



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 432 OF 2014

(Formerly NYERI HCC 139 OF 2008)

JAMES NG'ANG'A KIBAYA.....1st PLAINTIFF/RESPONDENT

MWANGI CHEGE2nd PLAINTIFF/RESPONDENT

(Suing for and on behalf of the Chairman, Athara Farmers Shareholders Complaints Committee)

-VERSUS-

THE HON ATTORNEY GENERAL.....1st DEFENDANT/RESPONDENT

MURANG'A DISTRICT LAND REGISTRAR.....2nd DEFENDANT/RESPONDENT

THE PROVINCIAL CO-OPERATIVE AUDITOR-CENTRAL

PROVINCE3rd DEFENDANT/RESPONDENT

JENEM COFFEE FACTORY LIMITED.....4th DEFENDANT/RESPONDENT

MITITHIRU COMPANY LIMITED.....5th DEFENDANT/APPLICANT

THE CO-OPERATIVE BANK.....6th DEFENDANT/RESPONDENT

JAMES MUIRUTI (CHAIRMAN)

MICHAEL GACHEI (TREASURER)

WILLIAM GACHEI (SECRETARY)

Sued for and on behalf of Athara Farmers

Co-operative Society (1992).....7th DEFENDANT/RESPONDENT

PETER IRUNGU (CHAIRMAN)

PETER WAINAINA (SECRETARY)

(Sued for and on behalf of Athara Farmers

Co-operative Society (1988).....8th DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 29th August 2019 brought under a certificate of urgency and pursuant to the provisions of Order 10 Rule 11, Order 18 Rule 10 of the Civil Procedure Rules, Sections 146(4) of the Evidence Act and Section 3A of the Civil Procedure Act where the Applicant seeks for the following orders.

a. Spent.....

b. That the interlocutory judgement entered against the 5th Defendant on the 8th day of February 2012 be set aside upon such terms as are just.

c. That the Court admits the 5th Defendant's Memorandum of Appearance dated 18th June 2012 and filed on the 19th June 2012 and the 5th Defendant's statement of defence dated 18th of June 2012 and filed on 19th June 2012 as duly filed.

d. That the Court grants the 5th Defendant leave to file its List of documents, list of witnesses, Witness statements and List of issues out of time.

e. That the honorable Court recalls Jams Nganga Kibaya (PW1) and Mwangi Kiarie alias (PW2) for cross examination by the 5th Defendant with leave to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and or 8th Defendants to further cross examine PW1 and PW2 and corresponding leave to the Plaintiff to re-examine the PW1 and PW2.

f. That the honorable Court recalls Ziporah Mburu (DW1) for cross examination by the 5th Defendant, with leave to the Plaintiff, 1st, 2nd, 3rd, 6th, 7th and 8th Defendants to further cross examine DW1 and corresponding leave to the 4th Defendant to re-examine DW1.

g. That the costs of this Application be provided for.

2. The said Application was supported by the grounds set on its face as well as on the supporting affidavit of Robert Mugambi Mutuma, an Advocate and Secretary of the 5th Defendant /Applicant.

3. Pursuant to the filing of the said Application, the Applicant was directed to serve their Application for inter-parties hearing on the 28th November 2019 wherein leave was also granted to the Respondents to file their responses thereto.

4. By consent, parties agreed to dispose of the Application by way of written submissions wherein while the Plaintiffs and the 5th Applicant complied, the 1st-3rd and the 7th Respondents submitted that they were not opposed to the Application, whilst the 4th, 6th and 8th Respondents neither filed their responses nor written submissions to the Application.

5. The Applicant's submission while relying on the decided case of **Pithon Waeru Maina vs Thuka Mugiria [1983] eKLR** was to the effect that they had overwhelming just and sufficient cause to warrant the granting of the orders so sought.

6. That the Applicant owned and occupies the suit land Reg No. Makuyu/Kimorori/ Block 5/92 having acquired the same on the 16th January 2007 wherein it had enjoyed uninterrupted occupation therein.

7. That pursuant to service of summons and an amended Plaintiff by the Plaintiff, the Applicant had on the 5th August 2011 instructed its former Counsel, M/s Mbugua & Macharia Advocates to enter appearance on its behalf.

8. That the said Counsel had vide theirs dated the 30th July 2012 informed the Applicant that they had filed their Memorandum of Appearance and Statement of defence on the 19th June 2012. What the Counsel had not disclosed however, was that the said documents had been declined by the Court and that a default judgment for non-appearance and defence had been entered against the Applicant.

9. That it had been on the 3rd July 2019 when the Applicant had perused the Court file without its Counsel that they had discovered that interlocutory judgment for non-appearance and filing of a defence had been entered against them wherein the Plaintiff had already called and close its case and the Defence case had been partly heard.

10. It was their submission that in the intervening period up to the 3rd July 2019, that the Applicant, vide their numerous letters annexed herein, had sought to know the status of the case from their previous Counsel. That on many occasions, the said Counsel would not respond to their quest for update and in the event that the said Counsel responded, he would mislead the Applicant on the said status.

11. That upon the belief that the Plaintiff had never progressed with this case, the Applicant had even instructed their former Counsel to file an Application for dismissal of the suit for want of prosecution.

12. That subsequently, on the 23rd July 2019, the Applicant's former Counsel had written to the Plaintiff indicating that the suit had been scheduled for mention on the 14th November 2019 for purposes of taking further directions regarding the hearing of the case including the status of compliance with Order 11 of the Civil Procedure Rules.

13. The Applicant submitted that the mistake of Counsel ought not to be visited upon a litigant and that the Court should endeavor to assert and preserve a litigant's rights to be heard without placing undue weight on a litigant's Counsel's mistake as was held by the Court of Appeal

in the case of **Sheikh T/A Hasa Hauliers vs Highway Carriers Ltd Mombasa [1988] eKLR** amongst others.

14. That the Court ought not to drive the Applicant out of the seat of justice empty handed and more so where the dispute involved the suit land upon which the Applicant not only owns but has been in occupation for the past 13 years, yet the Plaintiff seeks for the cancellation of the Applicant's title and payment of mesne profits.

15. The Applicant sought to be heard so as to defend the impeachable integrity of its title and proprietorship over the suit land. They sought for their Application to be allowed.

16. The Application was opposed by the Plaintiffs both in their replying affidavit and submissions. The Plaintiffs submitted that the suit was filed on behalf of farmers who were the bonafide owners of the suit property and who had been defrauded of the same following a series of illegal dealings amongst the Defendants, the Applicants herein included.

17. That they had served their pleadings and summons on all the Defendants including the Applicants herein upon which the Applicant failed to enter appearance within the stipulated 15 days upon receipt of summons. That equally, they had failed to file their defence. Accordingly, judgment in default had been entered against the Applicants on the 8th February 2012 and rightly so.

18. That they had tendered their testimony/evidence on 11th of February 2014 and 23rd June 2016 whereupon they had closed their case. That their witnesses, and more so PW1 who had testified at the age of 74 years were old. That the cause of action had occurred some 20 to 30 years ago and therefore the recalling of the witnesses for cross examination would inflict undue and unfair hardship on the Plaintiffs who had since advanced further in age.

19. That the Plaintiffs had diligently pursued their case and should not be punished for the negligent acts of the Applicant herein and that to allow the orders so sought in the instant Application would be devastating and prejudicial to the Plaintiffs who had sued on behalf of a multitude of farmers who continued to languish in poverty. That as a matter of public interest, the Application ought to be dismissed with costs.

20. That although the Applicant claimed to have been diligent in defending the suit and had advanced documentary evidence to show that they had issued instructions to their former Counsel to enter appearance and file their defence, and further had even sought for progress report of the suit, yet such propensity of such evidence could not be established. That indeed the said document could have been doctored and back dated and therefore the said documents should not be accepted as a true account of the Applicant's diligence.

21. That an obligation had been placed upon the Applicants to defend their case diligently even when Counsel was on record. They ought to have attended Court to follow the progress of their case. Their assertion of diligence on their part and ignorance on the status of their case was an afterthought and a mere excuse which ought not to be acceptable as sufficient grounds to allow the Application.

22. That although they had learnt of the interlocutory judgment on 30th July 2012, they ought to have filed the instant Application immediately. However it had taken them over seven years to file the same which action could only be interpreted as gross negligence on their part.

23. That even after learning of the alleged misconduct and negligence of their former Counsel on 30th July 2012 they continued retaining and instructing him until July 2019 when they instructed another Counsel. They were therefore estopped from claiming that their former Advocate was not under instruction and that he acted negligently and further that they were unaware of the civil process

24. That their failure to comply with Order 7 and Order 11 of the Civil Procedure Rules for close to nine years was extremely negligent and it follows that the Application was in bad faith, frivolous and an abuse of the Court process and to allow the same would undoubtedly be prejudicial to the Plaintiffs.

25. That equity aided the vigilant and not the indolent and therefore since the orders sought by the Applicant were discretionary remedies by nature, the Court should only award equitable relief to litigants who had not slumbered on their rights. That the Applicants in this case had slumbered on its rights.

26. That the principles for setting aside judgments in default of appearance and defence were well set out in numerous decisions of Courts including in the case of **Baraka Apparel EPZ (K) Ltd vs Rose Mbula Ojwang T/A Faida 2002 Caterers [2007] eKLR**.

27. That allowing the said Application as prayed would be tantamount to assisting the Applicant who had deliberately sought to undermine, obstruct or delay the course of justice.

28. That the objective of the honorable Court as provided for under section 1A of the Civil Procedure Act was to facilitate the just, expeditious, proportionate and affordable resolution to civil cases.

29. The Plaintiff submitted that there was no cause to set aside the judgment as the Applicant had ample time and opportunity to defend its case before judgment was entered but had squandered the said opportunity.

30. It was their submission that the Constitution required that every person is given an opportunity to defend themselves but not for the Courts to bend backward to accommodate a party who had been given an opportunity to defend itself but deliberately failed to do so as was in the case herein.

31. That the present Application was an attempt to obstruct the course of justice and therefore the Applicant was not entitled to the Court exercising discretion in its favor. The Plaintiffs sought that the said Application be dismissed with costs to them.

Determination.

32. I have considered the Application herein as well as the Replying Affidavit and the written submissions by Counsel for both the Applicant and Plaintiff herein. I have considered the reasons presented by the Applicant regarding their failure and/or the failure of their Advocate to enter appearance and file their defence in response to the Plaintiff's pleadings within the stipulated time frame. I have keenly perused the affidavits filed in support of the Application to find out whether the Applicants had valid reasons for the said failure.

33. It must be remembered that whereas the 1st, 2nd, 3rd and the 7th Respondents were not opposed to the Application, the 4th, 6th and 8th Respondents neither filed their responses nor written submissions to the Application and therefore it could be rightly presumed that they too were not opposed to the same.

34. Order 10 Rule 11 of the Civil Procedure Rules gives this Court wide discretionary power to set aside a default judgment. The rule provides that:

“Where judgment has been entered under this Order, the Court may set aside such judgment and any consequential decree or Order upon such terms as are just.”

35. In exercising its discretion under this rule, the Court should be guarded by the demands of rendering justice. This is a judicial discretion which like all other discretion should be exercised judiciously.

36. The main ground for seeking to set aside the interlocutory judgment that was entered against the Applicant was that they were not aware of the proceedings in Court as they had instructed Counsel to represent them but that Counsel had failed to enter appearance or file their defence and /or update them on the proceedings before Court.

37. The issues that come out for determination by this Court are:

- i. Whether there is sufficient explanation for the delay in filing the defence?
- ii. Whether there is a meritorious defence?
- iii. Whether the Plaintiff will be prejudiced by the setting aside of the interlocutory judgment.
- iv. Costs.

38. On the first issue for determination as to whether there was sufficient explanation for the delay in filing the defence, from the Court record, it is clear that the instant suit was filed on the 21st October 2008 together with an Application by way of Notice of Motion. Thereafter vide a Chamber summons amended on the 24th August 2009 and filed on the 26th August 2009, the Plaintiff sought to amend their Plaintiff and to join the Applicant herein to the proceedings as the 5th Defendant.

39. The Application was allowed on the 21st June 2011 as unopposed, wherein an amended plaintiff enjoining the Applicant as the 5th Defendant was filed in Court on the 12th July 2011 and Summons to enter appearance were extracted on the 12th July 2011 and served upon parties. The Applicants were thus duty bound to file their Memorandum of Appearance and Defence 15 days upon service of the summons.

40. This did not happen. Instead, the Applicants filed their Memorandum of Appearance on the 11th August 2011, one month later. On the 8th February 2012, the Plaintiff filed a request for Interlocutory Judgment against the Applicant and the Defendants herein for failing to enter appearance and/or file defence within the prescribed time. An Interlocutory Judgment was entered for the Plaintiff against them and the matter was fixed for formal proof.

41. On the 19th June 2012 another the Memorandum of Appearance, this time accompanied with a statement of defence for the 5th defendant/Applicant was filed by M/S Mbugwa Atudo & Macharia Advocates. This was almost one year after summons of appearance had been issued and served.

42. On the 23rd January 2013, the matter was fixed for formal proof hearing where the same proceeded on the 11th February 2014 up to the 23rd June 2016 when the Plaintiff closed its case. It is worth noting that during this period, neither the Applicants nor their Counsel had appeared in Court either for a mention or for hearing of the case.

43. On the 22nd November 2016, the defence proceeded with its case and it was when it was midway that the Applicants suddenly woke up from their slumber and filed the present Application, 8 years after they had been enjoined in the suit.

44. The Applicant has attributed the delay in filing of their statement of defence on the mistake of their counsel and has urged the Court not to visit the mistake of their Counsel on them to drive them out of the seat of justice but to render justice and accord them an opportunity to be heard.

45. I find that although the Applicants had an obligation to defend their case diligently even when Counsel was on record, they also ought to have attended Court to follow the progress of their case and/or to ensure that their Counsel filed the necessary documents on time and attended Court to prosecute their matters diligently. Indeed it is clear from the Applicant's Application and written submissions that it had only been on the 3rd July 2019 when they perused the Court file only to discover that an Interlocutory Judgment for non-appearance and filing of a defence had been entered against them wherein the Plaintiff had already called its witnesses and closed its case and the defence case had been partly heard.

46. As stated earlier, the provisions of Order 10 Rule 11 of the Civil Procedure Rules, bestow on the Court unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations.

47. In the case of **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** this principle was expressed 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 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."

48. In the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**, Njagi, J. (as he then was) held as follows:

"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected Defendant is entitled to have it set aside as of right."

49. From the above finding it is therefore imperative that I do ascertain, first and foremost, whether the impugned default judgment was regularly entered or not. From the record the same is clear that the Applicants herein were served with the amended Plaintiff and Summons to Enter Appearance on 29th July 2011 by a Court process server known as Jornah Mwaura Kabane who filed his Affidavit of service filed in Court on the 8th February 2012 attaching the relevant documentation in support of his averments. Following the said service, the Applicants filed their Memorandum of Appearance dated the 9th August 2011 on the 11th August 2011. Thereafter they filed their defence on the 19th June 2012. By which time the Court had already entered an Interlocutory Judgment against the Applicants.

50. I find that the Summons to Enter Appearance and the amended Plaintiff were duly served on the Applicant and therefore it follows that the default judgment was regularly entered and having found as such then I have to be cautious on whether or not to set the default judgment aside.

51. In the case of **James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR** the Court of Appeal explained circumstances which the Court is bound to take into account in determining whether or not to set aside a default judgment as follows:

The Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

52. Based on the above issue to be considered, I find that pursuant to the default judgment having been entered, on the 8th February 2012, the Plaintiff tendered their testimony on 11th February 2014 and 23rd June 2016 and thereafter closed their case. The Defendant also tendered their evidence and while the same was part heard, the present Application was filed. The length of time that had elapsed since *the default judgment was entered* was 8 years. I find that this was an unlawfully long time.

53. I have considered the defence filed by the Applicant herein where the Applicant herein has simply denied the assertions in the amended plaintiff stating that they were innocent purchasers for value without notice and therefore their title was valid and could not be cancelled or impeached lawfully as it was protected by the provisions of Section 27 of the Registered Land Act.

54. The Court of Appeal In the case of **Patel vs Cargo Handling Services Ltd [1974] EA 75** defined the meaning of defence as follows:

"In this respect, a defence on the merit does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue'.

55. Having considered the statement of defence annexed to the Application on record, I am persuaded that there are triable issues such as allegations and counter allegations of fraud that would be best tried in a trial so that the Court can determine the matter on its merits.

56. On the last issue for determination, as to whether the Plaintiff/Respondent will be prejudiced by the setting aside of the interlocutory judgment, I find that although the Plaintiff has opposed the Application for reason that their witnesses and more so PW1 who had testified at the age of 74 years were old and that the cause of action had occurred some 20 to 30 years ago, yet the Plaintiff had not informed the Court on how they would be prejudiced which prejudice if any, could not be reasonably compensated by costs for the delay occasioned by setting aside the interlocutory judgment.

57. In the Court of Appeal decision of **Gurcharn Singh T/A Kessar Singh V. Khudroad Rhan s/o Khudadad Construction Co. –**

HCCC NO. 1547 of 1969, Hancox J (as he then was) was of the view:-

“.....that the Advocate’s mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach to an Application of this nature. As I said in Eldoret HCCC No. 14 of 1980 – The Municipal Council of Eldoret V James Nyakeno, “the Court goes by the principle that such an ex-parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the Court’s power of revocation at its discretion.” It is unfortunate that Advocates’ sins and omissions are sometimes visited on their clients who are left without the remedy they sought, but to sue the Advocate for professional negligence, but where a litigant shows that his default has been due to the party’s Advocate’s mistake in an Application of this nature, unless injustice would be occasioned to the other party the Court should consider the Applicant’s case with broad understanding.”

58. In conclusion I find that setting aside of the *ex parte* judgment is a matter of the discretion of the Court whose main aim is doing justice between the parties as was held in the case of **Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR** where the Court citing relevant cases on the issue held *inter alia*:-

*“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see **Patel vs E.A. Cargo Handling Services Ltd.**) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah vs. Mbogo**). 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 vs Gasyali**. It also goes without saying that the reason for failure to attend should be considered.”*

59. Taking into account the circumstances of this case, and the balance of convenience, the Court finds no prejudice on the Plaintiff/Respondent that cannot be remedied with the compensation in costs.

60. Accordingly, I allow the Application dated the 29th August 2019. The 5th Defendant/Applicant shall have the costs of the Application

Dated and delivered at Nyeri this 8th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE