**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL SUIT NO. 23 OF 2001 (O.S)**

**IN THE MATTER OF LAND PARCEL NO. KERICHO /KIPCHIMCHIM/1003**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22)**

**BETWEEN**

**KIMETET ARAP MIBEI……..PLAINTIFF/RESPONDENT**

**VERSUS**

**PHILOMENA CHEBOEN…...DEFENDANT/RESPONDENT**

**RULING**

## Introduction

1. What is before me is the application dated 13th April, 2017 brought pursuant to sections 1A, 1, 3A, and 63E of the Civil Procedure Act and Order 51 Rule 1A and 8, Order 10 Rule 11. Order 21 Rule 6, order 37 Rules 2 and 3, Order 37 Rule 16, Order 50 Rule 6 of the Civil Procedure Rules seeking the following prayers:

> 1. Spent.
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> 2. Spent.
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> 3. That the Honourable court be pleased to grant leave to the applicant to re-open, revisit, question and/or challenge the decree issued herein on 20th April, 2004.
>
> 4. Spent.
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> 5. That the honourable court be pleased to set aside the ex-parte judgment entered herein against the Applicant together with the decree issued herein.
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> 6. That the Honourable court be pleased to order or direct the re-opening of the case and grant leave to the Applicant to file her replying pleadings in support of her case for fresh and full inter-partes hearing on the merits in the wider interest of justice.

2. The application is based on the 13 grounds stated on the face of the Notice of Motion and the

applicant's supporting affidavit sworn on the 13th April, 2017. The long and short of it is that the applicant was not served with summons to enter appearance and only learnt about the existence of the suit in 2016 when she went to the Kericho District land Office to carry out a search and was informed that the land parcel number KEERICHO/KIPCHIMCHIM/1003 was no longer registered in her name but was registered in the name of the respondent herein pursuant to a court decree arising from the case herein. She thereafter went to Kericho High Court and perused the court file from which she learnt what had transpired. She avers that the respondent's affidavit in support of the Originating Summons is full of falsehoods.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 12th October, 2017. He avers that he has lived on the suit property all of his 82 years. He further avers that when he learnt that the respondent's husband had been registered as the proprietor of his land he filed this suit seeking that he be declared as the proprietor of the suit property by way of adverse possession. He states that despite being served, the defendant neither entered appearance nor filed a Replying Affidavit. The case therefore proceeded ex parte and on 29th October 2003, the court entered judgment for the plaintiff as prayed in the Originating Summons together with costs. The plaintiff then proceeded to have the suit land registered in his name and a title deed was duly issued. Almost a year later on 8th September 2004, the defendant filed an application to set aside the ex-parte judgment but the application was not heard until five years later on 28th May, 2009 when it was withdrawn. He avers that the present application is similar to the one that was withdrawn in 2009.

4. Even though counsel agreed to canvass the application by way of written submissions, none were filed.

**Issue for Determination**

5. The main issue for determination is whether the ex-parte judgment entered on 29th October, 2003 should be set aside so that the case can be heard afresh.

**Analysis and Determination**

6. In considering this issue I am guided by the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** where Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

> "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 as follows:
>
> a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based 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 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. **Shah V Mbogo 1967 EA 116 at 123B.**
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> c. Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner 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 as a result there has been injustice. **Mbogo V Shah 1967 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**."

7. I further rely on in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** where Duffus P 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. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it "a triable issue", that is, an issue which raises a prima facie defence and which should go to trial for adjudication"

8. Similarly, the case of **CMC Holdings Ltd V Nzioki 2004 KLR 173** in the court held as follows:

> "The law is now well settled that in an application for setting aside an ex-parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date, but also whether the defendant has a reasonable defence… which raises triable issues."

9. It is the applicant's contention that she was never served with summons to enter appearance. If this is true, it would have formed a very strong ground for setting aside the ex-parte judgment. Why then did the applicant choose to withdraw the earlier application? It is intriguing that the applicant has steered clear of any explanation regarding the withdrawal of the earlier application to set aside the ex-parte Judgment as this in my view might have given her a new lease of life. There is something strange about a litigant who withdraws a meritorious application, pays costs to the other side and then files a similar application 4 years later. This is what an abuse of the court process looks like. I sympathize with the applicant as she may have been mis advised into withdrawing the earlier application which stood a very good chance of being allowed but coming back to court for the same orders 4 years later without laying a basis for the comeback seems like an afterthought. Litigation must surely come to an end. Justice cuts both ways and there must be a very good reason for re-opening a case where the plaintiff obtained judgment 15 years ago.

10. The second issue that I have considered is whether the applicant has a defence that raises triable issues. Neither in this application nor in the earlier one filed in 2004 does the applicant attach a draft defence from which the court may be able to discern whether she has a good defence.

11. But even assuming that the court was inclined to allow the application to set aside the judgment, there is the added complication that the application was dismissed (albeit erroneously) for want of prosecution. How would the court deal with this aspect without a specific application to set aside the dismissal and in the absence of an appeal?

12. I have carefully considered the pleadings, application, affidavits and the entire proceedings herein and taking all the circumstances of this case into consideration, I am not at all convinced that there is any compelling reason to set aside the judgment. Accordingly, I find no merit in the application and I dismiss it with costs to the respondent.

**Dated, signed and delivered at Kericho this 2nd day of March, 2018.**

**….....**

**J. M ONYANGO**

**JUDGE**

**<u>In the presence of:</u>**

1. Mr. Onesmus Langat for the Plaintiff/Respondent.

2. No appearance for the Defendant/Applicant.

3. Court Assistant: Rotich.