REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO 215 OF 2013

JARED BENSON KANGWANA …….....PLAINTIFF/RESPONDENT

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE….DEFENDANT/ APPLICANT

RULING

INTRODUCTION

1. This ruling pertains to the Notice of Motion dated 2nd December 2019 in which the Defendant/Applicant seeks orders that the this honourable court be pleased to set aside the ex-parte judgment and all consequential orders entered against the Defendant on 24th May 2019. The application is based on the grounds stated on the face of the Notice of Motion, key among them being that the Defendant's former advocate failed to inform the Defendant of the hearing date or file the necessary List of documents and Witness statements. The applicant also contends that he has a valid Defence that raises triable issues.

2. The application is also based on the supporting affidavit of Patricia Ngutu, the Defendant's legal officer sworn on the 2nd December 2019 in which she depones that in 2013 they instructed the firm of Keengwe and Company Advocates to act on behalf of the Defendant and pursuant to those instructions the said firm filed a Notice of Appointment of Advocates and defence dated 21st June 2013. Thereafter the said firm of Advocates never communicated with the Defendant on any progress regarding the matter. She further depones that she only learnt of the judgment by chance in November 2019, when she was going through the online Kenya Law Reports while conducting research on an unrelated matter. They then instructed the firm of Ochieng Ochieng Advocates to peruse the file. Upon perusal of the court file, the said advocates discovered that the case had proceeded ex-parte on 18th March 2019 and judgment was delivered on 24th May 2019.

3. She depones that the mistakes of their advocate should not be visited on the Defendant. It is her contention that the Defendant has a reasonable defence and they should be given an opportunity to have their case heard on the merits. She expressed fears that since the impugned decree was in the nature of an injunctive order, the Plaintiff would develop and alienate the suit property and this would cause the defendant irreparable loss.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION:

5. The only issue for determination is whether the ex-parte judgment should be set aside.

The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are well settled.

6. In the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA cited in the case of Sammy Maina v Stephen Muriuki (1984) eKLR** Duffus P.J stated as follows:

> "*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. Where it is s regular judgment, the court will usually not set aside the judgment unless it is satisfied that there is a defence on eh merits …in this respect a defence on the merits does not mean that the defence must succeed…*"

7. In ***Shah V Mbogo 1967 EA 116 at 123*** the court observed that *this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.*

8. Counsel for the Applicant submitted that the Applicant has shown a sufficient cause why they failed to appear in court on the hearing date, the main reason being that the Defendant's advocate did not inform them of the progress of their case. She cited the case of **Ongom v Owota** for the proposition that once the Defendant satisfies the court that there is sufficient cause for failing to attend court, the court ought to set aside the ex-parte judgment subject to any conditions the court may deem fit.

9. 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 depend on the circumstances of each case. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing.

10. In the instant case, even though the Defendant's legal officer contends that their advocate did not inform them of the progress of the case from the time the defence was filed in 2013, there is nothing to show that the Defendant kept in touch with its advocate and sought to know how the case was progressing. The hearing date herein was taken by consent and it is not clear why the defendant's advocate chose not inform his clients of the same.

11. In **Ongom v Owota(supra**) the court observed as follows:

> "*Although it is an elementary principle of our legal system that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle courts must exercise care to avoid abuse of the system and unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure on the part of the litigant to give the advocate instructions."*

12. In this case, the Defendant is bound by the omissions of its advocate. The Defendant cannot escape any blame as it has failed to demonstrate that it was interested in pursuing its case by keeping in touch with its advocates. In the case of **Savings and Loans Limited v Susan Wanjiru Muritu HCCC No. 397 of 2002** Kimaru J expressed himself as follows:

> "*Whereas it would constitute a valid excuse for the defendant to claim the she had been let down by her former advocates' failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to the litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside the dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment of the defendant….It would be a travesty of justice for the court to exercise its discretion in favour of such a litigant"*

13. I will now consider whether the Defendant has a reasonable defence that raises triable issues. The Plaintiff's case is that he is the registered proprietor of the suit property pursuant to Grant of Lease issued to him by the Government of Kenya for a term of 99 years with effect from 1st September 1992. The Plaintiff avers that in April 2013 he engaged the services of a private Surveyor to identify the beacons of the suit property, so that he could fence it and start developing the same, when the Defendant's employees stopped the Surveyor from conducting the survey on the ground that the suit property belongs to the Defendant. This is what prompted the Plaintiff to move to court for an order for of injunction to restrain the defendant from interfering with the plaintiff's ownership and development of the suit property.

14. In its statement of defence dated 21st June 2013 deny that the Plaintiff is the registered proprietor of the suit property and state that if the Plaintiff has a grant of lease in respect of the suit property, then the same was obtained irregularly and illegally an ought to be cancelled. The Defendant further alleges that it lodged a caution over the suit property and therefore the plaintiff has no right to use it. It states that the suit property is under investigation as per the report of the Commission of Inquiry into the illegal /irregular allocation of public land. Even though the Defendant challenges the Plaintiff's title, it does not state that it has a better title than that held by the Plaintiff. Furthermore, the Defendant has not filed a counterclaim to have the Plaintiff's title cancelled. It is therefore arguable whether the defence raises triable issues.

15. Lastly, I will consider whether the Plaintiff is likely to suffer any prejudice if the judgment is set aside. This suit was filed in court in 2013. It was finally fixed for hearing by consent on 18th March 2018 after which judgment was delivered on 19th May 2019. This application was filed more than six months after judgment was delivered. The Plaintiff who obtained judgment in his favour has not been able to enjoy the fruits of his judgment and he will no doubt be prejudiced if the judgment is set aside.

16. In view of the foregoing, I am disinclined to exercise my discretion in favour of the Defendant as I find no merit in the application. The application is therefore dismissed with costs to the Respondent.

Dated, signed and delivered electronically via zoom this 23rd day of April 2020.

J.M ONYANGO

JUDGE