REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 873 OF 2015

DOUGLAS ONYANGO OLAK..........1ST PLAINTIFF/RESPONDENT

EVANS OCHIENG OLAK.................2ND PLAINTIFF/RESPONDENT

GEORGE OMONDI OLAK...............3RD PLAINTIFF/RESPONDENT

(Suing as personal representatives and administrators of The estate of

NEREA ATIENO OLAK – Deceased)

VERSUS

DOO..1ST DEFENDANT/APPLICANT

BAO, minor Suing through his father and next friend

DOO.. 2ND DEFENDANT/APPLICANT

RULING

The Defendant brought this application under a certificate of urgency seeking orders to set aside the ex-parted judgment entered against the Defendants on 17th July 2019, and to reinstate the suit for hearing *inter parties*.

The application is founded on the grounds that the Defendant was not informed of the hearing dates of 8th October 2008, 12th February 2009 and 18th December 2018 by his advocate and he therefore did not attend at all for defence. That on being informed by his tenants who were served with the copy of the judgment on 29th October 2019, he inquired from his Advocate and learned that his Advocate Mr Kopot has been ailing for 2 years and was not properly in practice at the material time. That the failure of an Advocate should not be visited on the client. That the suit land does not form part of the estate of the deceased and it is apparent that the Plaintiffs jointly planned to defraud the Defendant.

In his supporting affidavit, the Defendant stated he was served with a summons to enter appearance and plaint in Civil Suit No. 72 of 2005 sometime in October 2005 and he immediately instructed M/s B. W. Mathenge Advocate who filed a defence. That M/s Kopot & Company Advocates took over the case and filed an amended statement of defence on 14th September 2007.

The Defendant stated that it was evident that pleadings were properly closed and at the initial stage his Advocate was communicating with him and conveying to him all the developments in the case but as at 18th December 2018 when he was supposed to be adducing evidence in his defence, his Advocate did not notify him of the hearing date. That he later learnt from his housing agent that his tenants had been served with a decree showing that the plot now belonged to the Plaintiffs. That on inquiry, he learnt that his Advocate had been ailing for a period of 2 years and was not carrying on any active law practice. That the court should allow him to defend the case to the logical end.

Plaintiffs' Reply

The 1st Plaintiff filed a replying affidavit on behalf of himself and the other Plaintiffs. The 1st Plaintiff stated that there was no ex-parte judgments issued in the case as both parties participated in the trial and the Defendant's Advocate was properly served as and when there was to be court sessions. That the Defendant had not shown or exhibited evidence that can warrant the court to set aside a valid judgment.

Defendant's Submissions

Counsel for the Defendant began by submitting that the judgment entered against the ex parte was indeed ex-parte as the court gave judgment relying only on the evidence of the Plaintiffs. That setting aside an ex-parte judgment was a matter within the discretion of the court. That once the court is satisfied that there is sufficient cause for failing to appear in court for hearing, the court was obligated to allow the application subject to any conditions the court deemed fit.

Counsel also cited several authorities stating that the court should consider whether there is a sufficient reason for failure to appear and the Defendant has a reasonable defence which raises triable issues. Counsel submitted that there was sufficient cause shown by the Defendant.

Issues for Determination

1. Conditions for setting aside ex-parte judgment

Rule 7 of Order 12 of the Civil Procedure Rules, which contains provisions concerning non-attendance of parties, provides 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."**

The Court of Appeal in ***Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd*** **[2016] eKLR** laid out the principles for setting aside ex-parte judgments as follows:

> "The principles for the setting aside of ex-parte judgments are well-settled and have been for long. The issue falls within the discretion of the judge and it is a discretion that is to be exercised in a judicial and judicious way on the basis of clear principle, not capriciously or on a whim. It is exercised "**to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice**" as was famously stated by the High Court of Kenya in **SHAH VS. MBOGO & ANOTHER [1967] EA 116** and upheld by the predecessor of this Court in **MBOGO VS. SHAH [1968] EA 93**.
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> … The learned Judge was also obligated to consider in an application to set aside an ex-parte judgment whether the defendant had a defence that was not frivolous, a sham, or shadowy or, put another way, that raised a triable issue. If it did raise such an issue, the defence ought to have been allowed to be ventilated on merit at a trial for it should never be lost sight of that courts exist for the purpose of determining rights and entitlements of parties substantively and on merit upon hearing them and considering such evidence as they may tender."

In ***Philip Ongom, Capt v Catherine Nyero Owota*** **((Civil Appeal No. 14 of 2001)) [2003] UGSC 16 (page 6)** the Supreme Court of Uganda held that such an application must fulfil one of two conditions, namely:

> **"(a) either that the defendant was not properly served with the summons,**
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> **(b) or that the defendant failed to appear in court at the hearing, due to sufficient cause.**
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> **… However, what constitutes "sufficient cause", to prevent a defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case."**

Citing with approval the above case, Mativo J. in ***Wachira Karani v Bildad Wachira*** **[2016] eKLR** elaborated further on the condition of demonstrating **"sufficient cause"** to warrant the exercise of the court's discretion in the applicant's favour as follows:

> **"The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.[14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."**

In ***Sebei District Administration v Gsayali and others*** **[1968] EA 300** the Court held that it would still have discretion to set aside an ex-parte judgment even where it seemed that the judgment seemed to have been approbated by the client:

> **"As was said by Ainley, J. (as he then was) in *Jamnadas V. Sodha v. Gordhandas Hemraj* ((1952), 7 U.L.R. at p. 11):**
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> **'…The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.'"**

2. Whether the Defendant has demonstrated a sufficient cause for setting aside the judgment

From the record of proceedings there have been several instances of the matter being stood over generally because the Defendant's former Advocate Mr Kopot was ailing. The reason put forward by the Defendant for his and Mr Kopot failure to appear for the defence hearing is plausible. Moreover, the Defendant has raised triable issues in his statement of defence and amended statement of defence which should have been canvassed by the Defendant at trial and determined on merit.

Considering the circumstances of the case, I do exercise my discretion by allowing the application and the judgment is hereby set aside and the Plaintiffs awarded costs in any event.

DATED AND DELIVERED THIS 6TH DAY OF MARCH, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Mr Okoth for applicant

M/S Odongo