



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E&L CASE NO.549 OF 2013**

**ANTHONY KIPROP**

**(Suing as the Legal Representative of The Estate of Luka Kiprop Kiptai).....PLAINTIFF**

**VERSUS**

**SYLVESTER CHEMWENO SANG.....1<sup>ST</sup> DEFENDANT**

**CHEBIEMIT LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> DEFENDANT**

**RESIDENT MAGISTRATE'S COURT ITEN.....3<sup>RD</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application dated 10<sup>th</sup> March 2020 by the 1<sup>st</sup> defendant applicant seeking for the following orders:

- a) That pending the hearing and determination of this application delivery of judgment set for 16<sup>th</sup> April 2020 be suspended.
- b) That this court be pleased to set aside the proceedings of 4<sup>th</sup> February 2020.
- c) That the hearing of the matter be reopened and be heard *de novo*
- d) That the costs of this application be provided for.

This matter was scheduled for delivery of Judgment on 16<sup>th</sup> April 2020, but before the court could embark on writing the judgment, the applicant filed this application under certificate of urgency. The application is premised on the ground that counsel for the applicant was never served with a hearing notice. That the defendant is not to blame for the hearing of the proceedings *ex parte* and that counsel only became aware of the case upon being served with the submissions by the plaintiff.

The application was supported by the 1<sup>st</sup> defendant's affidavit which enumerated the reasons why he did not attend court. It was his averment that his counsel informed him that he was never served with a hearing notice and that he believed him as his counsel never misses court. He further stated that he should not be condemned unheard. The applicant also stated that the plaintiff is readily available to re-testify in the case. Counsel urged the court to allow the application as prayed.

The plaintiff filed a replying affidavit and demonstrated that the applicant was properly served with a hearing notice as required by law. The plaintiff further annexed the hearing notice to the affidavit of service which was filed in court and the same indicates that the applicant's advocate even stamped the notice acknowledging receipt. The plaintiff therefore urged the court to dismiss the application with costs as it is meant to delay the finalization of the case.

**ANALYSIS AND DETERMINATION**

The issues for determination in an application to set aside *ex parte* proceedings are as follows:

- a) Whether there is sufficient reasons or explanation for non-attendance.

b) Whether there was unreasonable delay in filing the application

c) Whether there will be any prejudice.

Order 12 Rule 2(a) of the Civil Procedure Rules provides that: -

**“If on the date fixed for hearing after the suit has been called on for hearing outside the court, only the Plaintiff attend, if the court is satisfied;**

**a) That Notice of Hearing was duly served; it may proceed exparte.**

If the court is satisfied that a hearing notice was properly served and after the suit is called on for hearing outside the court, then the same can proceed in the absence of the defendant. In this case the suit was called out but the 1<sup>st</sup> defendant was absent.

Order 12, Rule 7 of the Civil Procedure Rules grants the court discretion to set aside any exparte proceedings upon such terms that it deems fit and just. It provides as follows: -

**“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 discretion of the court to set aside ex parte proceedings must be exercised judiciously so as not to cause injustice to any party. Would it be in the interest of justice to set aside ex parte proceedings to allow the applicant to give his side of the story or shut him out completely due to his non-attendance of court? If a party explains the reason for non- attendance of the court proceedings to the satisfaction of the court, then the court can allow such party back to the seat of justice. If he does the negative, then he will not be allowed to abuse the court process by inundating it with applications that go against the need to hear cases expeditiously.

The applicant has sworn an elaborate affidavit explaining the reason why him and his counsel did not attend court as they were never served. From the court record, it shows that on 2<sup>nd</sup> October 2019 Counsel of the plaintiff indicated to the court that they took a date and erroneously served a wrong date to the defendants. The court subsequently gave another hearing date with and order that a hearing notice to be served on the defendants

On the date of the hearing the 1<sup>st</sup> defendant/applicant and his counsel were absent and the case proceeded ex parte. I notice that the affidavit of service filed in court on 30<sup>th</sup> January 2020 with an annexure of a hearing notice dated 30<sup>th</sup> October 2019 indicate that the notice was properly served and stamped by Mburu Okara & Co Advocates. On 4<sup>th</sup> October 2019 at 10.49 am. This is precisely what a proper service is all about. Applicant’s counsel might have forgotten to come to court but not because he was not served.

In the case of Muthaiga Road Trust Company Ltd...Vs...Five Continents Stationers Ltd & 25 Others (2003) KLR 714, where the Court of Appeal held that:-

*“In an application for setting aside, 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 find that the hearing notice was properly served but in the interest of justice I will order that the 1<sup>st</sup> defendant be given an opportunity to cross examine the plaintiff and present his case. The applicant will also pay thrown away costs of Kshs. 20,000/ to the plaintiff within the next 14 days’ failure of which the order lapses and the court shall proceed with writing and delivery of judgment. Costs of the application shall be in the cause.

**DATED and DELIVERED at ELDORET this 26<sup>th</sup> DAY OF MAY, 2020**

**M. A. ODENY**

**JUDGE**