



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 211 OF 2009

LUCY BOSIRE PLAINTIFF

VERSUS

NYANKONI MANGA ROBI DEFENDANT

RULING

1. The defendant by a Notice of Motion dated 5th December 2014 seeks the following orders:-

1. **The Honourable court be pleased to set aside the judgment delivered on the 31st October 2014 in default of attendance and reinstate the above suit for hearing and determination inter partes.**
2. **The honourable court be pleased to issue an order of stay of execution of the decree issued pursuant to that judgment pending the hearing and determination of this application and in the first instance the presence of the plaintiff/respondent be dispensed with.**
3. **The costs of this application be costs in the cause.**

2. The application is supported on the grounds set out on the face of the application and the supporting affidavit of the defendant sworn on 5th December 2014. The defendant has set out the following grounds in support of his application:-

- a. **The hearing of the case on the 19th February 2014 was conducted ex parte in the absence of the defendant or the defendant's advocate.**
- b. **Service of the hearing date was effected on the firm of Kerario Marwa Advocate who had ceased to act for the defendant by the said date and who failed to notify the defendant of the same.**
- c. **The advocate instructed by the defendant at the material time failed to file notice of change of Advocate and/or serve the defendant's former advocate.**
- d. **The advocate who should be on record for the defendant as at the date of hearing is now deceased.**
- e. **The case involved a land dispute over land measuring approximately 21.5hectares first registered in the name of Manga Robi Marwa, the family of the defendant and should not be disposed of summarily.**
- f. **The error of an advocate should not be visited on the client litigant.**
- g. **Any inconvenience occasioned to the plaintiff can be remedied by way of costs, and no prejudice will be occasioned if the suit is reinstated to hearing.**

3. The defendant in her supporting affidavit reiterates the grounds in support of the application and affirms that he instructed Kerario Marwa advocate to defend the suit on his behalf and the

- advocate did file a written statement of defence and counterclaim dated 3rd December 2009. The defendant avers that she did not receive any further communication concerning the suit from her said advocate until when her brother obtained a draft decree from the court showing the case had been decided in favour of the plaintiff ex parte. The defendant states that in January 2014 his brother one Marico Nyankoni decided to instruct M/s Minda Advocate to conduct the case on behalf of the defendant in place of M/s Kerario Marwa Advocate. The defendant annexes a copy of a deposit receipt issued by M/s Minda Advocate on 14th February 2014 marked “MN4” as evidence that M/s Minda Advocate was instructed.
4. The defendant further avers that Mr. Minda Advocate was unaware of the hearing date as at the time they instructed him and M/s Kerario Marwa Advocate had not notified them of the date fixed for the hearing of the case. The defendant admits a hearing notice was served upon the firm of Kerario Marwa Advocates on 6th June 2013 for the hearing of the suit on 19th February 2014 but the Advocate did not attend court or inform the defendant of the hearing leading to the hearing proceeding ex parte.
 5. The plaintiff/respondent filed grounds of opposition to the defendant’s application dated 13th December, 2014. The plaintiff inter alia averred that the defendant’s application is filed by a person without the requisite *locus standi* as the firm of G. S Okoth & Company Advocates are not properly on record. The plaintiff states the defendant’s advocates on record were properly served with a hearing notice of the suit and no reasonable ground for non attendance at the hearing by the defendant or his agents has been given. The plaintiff further avers the defendant is intent on misleading the court by claiming that the firm of M/s Minda & Company had been instructed to act for the defendant when there is no evidence to that effect. The plaintiff contends the defendant’s application is misconceived and bad in law and is otherwise an abuse of the court process and deserves to be struck out.
 6. The court record shows that this suit was on 10th October 2013 fixed for hearing on 19th February 2014 and as the defendant was not present when the date was fixed a hearing notice dated 11th October 2013 was on 18th October 2013 served on the firm of M/s Kerario Marwa & Company Advocates then on record for the defendant who duly stamped the hearing notice in acknowledgement of the same as per the affidavit of service sworn by one Joshua Otieno Okeyo on 19th February 2014. The defendant and/or the defendant’s advocate did not attend court on the hearing date and the court having been satisfied the defendant had been served proceeded to hear the case ex parte and rendered a judgment on 31st October 2014 in favour of the plaintiff. It is this judgment that the defendant seeks to be set aside.
 7. The parties agreed to argue the defendant’s application dated 5th December 2014 by way of written submissions. The defendant/ applicant filed his submissions dated 16th June 2015 on 19th June 2015 and the plaintiff filed her submissions in response dated 27th June 2015 on 29th June 2015. The defendant/applicant submitted that as the plaintiff did not file any replying affidavit choosing only to file grounds of opposition, the plaintiff in opposing the application ought not to raise any issue of fact and should confine herself to only matters of law. I have reviewed the application and the record of the proceedings and in my view the facts are fairly straight forward and not disputed. It is not in dispute that the firm of Kerario Marwa & Co. Advocates were the ones on record when the suit was fixed for hearing and when it was heard. The firm of M/s Minda & Company Advocates never at any time placed themselves on record for the defendant. It is not in dispute that the firm of M/s Kerario Marwa & Company Advocates were served with a hearing notice of the suit for 19th February 2014.
 8. The plaintiff has strongly submitted that the firm of G. S Okoth & Company Advocates are not properly on record as there was no compliance with Order 9 Rule 9 of the **Civil procedure Rules 2010** which provides as follows:

9 (9) Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such a change or intention to act in person shall not be effected without an order of the court;-

- a. **Upon an application with notice to all the parties; or**

b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

The plaintiff argues the Notice of change of advocate filed by M/s G. S Okoth & Company Advocates was after judgment and hence there should have been compliance with Order 9 Rule 9 which there wasn't and consequently the instant application was filed by a stranger who had no *locus standi* rendering the application liable to be struck out '*Ex-debito justiae*'.

9. As per the court record, following the filing of the consent allowing for the change of advocate on 26th November 2014, the Deputy Registrar on the same date endorsed on the court file that the change of advocate had pursuant to the consent filed been given effect to. The endorsement by the deputy registrar was such an order as envisaged by Order 9 Rule 9 and my view therefore is that the Notice of Change of Advocate was validly effected. The essence of Order 9 Rule 9 was to prevent parties from changing their advocates after entry of judgment without notification and/or consent of the advocate who hitherto had acted for the party who seeks to effect the change of advocate and/or intends to act in person. The rule was further to ensure that parties do not merely chuck out advocates in a bid to avoid paying such advocates their fees following the conclusion of the case.
10. In the instant application the issue for determination is whether the defendant is in the circumstances of the matter entitled to have the court exercise its discretion in his favour to have the ex parte judgment set aside. Order 12 Rule 2 (a) provides:-

2. If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is satisfied:-

(a) That notice of hearing was duly served, it may proceed ex parte;

Order 12 Rule 7 provides:-

7. 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.

11. In the instant case I am satisfied the plaintiff was entitled to proceed with the hearing ex parte on 19th February 2014 as the defendant had been served with the notice of hearing way back in October 2013. It is also evident on record that the defendant's advocate was on 6th June 2014 served with a mention notice of the matter on 15th July 2014 for purposes of taking a date for judgment. In the premises I am equally satisfied that the judgment delivered by Hon. Justice Okong'o on 31st October 2014 was a regular judgment obtained by the plaintiff procedurally.
12. From my review of the matter I am not satisfied that the defendant has shown any justifiable cause why the court should exercise its discretion in his favour. The court record shows the attendance by the defendant before court has been erratic and intermittent. The last recorded attendance on behalf of the defendant was on 4th October 2011 before **Sitati J.** On 25th June 2013 when directions were taken the defendant was unrepresented. The defendant is blaming his advocate M/s Kerario Marwa Advocates for the predicament he is in. The advocate was the duly appointed agent for the defendant and for as long as the advocate was on record, the plaintiff had an obligation to deal with the said advocate as the defendant's agent. The defendant does not state that he attempted to obtain any information about his case from his advocate on record but failed, all he states is that in February 2014 they decided to change advocates from Kerario Marwa & Company Advocates. The copy of deposit receipt dated 14th February 2014 from Minda & Co. Advocates does not indicate it was for the conduct of the present suit as it merely indicates the sum paid was on account of filing. The defendant does not appear to have followed up on the instructions they say they gave to Minda & Company Advocates and neither did they seek to find out from their erstwhile advocate, Kerario Marwa or from the court the position of the case until as the defendant states his brother obtained a copy of the draft decree from the court which

showed the case had been heard and determined ex parte in favour of the plaintiff. The conduct by the defendant in this matter does not in my view depict the conduct of a person who was keen in the pursuit of his case otherwise he would have made follow up with his advocate to ascertain the status of the case. Once a party appoints an advocate he still remains the principal and he has the duty and obligation of ensuring the agent acts as per instructions given and keeps him updated on the progress of the matter.

13. The defendant/applicant has argued that the court should set aside the ex parte judgment to afford the defendant an opportunity to be heard and so that the case may substantively be determined on merits. Justice is a two way traffic, the plaintiff and the defendant each crave for justice. The plaintiff states she has a valid and regular judgment obtained after due process and argues the defendant is bent on frustrating her in enjoying the fruits of her judgment. The court after hearing the plaintiff gave a reasoned judgment upholding the plaintiff's claim and dismissing the defendant's defence and counter claim. I find no basis upon which I can set aside the judgment having held that the defendant has not demonstrated any sufficient and/or reasonable cause to warrant me to exercise my discretion to set aside the judgment in his favour.

14. The upshot is that I find the defendant's application dated 5th December 2014 to be devoid of any merit and the same is ordered dismissed with costs to the plaintiff.

15. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 4th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE