REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 91 OF 2013

GABRIEL MUINGAI SIMIYU.....PLAINTIFF/ESPONDENT

VERSUS

DESTERIO BARASA ONDWASI.... DEFENDANT/APPLICANT

R U L I N G

1. The defendant/applicant moved the Court vide notice of motion application dated 15/1/2020 seeking Orders that;

    1. Spent

    2. A temporary stay of execution be granted pending the hearing and determination of this application.

    3. The Court be pleased to set aside the judgment herein and all the subsequent proceedings and/or orders.

    4. The defendant/applicant be granted leave to file defence.

    5. Costs of this application be provided for.

2. The application is premised on the annexed affidavit and the following grounds*;*

    1. The defendant/applicant was not heard in this case although he had instructed an advocate to act for him.

    2. That the advocate whom he had instructed did not file any defence and did not communicate with him about the hearing of this suit.

    3. The defendant/applicant's property has been attached and sold and there is a notice to show cause due for hearing on 12/2/2020.

    4. The defendant/applicant has never excavated stones from the plaintiff's land.

    5. It is in the interest of justice that the judgment herein and all consequential orders be set aside.

3. The defendant deposed that he trusted Mr. Okutta advocate whom he had instructed to be in control and that he would inform him of the progress of the case. That he realized the case had been decided in March 2019. He came to court and perused the Court file only to find judgement had been entered against him with costs on 30/1/2019. The applicant deposed that the failure to participate in the proceedings was caused entirely by Mr. Okutta advocate who did not inform him of the progress and did not file a defence on his behalf. He deposed that he has a good defence to the claim as shown in his draft defence.

4. The plaintiff/respondent filed grounds of opposition dated 28/1/2020 stating thus;

    1. That the application is incurably defective as it offends clear provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules 2010.

    2. That the applicant is guilty of laches having sought court's intervention after inordinate delay and execution.

3. That the application does not meet the threshold laid down by the law for stay of execution.

4. That it is now trite law that there can be no stay of execution on costs.

5. That the mistake of the defendant's former lawyers cannot be visited on the plaintiff so as to drive him out of the judgment seat.

6. That judgment entered in this matter was regular/lawfully arrived at after due process and cannot be impeached at this moment so as to please the defendant.

7. That the defendant does not have a good defence to the case as he admits owning his own parcel on which he should restrict his activities.

8. That the application is otherwise frivolous, vexatious and an abuse of court process hence deserving dismissal with costs.

5. During the hearing of the application, Mr. Khakula learned counsel for the applicant informed the Court that he was now pursuing only **prayer 3 & 4** of the application. That the applicant relies on the grounds on the face of the application adding that the applicant is aggrieved because he never committed the acts complained of. Mr. Khakula submitted that the defendant was wronged by the omission of his previous counsel and prays for opportunity to defend the suit. That the plaintiff already got costs of the suit as the defendant's livestock was attached and sold.

6. In response, the plaintiff/respondent submitted that the firm of J. S. Khakula are improperly on record judgement having been entered. That the applicant came to court one year after judgment was delivered and his goods attached. He submitted further that the suit was heard on a date fixed by consent hence there is no basis to impeach the judgment. The plaintiff contends that the draft defence does not raise any triable issue. He urged the court to dismiss the suit for being an abuse of the Court process.

7. On being improperly on record, Mr. Khakula submitted that the applicant filed a notice to act in person on 1/2/2019 so that the time they came on record on 1/3/2019 there was no advocate on record for the defendant. That no party can be penalized for not citing the rule under which the application is brought. He urged the Court to grant the orders sought.

8. The record of the Court does show that Ouma-Okutta & Associates filed an appearance for the defendant on 5/12/2103. Thereafter he attended court on behalf of the defendant on various dates which include; 10/9/2013, 11/3/2014, 16/9/2014, 23/2/2015 and 11/5/2015. It is on 11/5/2015 when a hearing date was set for 2/7/2015. The defendant pleaded that he trusted Mr. Okutta to have been in control of this matter. With the counsel's several court attendances one can see negligence on the part of counsel for failing to file a defence to the claim. Was the mistake excusable?

9. The question whether a litigant should suffer the mistake of his advocate has been discussed in several cases. For instance, in the case of **BELINDA MURAS & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR Hon Madan JA** (as) he then was defined what constitutes a mistake as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. <u>The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate</u>."** [own emphasis]

10. Further in the case of ***MARTHA WANGARI KARUA –VS- IEBC Nyeri Civil Appeal No.1 of 2017*** the Court of Appeal held as follows:-

> **"The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be…"**

11. In ***Shah Vs Mbogo (1968) E.A. 93*** the Court had this to say about the purpose of setting aside an exparte judgment is, **"Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, <u>but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice</u>, the motion should be refused"**.

12. The issue arising therefore is whether there is an excusable mistake to warrant the defendant being given a hearing. The plaintiff argued that the draft defence raises no triable issue. The court in ***Patel Vs E.A Cargo Handling Services Ltd (1974) EA 75 at 76(c) & (e)*** and ***John Mukuha Vs Charles Mwenga Mburu (2019) eKLR*** held that an exparte judgment ought to be set aside where it is shown that there is a defence on merit even if it raises only one triable issue. In the draft defence it is pleaded thus,

> "paragraph 3: **The defendant strongly denies the allegations in paragraphs 4, 5, 6 and 7 of the plaint. He has never at any time excavated building stones form the plaintiff's land and has never threatened to put the land to his own use nor barred the plaintiff from entering and using his own land."**
>
> Paragraph 4: **"The defendant avers that he has his own land – BUKHAYO/LUPIDA/1979 and has interest whatsoever in the plaintiff's."**

13. The claim by the plaintiff as pleaded in the plaint stated thus;

a. An order of permanent injunction restraining the defendant either by himself, his gents, servants or anyone acting under him from excavating stones, farming, planting, tilling, using and or in any other way interfering with the plaintiff's L.R. No. BUKHAYO/LUPIDA/2491.

b. Costs of the suit.

c. Any other relief deemed fit and fit to grant**.**

15. The court in the judgment sought to be set aside granted the permanent injunction asked. In light of the paragraph 3 & 4 of the draft defence pleading that; the defendant has a distinct parcel of land from that of the plaintiff and denial by the defendant that he did not excavate the Plaintiff's land in my opinion and I so hold raises a triable issue to go for trial. Was there a justification to award an order of permanent injunction and condemn the defendant to pay costs? This question can only be answered by giving the defendant an opportunity to present his case.

15. On the issue of the plaintiff suffering the inconveniences for mistake of counsel of the defendant, the same can be cured by an award of thrown away costs. Consequently, I find that the application is merited and allow it so as to give parties an opportunity to present their case. The plaintiff is awarded thrown away costs which this court assesses at the amount already realized/paid from the auction of the defendant's livestock. Costs of this application is ordered in the cause.

Dated, signed and delivered at BUSIA this 30th day of April, 2020.

A. OMOLLO

JUDGE