims to have purchased the suit property from one Paulina Kwamboka Nyasiaboka who is the respondent's mother. She denies the allegations of fraud levelled against her. In my view the defence raises triable issues which ought to be determined at a full hearing in order to arrive at a finding on whether or not there was fraud.

9. Against the foregoing background, I am satisfied that the application has merit. I must however consider that justice cuts both ways and the interests of the plaintiff who has obtained a judgment in her favour must also be taken into account. I therefore allow the defendant's application and set aside the ex-parte judgment together with all the consequential orders thereto on condition that the defendant/applicant pays the plaintiff/respondent thrown away costs of Kshs. 10,000/= within 21 days from the date hereof failing which the orders herein shall automatically lapse.

The costs of this application shall be borne by the Defendant/Applicant.

Dated, signed and delivered at Kisii this 28th day of February 2020.

J.M ONYANGO

JUDGE