REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. CASE NO. 364 OF 2012

NG'ANG'A WAINAINA.....PLAINTIFF/RESPONDENT

VERSUS

HAMISI BWANA.....1ST DEFENDANT/APPLICANT

MUTUA KASYUMA.....2ND DEFENDANT/APPLICANT

PETER MAINGI.....3RD DEFENDANT/APPLICANT

MUSANDI WAMBUA.....4TH DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 3rd September, 2019 that was brought under Section 3A and 63(e) of the Civil Procedure Act, Order 12 Rule 7, Order 51 Rule 1 & 12 and Order 22 Rule 22 of the Civil Procedure Rules, the Defendants/Applicants have sought for the following orders:

a) Spent.

b) Spent.

c) Spent.

d) That the Honourable Court be pleased to set aside the proceedings of 17th May, 2018 and Judgment passed on 18th January, 2019 and all the consequential orders.

e) That the Honourable Court does allow the matter to proceed as a defended cause herein.

2. The Application is supported by the Affidavit of Mutua Kasyuma, the 2nd Defendant, sworn on 3rd September, 2019, with the authority of the 1st and 4th Defendants. It was deponed that the Defendants were served with summons to enter appearance in February, 2013 whereupon they approached the firm of J.T. Nzioki & Co Advocates who filed a Defence on 4th June, 2013.

3. The 2nd Defendant deponed that the said advocate informed him that the matter had stalled because there was no Environment and Land Court in Machakos; that he communicated with the same advocate in March, 2017 and that he never received any communication from the advocate ever since and was under the impression that the matter had not been fixed for hearing.

4. The 2nd Defendant deponed that on 30th August, 2019, he was served with a Decree; that it occurred to him that the matter had proceeded on 17th May, 2018 and that Judgment was entered in his absence on 18th January, 2019. According to the 2nd Defendant, when his current advocate perused the court file, he established that his former advocate never attended court.

5. The deponent averred that he and the other Defendants have a good defence to the claim; that the failure to attend court was as a result of circumstances beyond their control and that it is in the interest of justice that the proceedings of 18th May, 2018 and the Judgment of 18th January, 2019 be set aside so that the Defendants may be allowed to defend the matter on its merits.

6. The Plaintiff/Respondent opposed the Application vide a Replying Affidavit sworn on 1st October, 2019. The Plaintiff deponed that he is the *bona fide* registered proprietor of land known as Ndalani/Ndalani Block 1/1618; that the Defendants' previous advocates were served with mention notices as well as invitations to fix hearing dates and that the Defendants' previous advocates were served with Judgment

notices and a draft decree as well as warrants to deliver vacant possession.

7. The Plaintiff deponed that the Judgment and consequential orders were obtained regularly; that there was no basis to set aside a regular Judgment; that the Defendants have not demonstrated that they were entitled to the suit property and that the Defendants have not demonstrated that they have a defence that raises triable issues. The Plaintiff urged the court to dismiss the Application with costs to him.

8. The Application was canvassed vide written submissions. The Defendants' counsel submitted that it was undisputed that the Defendants never participated in the proceedings despite a Defence having been filed on their behalf; that the court should exercise discretion in favour of the Defendants and set aside the Judgment so that the matter may be heard on its merits and that the Defence raises triable issues. Reliance was placed on the case of *Patel vs. E. A. Cargo Handling Services Ltd (1974) E. A. 75.*

9. The learned counsel for the Defendant further submitted that the subject matter of the dispute was an agreement over parcel of land known as Ndalani/Ndalani Block 1/1618; that it was undisputed that the Plaintiff/Respondent had not fully paid the purchase price for the said land and that there was communication breakdown between the Defendant and their former advocates. Counsel relied on the case of *Wachira Karani vs. Bildad Wachira [2016] eKLR* where Mativo J. cited the following excerpt from the case of *Ongom vs. Owota, SCCA (2003) KALR.*

> *"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 or 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 due instructions."*

10. The Plaintiff's/Respondent's counsel submitted that after several mentions, the matter was certified ready for hearing and was set down for hearing on 17th May, 2018; that on 17th May, 2018, the matter proceeded for hearing and that although the Applicants' previous Advocate was duly served with the Hearing Notice, he neither attended court nor deputized someone to hold his brief.

11. The Plaintiff's counsel submitted that it is the duty of a litigant to take measures to ensure that he is updated regarding a matter pending in court. Counsel relied on the case of *Neeta Gohil vs. Fidelity Commercial Bank Limited [2019] eKLR,* where Muchemi J. held as follows:

> *"18. However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J expressed himself as follows:-*
>
> > *"whereas it would constitute a valid excuse for the Defendant to claim that 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 a 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 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 said 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. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.*
>
> *19. I hold similar view that it is not enough for a [party to simply blame an Advocate for a mistake but the party must show tangible steps taken by him in following up his matter."*

12. Learned counsel submitted further that once a party retains an Advocate, any process served upon the said Advocate is as effectual as if the same had been served on the party in person. Counsel reproduced the provisions of Order 9 Rule 1 of the Civil Procedure Rules, 2010 that states as follows:

> *"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed to act on his behalf."*

13. Counsel also placed reliance on Order 9 Rule 3 of the Civil Procedure Rules, 2010 that states that:-

> *"Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs."*

14. It was the Plaintiff's advocate's argument that in light of the above provisions, the service of the hearing notice upon the Applicants' previous Advocates was as effectual as if the same had been served upon the Applicants.

15. The record shows that the Plaintiff filed this suit against the Defendants on 28th September, 2012. In the Plaint, the Plaintiff averred that he is the registered proprietor of land known as Ndalani/Ndalani Block 1/1618 *(the suit property),* and sought for the eviction of the Defendants from the land.

16. The Defendants/Applicants have admitted that they were served with the summons to enter appearance and instructed an advocate who filed a Defence on their behalf. According to the Defendants, their former advocate did not inform them about the hearing date of 17th May, 2015 when the matter was coming up for hearing.

17. The Defendants are seeking to set aside the Judgment of the court dated 18th January, 2019, on the sole ground that their advocate did not inform them about the hearing date. According to the Defendants/Applicants, their advocate is wholly to blame for the misfortune which they find themselves in.

18. Order 9 Rule 3 of the Civil Procedure Rules, 2010 provides that processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the court otherwise directs.

19. In the cases of *Shanti vs. Handocha (1973) EA 207, Essaji vs. Solanki (1968) EA 218, Mugo vs. Wanjiru (1970) EA 481* as well as the Ugandan Supreme Court case of *Attorney General vs. Oriental Construction Limited (1991) UGSC 15*, a number of principles were established that would come to the aid of the court in exercising its jurisdiction to set aside a regular Judgment.

20. Firstly, the Applicant must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. Secondly, the administration of justice normally requires that all disputes should be investigated and decided on their merits and lastly, errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

21. However, it is trite that a litigant should be vigilant at all times. Where a litigant has instructed counsel in a matter, it is for him to keep himself abreast of the position of the matter at all times. This position has been restated in a number of cases, including the case of *Neeta Gohil vs. Fidelity Commercial Bank Limited [2019] eKLR,* where Muchemi J. held as follows:

> *"18. However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J. expressed himself as follows:-*
>
> > *"whereas it would constitute a valid excuse for the Defendant to claim that 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 a 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 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 said 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. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.*
>
> *19. I hold similar view that it is not enough for a [party to simply blame an Advocate for a mistake but the party must show tangible steps taken by him in following up his matter."*

22. Just like in the *Neeta Gohi* case *(supra),* if the Defendants had been vigilant, they would not have waited since 17th May, 2018, when the matter proceeded for hearing, until 3rd September, 2019 to be aware that the matter had proceeded for hearing. Having filed their Defence on 4th June, 2013, it was incumbent on the Defendants to ascertain the position of the suit. They never did that, and cannot now seek the court to exercise its discretion in their favour.

23. In any event, the Plaintiff is the registered proprietor of the suit property. In the Defence, the Defendants have alleged that they have settled on the suit property for more than twenty (20) years. However, the Defendants did not raise the defence of adverse possession, neither did they allege that the Plaintiff obtained his Title Deed fraudulently or by mistake.

24. The Defence on record is a mere denial, and does not raise any triable issue. For those reasons, it is my finding that the Application dated 3rd September, 2019 is not meritorious. The Application is dismissed but with no orders as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE