REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 99 OF 2018

WILSON KIPKOECH LELEI.....PLAINTIFF

VERSUS

STEPHEN KIPSANG KOECH.....1ST DEFENDANT

LIDYA JEPNGETICH LELEI.....2ND DEFENDANT

RULING

1. The application dated **17/7/2019** and filed in court on the same date has been brought by the defendants who seek the following orders:

> **1. …spent**
>
> **2. That this court be pleased to review, vary and/or set aside its judgment delivered on the 15/7/2019.**
>
> **3. That pending the hearing and determination of this application inter-partes there be stay of the enforcement of this court's judgment delivered on 15/7/2019.**
>
> **4. That costs of this case be in the cause.**

2. The application is brought under **Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act, Order 45 & 12 Rule 7 of the Civil Procedure Rules.**

3. The grounds on the face of the application are that judgment was entered against the defendants in this matter; that on **5/12/2018** when the suit came up for hearing the advocate for defendants was absent, having forgotten to diarize the hearing date in his diary; that before that date the parties had attempted an alternative dispute resolution process vide which the 1st defendant had refunded the purchase price to one **Moses Kipchumba Sainet** and his wife which amount the said Moses had paid to the plaintiff for the **2 acres** which the court has ordered that the defendants be evicted from; that before judgment, on **20/12/2018** the defendants filed an application seeking that the orders closing the defence case be set aside; that the application was brought to the attention of the Deputy Registrar who opened a skeleton file and assured the defendants counsel that the application would be sent to Mombasa for the judge to act upon it; that the court has indicated no such application was brought to its notice; that it was not within the knowledge of the court that the plaintiff and his family had reconciled through ADR and that he had shared his land with his family and that the **Kshs.400,000/=** had been refunded to **Moses Kipchumba Sainet**. The instant application is predicated upon the premise that had the court known of these facts it would have arrived at a different judgment.

4. The application is supported by the affidavit of the 1st defendant, sworn on his own behalf and on behalf of 2nd defendant dated **17/7/2019** which largely reiterates the grounds at the foot of the application, and also on a further affidavit filed on **4/12/2019**.

5. The plaintiff filed a replying affidavit dated **13/11/2019** on **21/11/2019**. In that affidavit he states that execution should proceed; that he has not been party to any negotiation with the defendants; that he was forced into signing the agreement which purported to state that he had accepted to share out his land; that his title deed was stolen by the defendants; that he was not a party to the refund of **Kshs.400,000/=** by the defendants to **Moses Kipchumba Sainet;** that the signature on the agreement dated **22/8/2011** is a forgery; that the applicants have failed to explain why the information is now trickling through the application was not brought to the attention of the court before the hearing and the judgment; that the application dated **20/12/2018** was never served on him or his advocate, and the judgment, having been delivered on merit should only be appealed against and not reviewed; that this is an old matter filed in **2007** which requires to be finalised.

6. The defendants filed their submissions on **4/12/2019.** The plaintiff filed his submissions on **22/1/2020.**

7. I have considered the application and the response including the filed submissions.

Determination

8. The main issues that arise for determination in the instant application are as follows:

> **(a) Whether this court should review vary and/or set aside its judgment delivered on 15/7/2019.**
>
> **(b) Who should bear the costs of the application?**

a. Whether this court should review vary and/or set aside its judgment delivered on 15/7/2019

9. One of the main grounds the plaintiff relies on in opposition to the instant application is that the matters now being revealed by the defendants do not amount to a ground of review under **Order 45** of the Civil Procedure Rules. However that is a procedural issue which I believe has been addressed in a different way by the applicants as will be seen below.

10. The grounds upon which the court may review its judgment are set in **Order 45 rule 1(1)** as follows:

> **(1) Discovery of new and important matter or evidence which after the exercise of due diligence which was not within the applicant's knowledge or could not be produced by him at the time the decree was passed or the order made.**
>
> **(2) Mistake or error apparent on the face of the record.**
>
> **(3) Any other sufficient reason.**

11. It is noteworthy that the application is not only brought under **Order 45** but also under **Order 12 rule 7** of the **Civil Procedure Rules**. While **Order 45** relates to review of judgment, **Order 12** relates to hearing and consequences of non-attendance. **Order 12 rule 7** which the applicants rely on states as follows:

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

12. Though I agree with the plaintiff that **Order 45** of the **Civil Procedure rules** is not applicable to the instant application he has to contend with the inclusion of **Order 12 Rule 7** whose provisions have been set out verbatim above, as a basis for the application, that is the law the applicants have relied on, and which appears, in the light of the contents of their affidavit evidence to be their appropriate provisions for the application for setting aside orders. Consequently, the objection that the application is wrongly brought under **Order 45** has no effect owing to the fact that **Order 12** is also relied on.

13. The main grievance of the applicants as I perceive it is that they were not heard; that the reason for not being heard is that their advocate forgot to diarize the hearing date for this matter; that upon discovery that the matter had proceeded ex-parte and judgment set for **4/2/2019**, they filed an application on **20/12/2018** which was sent to Mombasa so that the judge who had delivered the judgment may deal with it; that this court appears to have been oblivious of such an application and that judgment was nevertheless issued on **15/7/2019.**

14. In my view this is purely an application for setting aside judgment on the basis that the defendants were not heard.

15. Are there good grounds advanced for setting aside the judgment? A perusal of the record of the court shows that all the parties are related; the plaintiff is father to the 1st defendant and husband to the 2nd defendant. The two acres of land which the defendants occupy is purported to have been sold to a third party. The defendants maintain that ADR was going on even while this suit was pending. A settlement of some sort had been reached with the third party being refunded **Kshs.400,000/=** by the defendants. That is supposedly the money he had paid the plaintiff for the land now taken by the defendants. This court should not speculate much on the precise details of the refund transactions; no third party by the name Moses Kipchumba Sainet was ever enjoined in these proceedings; apart from the proceedings of **28/3/2012** before Justice J.R. Karanja on which date the plaintiff testified no other substantive hearing appears to have taken place in this matter; it came up on **10/10/2012, 5/11/2012, 29/4/2013, 4/3/2015, 24/3/2016, 14/6/2016, 31/10/2018, 5/12/2018, 13/12/2018** and **15/6/2019** the last being the date of delivery of judgment.

16. On **5/12/2018** counsel for the plaintiff successfully applied, in the absence for the counsel for the defendants, for the defendants' case to be marked as closed and an order was made that submissions be filed.

17. In the light of foregoing, I find that had this court heard and determined the application dated **20/12/2018** which I have now confirmed to be in the court record, it "*may*" have arrived at a decision to suspend submissions and judgment in favour of a substantive hearing of the defence case. I cautiously apply the word *"may"* for the reason that the fate of that application, perchance it had been heard could not have been easily predicted with precision. All that matters for now is that that application was not heard before judgment was delivered in this matter.

18. Consequently submissions were filed by the plaintiff and judgment was issued. In my view the defendants took the appropriate course of action in filing an application to intercept the process of preparation and delivery of judgment and to seek a pronouncement by the court that they were entitled to be given a hearing before judgment.

19. Article 50 of the **Constitution of Kenya 2010** provides as follows:

> **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

20. The essence of an ideal court trial is to have the parties produce their evidence and obtain a determination regarding their dispute on its merits.

21. In this case only the plaintiff testified. Documentation annexed to the application suggests that long after the filing of this suit by the plaintiff in **2007** various attempts were made to resolve the dispute in **2011, 2012, 2013, 2014, 2016** and **2017**.

22. This court cannot ignore the fact that from the date **28/3/2012** to **5/12/2018** a period of **7** years no substantive hearing took place in the matter. This court is inclined for the purpose of this application only to believe the defendants when they assert that attempts to resolve the matter out of court had been on course; it is not known to this court why the details of the attempts were not brought to the attention of court early enough. However as I have stated hereinbefore the parties in this case are related by way of familial bonds and reside within the same area. Some elements of lethargy and acquiescence to sloth may have set in on the part of both the plaintiff and the defendants in the course of the **7** year period of inactivity in this suit.

23. Be that as it may this court is aware that an *ex-parte* judgment can be set aside at the absolute or unfettered discretion of the court for any good reason as the main purpose of a court of law is to do justice with the parties. See the case of **Patel v EA Cargo Handling Services Ltd., [1974] EA 75.** In that case it was stated 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 conditions on itself to fetter the wide discretion given to it by the rules."**

24. In the case of **Shah v Mbogo and Another [1967] EA 116** at **123** on the principles governing the exercise of the court's discretion to set aside a judgment obtained *ex-parte* the court stated:

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

25. A mistake of counsel is bemoaned by the applicants in this suit. The kind of mistake attributed to the counsel for the defendants, that is the failure to diarize the hearing date is not an extraordinary mistake that this court may decline to overlook for the purpose of ensuring that justice is done to the parties. (See the cases of **Philip Chemwolo and Mumias Sugar Co Ltd -vs- Augustine Kubende [1986] eKLR** and **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr]. and Sheikh t/a Hasa Hauliers v Highway Carriers Ltd [1988] eKLR)**

26. In the case of **Sheikh case (supra)** it was observed as follows by **Gachuhi, JA.:**

> **"It must be clear that the court is to administer justice through the procedure laid down. It is important in administering justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant, may not be aware of the failure of his advocates in complying with rules. He is at the mercy of his advocate. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should the litigant suffer due to the mistakes and errors of his advocate?"**

27. The court in the **Sheikh case** (supra) also stated as follows:

> **"The issue of setting aside judgment is a daily occurrence in the courts. Each application has to be dealt with on its merit. Harris J considered steps to be taken in the hearing of the application and stated in Jesse Kimani v McConnell & Another, [1966] EA 547 at 555 F & G:-**
>
> **"It seems to me that a reasonable approach to the application of these rules to any particular case would be for the court, first to ask itself whether any material factor appears to have entered into the passing of the ex-parte judgment which would not or might not have been present had the judgment not been ex-parte, and then, if satisfied that such was or may have been the case, to determine whether in the light of all the facts and circumstances both prior and subsequent and if the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."**

28. The setting aside of judgment may therefore be allowed as long as it will not occasion prejudice to the judgment creditor. In the instant case the defendants are still in occupation of the suit land regarding which the court in its judgment observed as follows:

> **"In my view they cannot be evicted from the property they regard as their home".**

29. The plaintiff is alleged to have sold the suit land to a third party and avers that he was not a participant in the negotiations between the defendants and that third party whereby a refund was made to the third party; however I have not heard the plaintiff to say that the third party

is pursuing him for a transfer of the land or a refund. I therefore do not find that the plaintiff would suffer any prejudice if the judgment was set aside if only to facilitate the calling the evidence by the defendants in support of their case or for the clear statement before court of the kind of settlement they allege has been entered into and whether that settlement concludes this litigation.

30. Consequently this court is of the view the best course of action in the circumstances adumbrated above is to set aside the judgment delivered on **15/7/2019** in its entirety to pave the way for a hearing of the defendants defence. However this court is of the opinion that the proceedings regarding the plaintiff's evidence as well as the consent recorded on **23/7/2012** should remain in place, and orders accordingly.

31. The upshot of foregoing is that the application dated **17/7/2019** succeeds. I hereby issue the following final orders:

(a) The judgment delivered on 15/7/2019 and all consequential orders are hereby set aside.

(b) The evidence of the plaintiff and the consent of 23/7/2012 shall remain on the record and be relied on and the suit shall be listed for the hearing of the defence case;

(c) Each party shall bear their own costs of the application.

It is so ordered.

Dated, signed and **delivered** at **Kitale** on this **10th** day of **March, 2020**.

MWANGI NJOROGE

JUDGE

10/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Tarigo holding for Kipseii for plaintiff

Ms. Ondari holding brief for Kaosa for defendant

COURT

Ruling read in open court at 4.00 p.m.

MWANGI NJOROGE

JUDGE

10/3/2020.