REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 510 OF 2012

HARUN G. MWANGI.....PLAINTIFF

VERSUS

ZACHARIA KARIEGA MUCHUNU.....DEFENDANT

RULING

On 8th February, 2017, this suit was fixed for hearing on 21st March, 2017. When the matter came up for hearing, neither the defendant nor his advocate attended court. The plaintiff and his advocate were in attendance. The court having satisfied itself that the defendant's advocates were served with a hearing notice, it allowed the plaintiff to prosecute his case. The plaintiff gave evidence and closed his case after which the court directed that the parties make closing submissions in writing. The matter was listed for mention on 17th July, 2017 to confirm the filing of submissions and fixing of a date for judgment. When the matter came up on 17th July, 2017, the court did not give a judgment date because the defendant had not been served with a mention notice.

The court fixed the matter for mention again on 30th October, 2017 and directed that the defendant's advocates be served with a mention notice. On 30th October, 2017, the advocates for both parties appeared in court and the court fixed the matter for judgment on 21st June, 2018. The defendant's advocates who were aware that the suit had been heard in the absence of the defendant did not raise the issue with the court when the matter came up for fixing of a judgment date and took no action after the date of judgment was given to move the court to set aside the ex parte proceedings. The court delivered judgment in the matter on 21st June, 2018 in favour of the plaintiff. The court declared the plaintiff as the owner of Plot No. 116, Kariobangi South Sector VI ("the suit property") and ordered the defendant to vacate the property and handover the same to the plaintiff within 60 days from the date of judgment. The court also condemned the defendant to pay the costs of the suit.

What is now before the court is the defendant's Notice of Motion application dated 14th August, 2018 seeking to set aside the judgment entered on 21st June, 2018 so that the suit can be heard a fresh. The application was brought on the grounds set out on the face thereof and on the affidavit of the defendant sworn on 14th August, 2018. The application was brought on the grounds that the defendant had instructed the firm of T.M. Kuria & Co. Advocates to act for him in this suit and that he was not informed that the suit was coming up for hearing on 21st March, 2017. The defendant averred that he was surprised when an order was made for his eviction from the suit property without him being heard in the matter. The defendant averred that he was condemned unheard and that it would serve the interest of justice to allow the application. The defendant contended that he had a good defence to the plaintiff's claim which he should be given an opportunity to put forward. The defendant averred that he had brought the application timeously and the fact that the judgment against him had been executed was not a bar to the granting of the orders sought.

The application was opposed by the plaintiff through a replying affidavit sworn on 22nd March, 2019. The plaintiff averred that before the matter was fixed for hearing on 21st March, 2017, the same had come up for hearing in 2015 when the same did not proceed because the defendant was not ready. The plaintiff averred that the defendant was served with a notice for the hearing that took place on 21st March, 2017 and as such the judgment that was entered by the court on 21st June, 2018 was a regular judgment. The plaintiff averred that the defendant had not put forward any valid ground to warrant the setting aside of the said judgment. The plaintiff contended that failure by the defendant's advocates to inform him of the hearing date was not sufficient reason for the court to exercise its discretion in favour of the defendant. The plaintiff averred that the defendant had no defence to his claim over the suit property.

The application was argued on 4th December, 2019 when Mr. Ajulu appeared for the defendant/applicant while Mr. Njagi appeared for the plaintiff/respondent. In his submission in support of the application, Mr. Ajulu blamed the defendant's previous advocates for the defendant's failure to attend court for the hearing on 21st March, 2017. Mr. Ajulu cited the case of Wachira Karani *v* Bildad Wachira [2016] eKLR, and submitted that the defendant should not be made to suffer as a result of a mistake by his advocates. Mr. Ajulu submitted that the defendant had shown sufficient cause for his failure to attend court for the hearing and urged the court to exercise its discretion in favour of granting the orders sought. Mr. Ajulu submitted that the defendant had an arguable defence to the plaintiff's claim which he should be given an opportunity to put forward.

In his submission in reply, Mr. Njagi argued that the defendant was aware of the hearing date. He submitted that the judgment that the defendant sought to set aside had already been executed and the plaintiff had already taken possession of the suit property. Mr. Njagi submitted that in the circumstances, it would be unjust to set aside the judgment. In response, Mr. Ajulu submitted that when the defendant came to court seeking to set aside the judgment of 21st June, 2018, the said judgment had not been executed. He submitted that the defendant was evicted from the suit property when the present application was pending. Mr. Ajulu submitted that the plaintiff should not be allowed to benefit from his own fault.

I have considered the defendant's application together with the affidavits filed in support thereof. I have also considered the plaintiff's affidavit in opposition to the application. Finally, I have considered the submissions by the counsels for the parties. The issue that I have been called upon to determine is whether the defendant has put forward sufficient reasons to warrant the setting aside of the judgment entered herein on 21st June, 2018. Order 12 Rule 7 of the Civil Procedure Rules gives the court discretionary power to set aside judgment entered against a party who has not attended court during the hearing of a suit.

It is settled that the court's discretionary powers must always be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in Patriotic Guards Ltd. *v* James Kipchirchir Sambu [2018] eKLR as follows:

> **"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."**

The principles to be considered by the court in applications for setting aside ex parte orders were set out in the case of Shah *v* Mbogo [1967] E.A 116 as follows:

> **"….the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice**."

Applying the said principles to this case, I am inclined to exercise my discretion in favour of defendant. I have noted from the record that prior to 21st March, 2017, this suit had come up for hearing only once on 6th July, 2015 when the same was adjourned on the ground that the defendant's advocate was attending to another case in Mombasa. There is no evidence that the defendant had at any time attempted to obstruct or delay the hearing of this suit. I am in agreement with the defendant that he was let down by his previous advocates. The evidence on record shows that the defendant's previous advocates were aware of the hearing date of 21st March, 2017 and of the fact that the matter was heard in the absence of the defendant. The evidence on record also shows that the defendant's previous advocates were aware of the judgment date. There is no evidence that the said advocates informed the defendant of any of the foregoing events or that they took any action to set aside the proceedings of 21st March, 2019 before the court rendered its judgment.

From the material placed before the court by the defendant, I am satisfied that the defendant has an arguable defence to the plaintiff's claim. I am of the view that justice would be better served if the defendant is given an opportunity to put forward his defence to the plaintiff's claim. I am also of the view that the prejudice that will be occasioned to the plaintiff by allowing the defendant's application can be remedied in costs and appropriate orders for the maintenance of status quo pending fresh hearing. In **Phillip Chemwolo & Another *v* Augustine Kubede [1982-88] KAR 103 at 1040, Apalloo J** (as he then was) stated as follows:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

For the foregoing reasons, I find merit in the defendant's Notice of Motion application dated 14th August, 2018. The application is allowed on the following terms;

1. The judgment delivered herein on 21st June, 2018 is set aside.

2. The suit shall be heard a fresh.

3. Pending fresh hearing of the suit, the status quo prevailing as of the date hereof in relation to the parcel of land referred to by the plaintiff as Plot No. 116 and by the defendant as Plot No. 228 situated at Kariobangi South Sector VI, Nairobi (the suit property) shall be maintained.

4. The plaintiff shall remain in possession of the suit property but shall not sell, charge or construct any structure thereon pending fresh hearing of the suit.

5. The defendant shall pay to the plaintiff thrown away costs assessed at Ksh. 45,000/- within 90 days from the date hereof in default of which the orders granted herein above shall automatically stand set aside and the judgment entered on 21st June, 2018 reinstated.

Delivered and Dated at Nairobi this 11th day of June 2020

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams video conferencing platform in in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant