REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 29 OF 2019.

FLORENCE NASIMIYU WEKESA.....PLAINTIFF

VERSUS

AMBROSE MULONGO KASAWA.....DEFENDANT

AND

MOSES NAMBAFU WEKESA.....APPLICANT

R U L I N G

It is unfortunate that an application filed on 6th July 2011 and on which submissions were filed way back on 19th June 2012 has been placed before me on 16th January 2020 for purposes of drafting a ruling on an application to set aside an ex – parte Judgment obtained on 8th July 2010!!

Part of this delay, it would appear, was caused by the demise of the plaintiff's previous counsel. Then the file ended up in the wrong Court before being transferred to this Court on 12th November 2019. That notwithstanding, it is not clear why the ruling that I am now called upon to deliver was not delivered way back in 2012 after the submissions were filed. I say so because, due to the lapse of time, some of the prayers that the defendant seek may perhaps be now out of reach. Enough on that.

FLORENCE NASIMIYU WEKESA (deceased) was the original plaintiff in this case filed on 7th June 2006. She has since been substituted by her son **MOSES NAMBAFU WEKESA** (the plaintiff herein). In the suit, the deceased sought against **AMBROSE MULONGO KASAWA** (the defendant) the main order that the land parcel **NO BOKOLI/MUKUYUNI/429** (the suit land) was held by the defendant in trust for her and had been registered in the names of the defendant fraudulently. She therefore asked the Court to cancel the defendant's registration as proprietor of the suit land and to substitute it with the name of the plaintiff. The record shows that the defendant did not enter appearance or file a defence and following an ex-parte hearing on 9th June 2010, Judgment was entered for the plaintiff on 8th July 2010. The deceased thereafter taxed her bill of costs at Kshs. 67,205/= and execution proceeded through the firm of **ESHIKHONI AUCTIONEERS** which attached the defendant's properties on 28th June 2011.

By a Notice of Motion dated 6th July 2011 and which is the subject of this ruling, the defendant sought the following orders: -

1: Spent

2: That ESHIKHONI AUCTIONEERS be restrained from selling the defendant/Applicant's property pending hearing and final determination of hearing and final determination of this application.

3: That there be temporary stay of execution pending the hearing and final determination of this application.

4: That this Honourable Court be pleased to set aside the ex – parte Judgment and Decree herein to grant the defendant/Applicant leave to defend.

5: That this Honourable Court be pleased to issue an order of release of the defendant/Applicant's property which were illegally seized by ESHIKHONI AUCTIONEERS.

6: That the costs of the application be in the cause.

The application is premised on the grounds set out therein and is also supported by the defendant/Applicant's supporting affidavit dated 6th July 2011.

The gravamen of the application is that the defendant/Applicant had no knowledge that this suit had been filed against him and neither was he served with any notice of entry of Judgment and therefore the attachment carried out by **ESHIKHONI AUCTIONEERS** on 2nd July 2011 when his house-hold goods including one black and white cow as well as it's calf and a brown heifer were attached was improper as he had not been served with summons to enter appearance. That the affidavit of service by the process server called **KISEMBE KILISWA** claiming to have served him on 8th October 2006 is a mere fabrication and he should be summoned to appear for cross – examination. That he has a solid defence and should therefore be given an opportunity to defend the suit against him.

The application was opposed and the plaintiff/Respondent filed grounds of opposition claiming that the application is fatally defective and should be struck out since the defendant/Applicant was duly served with summons to enter appearance. Further, that the application had been over-taken by events since all the attached goods were sold and the application was filed after undue delay.

Submissions were thereafter filed by **WANYAMA WANYONYI & CO. ADVOCATES** for the plaintiff/Respondent on 7th June 2012 and by the firm of **J. S. KHAKULA & CO ADVOCATES** for the defendant/Applicant on 19th June 2012. The reasons why it has taken seven (7) years to have the matter brought up for ruling have been alluded to at the commencement of this ruling. All I can hope for is that this lapse shall not recur again.

I have considered the application, the grounds of opposition and the submissions by counsel.

This Court no doubt has the discretion to set aside ex – parte Judgments. As was held in the case of **PITHON WAWERU MAINA .V. THUKU MUGIRA 1983 eKLR** the Court will consider the following principles in an application of this nature: -

(a) There are no limits or restrictions on the exercise of this discretion except that in setting aside an ex- parte Judgment, the Judge does so on terms that may be just.

(b) 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 party who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice.

(c) Where there was no proper service, then the exparte Judgment will be set aside as a matter of course – ex debito justitiae.

(d) Where there was proper service, the Judgment is a regular one but the Court may nonetheless set it aside if satisfied that there is a defence on the merits.

(e) A defence on the merits does not mean a defence that must succeed but rather, a defence that raised triable issues.

(f) The discretion must be exercised judicially but not arbitrarily.

See also **SHAH .V. MBOGO 1967 E.A 116, SHABIR DIN .V. RAM PARKASH ANAND (1955) 22 E.A.CIA 48** and **KANJI NARAM .V. VELJI RAMJI 1954 21 EACA 20**.

I have looked at the affidavit of service by the process server one **KISEMBE KILISWA** dated 10th October 2006 in which he has described how he served the defendant/Applicant at **BWANI AREA OF TRANS-NZOIA** at 10:45 am on 3rd July 2006 after he had been pointed out by the plaintiff/Respondent. Whereas the defendant/Applicant denies having been served, there is nothing to suggest that he was not at the named place at the said date and time. The Judge **MUCHEMI J** who had the case was satisfied that the service was proper. I have no reason to find otherwise.

Having said so, however, the Judgment sought to be set aside was delivered by **MUCHEMI J** on 8th July 2010. This application seeking to set aside the said Judgment was filed one (1) year later on 6th July 2011. A delay of one (1) years is clearly in – ordinate and the defendant/Applicant has not given any explanation for the same. Indeed, he does not even say when he because aware of the said Judgment. He only avers in his supporting affidavit that the firm of **ESHIKHONI AUCTIONEERS** seized his properties on 2nd July 2011. The Proclamation Notice which is part of the documents herein shows that it was carried out on 23rd June 2011 and Notification of Sale was done on 2nd July 2011. There is also evidence through a letter dated 6th July 2011 from the firm of **ESHIKHONI AUCTIONEERS** and addressed to the Deputy Registrar Bungoma that the attached properties were sold on 5th July 2011 and the livestock raised Kshs. 18,000/= of which Kshs. 6,000/= was remitted to the plaintiff/Respondent's counsel. The rest of the attached properties were to be sold at the expiry of seven (7) days. It is clear therefore that prayers 2, 3 and 5 of the application have been over – taken by events as some of the attached properties were infact sold way back on 5th July 2011 and part of the proceeds released to the plaintiff/Respondent's counsel. The rest of the properties which include a television set, furniture and old bicycle are un-likely to be serviceable nine years later. It would be an exercise in futility to issue any orders of stay of execution or release of the properties and looking at the estimated value of the said properties, the storage costs would be well in excess of any benefits that would be derived by ordering their release. I take not of the fact that as at 2nd July 2011, the Auctioneers charges were Kshs. 45,000/= yet the total value of the Television set, furniture and two bicycles was less than Kshs. 10,000/=. And although **MUCHEMI J** on 11th July 2011 granted the parties time upto 7th November 2011 for inter – parte hearing, nothing happened on that day and in the absence of any evidence to the contrary and the stay order not having been extended, this Court can only conclude that the other properties were also sold soon after that date. One of the issues that this Court must consider if whether there will be prejudice to the plaintiff/Respondent if the orders sought are granted and given the lapse of time, it is clear that he will indeed be prejudiced. I am not in doubt that while considering whether or not to set aside a default Judgment, I must take into account all the facts both prior to and subsequent to the Judgment in question. Further, the discretion to set aside such a Judgment must be exercised judiciously and on sound basis but not arbitrarily. Taking into account the fact that the Judgment sought to be set aside was entered some seven (7) years ago and that properties were attached and sold, it would not be a proper exercise of my discretion to allow the application to set aside the said Judgment.

Courts should not act in vain.

The up – shot of the above is that the Notice of Motion dated 6th July 2011 is dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

20th February 2020.

Ruling dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Mr Milimo for defendant present

Defendant present

Plaintiff - Absent

Applicant – Absent

Boaz N. Olao.

J U D G E

20th February 2020.