REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ELC CASE NO. 102 OF 2009

CLEMENSIA NYANCHOKA KINARO.....PLAINTIFF/RESPONDENT

VERSUS

JOYCE NYANSIABOKA ONCHOMBA.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. What is before me is the Defendant's application dated 4th November 2019 brought under Order 12 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B and 63(e) of the Civil Procedure Act seeking the following Orders:

1. The entre proceedings of the court of the 19th September 2013 culminating on the 29th May 2014 and the subsequent decree thereof be set aside.

2. The suit herein be heard afresh and starts *denovo* to accord the applicant an opportunity to be heard on merit.

3. The costs of this application be provided for

2. The Application is premised on the following grounds:

i. The matter herein proceeded *exparte* on the 19th day of September 2013 when the Applicant and/or his advocate did not attend.

ii. The scheduled date of hearing of the 19th September 2019 was not communicated to the Applicant by his then advocates on record hence the reason for the Applicant's failure to attend the hearing of the matter herein.

iii. The Applicant only became aware of the Judgment herein when the execution proceedings were commenced seeking to evict her from the suit land.

iv. The Applicant is willing to pay the respondent thrown away costs to the decree holder to compensate him for attendant cost arising out of the exparte proceedings.

3. The Application is supported by the Affidavit of Joyce Nyansiboka Onchomba sworn on even date.

APPLICANT'S SUBMISSIONS

4. The Applicant submits that the Application dated 4th November 2019 is principally premised on the provisions of Order 12 Rule 7 of the Civil Procedure Rules which provides 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."

5. It is the Applicant's submission that the suit was fixed for hearing on 19th September 2013, which date was not communicated to her by the Applicant's Counsel on record at the time.

6. On the said date of the hearing Counsel for the Defendant/Applicant applied for an adjournment which request was denied by the Court. The Applicant states that her Counsel failed to inform her of the hearing and/or time allocated for the hearing after the application for adjournment was dismissed. The hearing subsequently proceeded at 12.30pm on the same date with no attendance by Defendant/Applicant's Counsel. The Court delivered its judgment on 29th May 2014.

7. The Applicant submits that the principles of setting aside an *exparte* judgment obtained in default of either party are well settled by the Court of Appeal and refers to **Potter, Kneller JJA & Chesoni Ag JA in Maina vs Mugiria [1983]** in which the learned judges set out the following principles:

a. "Firstly, 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 because the main concern of the court is to do justice to the parties

b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. **Shah v Mbogo [1967] EA 116** at **123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.**

c. Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. **Mbogo v Shah [1968] EA 93"**

d. The court has no discretion where it appears there has been no proper service **(Kanji Naran v Velji Ramji [1954] 21 EACA 20).**

e. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. **(Smith v Middleton [1972] SC 30) 8".**

8. The Applicant submits that the application herein dated 4th November 2019 is in line with the principles laid out in **Maina vs Mugiria (Supra)** and further that it is a paramount principle in law that parties in any dispute must be accorded fair hearing and allowed to present their evidence before a decision is passed on the issues for determination. It is therefore the Applicant's submission that the Application herein has merit and that it should be granted as prayed.

RESPONDENT'S SUBMISSIONS

9. The Respondent's submits that the Application before the court is incompetent, misconceived, lacks basis and ought to be struck out. He argues that the grounds raised in the application dated 4th November 2019 are an afterthought since all parties were accorded a fair hearing and were represented by very able advocates and therefore no one was condemned unheard.

10. The Respondent further submits that it is now over 5 years since the said judgment was delivered and the delay by the Applicant has not been explained. He submits that litigation must come to an end. It is the Respondent's submission that the application does not meet the threshold for setting aside of an ex-parte judgment.

11. Counsel for the Respondent's relies on the cases of **Shah vs Mbogo** and **Ongom vs Owota** where the court held *inter alia* that for orders to set aside *exparte* judgment to issue the court must be satisfied about one of two things namely:-

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

12. The Respondent submits that the judgment obtained together with the subsequent decree was issued in compliance with the law.

13. The Respondent states that from the time the judgment was delivered in 2014 to 2019 the Applicant has never moved the court. She stated that the applicant has all along been aware of the judgment and the execution proceedings but deliberately declined to seek the court's intervention because the Applicant herein deliberately disrespected the lawful orders issued by the court.

14. The Respondent submits that boycotting judicial proceedings cannot constitute a denial of a right to be heard. It is the Respondent's submission that after the lapse of the 30 day period given to the Applicant to vacate the suit property, she moved to execute against the judgment delivered on 29th May 2014 and the Deputy Registrar issued the Applicant more time to vacate failure of which forceful eviction would issue.

15. The Respondent further submits that the demeanor or conduct of the applicant during the execution proceedings was one of disobedience and therefore the Applicant does not deserve the reliefs sought in the application dated 4th November 2019.

ISSUES FOR DETERMINATION

16. I have considered the Notice of Motion, affidavits and rival submissions and the sole issue for determination is whether the court should set aside the ex-parte judgment delivered on 29th May 2014.

ANALYSIS AND DETERMINATION

17. The Applicant in the application dated 4th November 2019 has relied on Order 12 Rule 7 of the Civil Procedure Code which provides as follows:

> **7. "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".**

18. Additionally, Section 3A of the Civil Procedure Act provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It provides as follows:

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".**

19. The court has a wide discretion to set aside a judgment or order. The exercise of this discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. See **Shah vs Mbogo & Another (1967) EA 116**.

20. In the case of **Ongom -v- Owota**, it was held that the court must be satisfied that either the defendant was not properly served or failed to appear in court at the hearing due to sufficient cause.

21. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court(see **Sebei District Administration -v- Gasyali**).

22. It also goes without saying that the reason for failure to attend court should be considered. In the present case, the Applicant is seeking to set aside the *exparte* Judgment delivered by the Honourable Court on 29th May 2014.

23. The suit was fixed for main hearing by consent on 19th September 2019 and on the same date Mr. Maroro, Advocate appeared for the Defendant/Applicant and applied for adjournment of the matter. Application for adjournment was opposed by the Plaintiff's advocate and the court subsequently dismissed the adjournment application and ordered that the matter proceeds.

24. On the same date, the Court resumed at 12.30pm for hearing of the suit and there was no appearance for the Defendant/Applicant herein. The Plaintiff and her advocate were present in court and the hearing proceeded *exparte*.

25. Subsequently, the court delivered judgment on 29th May 2014 against the Defendant as prayed in the plaint dated 10th June 2009. The upshot of the said judgment was that the Defendant was ordered to vacate and hand over vacant possession of the suit property to the Plaintiff.

26. In her supporting affidavit the Applicant explained that the main reason she failed to attend the hearing scheduled for 19th September 2013 was because counsel holding brief for her advocate on record at the time failed to attend the hearing at the allocated time and failed and/or neglected to inform her advocate of the dismissal of the adjournment application.

27. The hearing date was fixed by consent of the parties and the Defendant/Applicant has failed to adduce sufficient reason why she failed to attend the hearing on 19th September 2013.

28. As aforementioned, it was held in **Shah vs Mbogo** *(Supra)* that the discretion to set aside judgment is not meant to assist a person who deliberately seeks to obstruct or delay the course of justice.

In this matter, judgment was delivered in 29th May 2014 and a decree issued on 25th July 2014.

29. The Applicant has stated that she only became aware of the judgment entered against her sometime in March 2017 when she was arrested by police officers from Gesonso Police Station in execution of the decree.

30. It is therefore evident that for a period of about three years, the Applicant was indifferent to the proceedings of the suit and didn't bother to inquire whether there was any judgment delivered by the court.

31. Despite filing a Defence and a Counter claim on 28th July 2009, the Applicant herein failed and/or neglected to follow the progress of the proceedings and thereafter avers that her advocate at the time failed to inform her of the hearing date of the suit which was agreed by consent of the advocates for the parties.

32. It is an established principle that the mistake of an advocate should not be visited on his client. However, an advocate is the agent of the litigant, and where the advocate is guilty of inaction, as the agent of the litigant, the litigant will bear the consequences of his advocates inaction.

33. In its decision in **The Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others**

[2015] eKLR, the Court of Appeal (Waki JA) stated:

> **"In this case, however, the applicant's advocates simply plead ignorance and consequential inaction which cannot avail them. This Court said so in Rajesh Rughani – Vs- Fifty Investment Ltd. & Another (2005) eKLR:-**
>
> **"If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".**
>
> **In the case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR this Court also observed:-**
>
> **"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences".**

34. In view of the foregoing, I am not satisfied that the Applicant's application merits discretion in her favor; while it is true that the objective of the court is to do justice, such justice must cut both ways.

35. In conclusion, having considered the facts of this case, the application and submissions provided by the parties as well as the relevant authorities. I find that the application before me is not merited and I dismiss it with costs to the Respondent.

Dated, Signed and Delivered electronically via zoom this 23rd day of April, 2020.

J. M. ONYANGO

JUDGE