REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 152 OF 2017

ELIZABETH NDULU MATHUVA.....PLANTIFF/RESPONDENT

VERSUS

JOSEPH MBIU MUTHIANI.....DEFENDANT/APPLICANT

R U L I N G

1. What is before court for ruling is the Defendant's/Applicant's notice of motion application expressed to be brought under Order 12 Rule 7, Order 9 Rules 9 and 10, Order 51 Rule 1 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act for orders: -

1) Spent.

2) THAT the firm of O. N. Makau & Mulei Advocates be granted leave to act for the Defendant/Applicant in place of the firm of Nathan Mbullo & Associates Advocates.

3) Spent.

4) Spent.

5) THAT the court does set aside the order against the Defendant issued in the judgement of this court on 17th April, 2018 and Defendant be allowed to put in the relevant pleadings and then the matter be set down for hearing.

6) THAT the court does set aside the order of the taxing officer issued on 12th June, 2019 to its entirety pending the hearing and determination of this application and the subsequent herein of the main suit thereof.

7) THAT the costs of this application be provided for.

2. The application is dated 11th November, 2019 and was filed in court on 12th November, 2019. It is predicated on the grounds on its face and is supported by the supporting and further affidavits of Joseph Mbiu Muthiani, the Defendant/Applicant herein, sworn at Machakos on 11th November, 2019 and 09th February, 2020.

3. The application is opposed by the Plaintiff/Respondent vide her replying affidavit sworn at Machakos on the 05th December, 2019 and filed in court on 06th December, 2019.

4. The application was canvassed by way of written submissions.

5. The Defendant/Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19 and 20 of his supporting affidavit that he had previously appointed the firm of Nathan Mbullo & Associates Advocates to act for him in this matter and to defend the same to its conclusion until judgment is rendered or grant of whatever relevant orders are issued which would mean conclusion of the matter. The Defendant/Applicant attached a notice of appointment of advocate filed in the matter as JMM1. He went on to depose that the advocate moved and filed a defence (JMM2) on 21st December, 2016 which was thirteen days after the filing of the plaint on 08th December, 2016 and that this was well within the statutory period of filing the defence after service of the plaint, that on 19th October, 2019 which was on a Sunday, he was served with an order of this court dated 02nd October, 2019 which indicated that a judgement had been delivered in this matter and an order of eviction was issued against him, that when he moved to the court's registry to peruse the court file so as to authenticate the order served upon him by the Plaintiff/Respondent, he realized that the matter was set down for hearing on what he believes to be 21st February, 2018 and that a hearing notice served upon the law firm of Nathan Mbullo & Associates Advocates was indicated that the Defendant/Applicant had withdrawn instructions and that directions by the said firm were never complied with. Annexed to paragraph 6 of the supporting affidavit is a copy of the affidavit of service and the hearing notice marked as JMM3. The Defendant/Applicant went on to

depose that the firm of Nathan Mbullo & Associates Advocates and in particular Mr. Nathan Mbullo never indicated to him that he had been served with a hearing notice and he would therefore not honour the same and fail to attend court for the hearing, that had Mr. Nathan Mbullo informed him of the same, the Defendant/Applicant would have attended the hearing of the matter and defended the case or sought the services of another advocate, that this was a mistake on the part of this advocate on record and he has been advised by his advocates on record that this court should not occasion the mistakes of his advocate previously on record as being mistakes of his own making, that his advocate on record never bothered to inform him on the position of the matter despite his numerous visits to the latter's office as he was informed at all times that the advocate was away and they did not know when he would return to the office, that he has an arguable case with probability of success as evidenced by his defence annexed as JMM 4, that he purchased the disputed portion of land number Makueni/Kalongo/2099 from the deceased husband of the Plaintiff/Respondent, one Isaiah Mathuva Wambua Somba, and annexed to the affidavit is a copy of the sale agreement marked as JMM5, that after the purchase, there was a dispute which was settled by the elders together with the area chief to the effect that for Mathuva Wambua to get back the land, he should have refunded the purchase price which he has not done to date. Annexed to paragraph 13 of the affidavit is the decision of the elders together with its translation and marked as JMM6. The Defendant/Applicant has further deposed that the son of the Plaintiff/Respondent went and maliciously demolished the house (that the Defendant/Applicant had built) and he was charged in court and sentenced to six months imprisonment for the offence of malicious damage to property, that the Plaintiff/Respondent was not the registered owner of the disputed portion of land at the time when the Defendant/Applicant purchased the same and that she came into possession of the same after successfully petitioning for the grant of letters of administration intestate vide Machakos Succession cause No. 502 of 2006 whose grant is annexed as JMM7, that after obtaining the order of this court, vide the judgment dated 17th April, 2019 the Plaintiff/Respondent moved into the disputed portion and started to wantonly cut down trees which the Defendant/Applicant had planted. Annexed to paragraph 18 of the Defendant's/Applicant's affidavit are photographs showing the trees that have been cut down and marked as JMM9. The Defendant/Applicant has also deposed that he set up a permanent structure on the parcel of land in 1993 and has since been his matrimonial home and source of his livelihood and if evicted from the land, he will have no other place to move to and that if the order of the taxing master is not set aside it would mean that the Plaintiff/Respondent would move to execute the taxed bill of cost and the outcome of the application would be an academic exercise.

6. The Plaintiff/Respondent has deposed in paragraph 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 25 of her replying affidavit that the application is an abuse of the court process and is full of misrepresentations calculated to mutilate justice, that the application has been overtaken by events, that the Respondent has already been evicted, that the only thing remaining are trees which were cut down and carried away three weeks prior to swearing the affidavit, that the Defendant/Applicant has admitted in paragraph 14 of his affidavit that his house was demolished and there is no evidence of another house having been built, that the issue of failure to come to court is a conduct that is not excusable, that the Defendant's/Applicant's advocate on record acknowledged the hearing notice and indicated that the Defendant/Applicant had not given him instructions, that the Defendant/Applicant as a client has a duty and obligation to pursue the prosecution of his case to the end, has a duty to follow up on the progress of his case and not to go to slumber once defence or notice of appointment is filed, that the Defendant's/Applicant's failure to give instructions to his advocate cannot be a ground for setting aside a judgement, that a case belongs to a litigant and not to his advocate, that the Defendant/Applicant has been indolent and taking his conduct since 2016 (only filed defence) it would be travesty of justice for the court to exercise its discretion in his favour, that the Defendant/Applicant has no triable defence and that the application should be dismissed as it is meant to remove the Plaintiff/respondent from the seat of justice.

7. In his further affidavit, the Defendants/Applicant reiterated his deposition in his supporting affidavit and further deposed in paragraphs 6, 7, 8, 9 and 10 that he has been advised by his advocate on record which advise he verily believes to be true that his failure to attend court was due to the fact that his former advocate did not inform him of the hearing date and that this was a mistake of an advocate which should not be visited upon an innocent litigant, that an advocate has a duty to inform client on the progress of a case, that since no notice to act in person had been filed in court by him, it meant that his former advocate had full instructions to defend this suit on his behalf, that in as much as the Defendant/Applicant had entered appearance and filed his defence way back in the year 2016, his former advocate kept him in the dark regarding the progress of this suit and thus the Defendant's/Applicant's conduct cannot be considered indolent and that the defence raises triable issues due to the fact that he claims proprietary rights in the subject land owing to the sale transaction between himself and the Plaintiffs/respondents late husband.

8. In his submissions, the Defendant's/Applicant's Counsel framed three issues of determination. These were: -

1) Whether the mistakes of an advocate should be borne by an innocent litigant.

2) Whether the defence raises triable issues.

3) Whether this honourable Court has discretion to set aside its ex-parte judgement?

9. On the other hand, the Counsel for the Plaintiff/Respondent did not frame any issues for determination but submitted on issues number 1 and 2 that were framed by the Defendant's/Applicant's Counsel.

10. On whether the mistakes of an advocate should be borne by an innocent litigant, the Counsel for the Defendant/Applicant submitted that it is not in dispute that the Applicant was previously represented by the firm of Nathan Mbullo & Associates Advocates. The Counsel pointed out that neither is it in dispute that the matter proceeded without the participation of the Defendant/Applicant. The Counsel went on to submit that it is the Defendant's/Applicant's firm position that the previous advocate on record kept him in the dark over these proceedings. In support of his submissions, the Counsel relied on the case of ***FM vs. EKW [2019] eKLR*** where L. Njuguna, J made the following remarks;

> *"In my considered view, the excuse tendered by Counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the exparte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the Counsel should not be visited on the Appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits."*

11. On the other hand, the Counsel for the Plaintiff/Respondent cited ***Section 1A (3) of the Civil Procedure Act*** which provides that: -

> *"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."*

12. Arising from the above, the Counsel submitted that when the hearing notice was served upon the Defendant's/Applicant's Counsel, the latter indicated that he had no instructions from the former. The Counsel added that the Defendant/Applicant went to sleep immediately after filing their last document on 22nd December, 2016. A quick look at the documents in question shows that the same were a memorandum of appearance and the defence dated 20th December, 2016.

13. It was further submitted that the Defendant/Applicant has not demonstrated the efforts, if any, that he made to follow up the case with his advocate, registry, attend court or even to appoint another advocate if the previous one was not accessible as alleged. The Counsel was of the view that the conduct of the Defendant/Applicant over the last four years is not excusable but a deliberate, intentional act. The Counsel submitted that the court's discretion must be exercised judiciously. In support of his submissions, the Counsel cited the case ***M'Mwirichia M'Angare vs. M'Ibri M'Bogori & Others and Standard Chartered Bank of Kenya Ltd – Interested Party [2018] eKLR*** as well as the case of ***Alice Mbumbi Nganga vs. Danson Chege Nganga & Another [2006] eKLR***.

14. On the issue of whether the court has unfettered discretion to set aside its own exparte judgement, the Defendant's/Applicant's Counsel cited ***Section 1B of the Civil Procedure Act*** which provides that: -

> *"For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—*
>
> *(a) the just determination of the proceedings;*
>
> *(b) the efficient disposal of the business of the Court;*
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> *(c) the efficient use of the available judicial and administrative resources;*
>
> *(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*
>
> *(e) the use of suitable technology."*

15. The Counsel further cited the case of ***Shah vs. Mbogo [1967] EA 166*** where the court held that: -

> *"This 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 its not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit."*

16. The Counsel further cited the case of **Patel vs. East African Cargo Handling Services Ltd [1974] EA 75**.

17. Regarding the issue of whether the defence raises triable issues, the Counsel cited the case of **Patel vs. East African Cargo Handling Services** (supra) where Sir William Duffus, P. held that: -

> *"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 agree that 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. In this respect defence on the merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it "a triable issue" that is, an issue which raises a prima facie defence and which should go to trial for adjudication"*

18. It was submitted on behalf of the Defendant/Applicant that the latter raises the defence of having been a purchaser of a portion of the subject suit property *(emphasis are mine)* and has been in occupation thus the claim of adverse possession. The Counsel added that the defence raises triable issues which can only be determined through trial. The Counsel concluded by urging the Court to grant the orders sought since the application has merits.

19. The Counsel for the Plaintiff/Respondent submitted that the defence is hopeless and confusing since it has no counter claim, pleads that the Defendant/Applicant is a purchaser in paragraph 5 and adverse possessor in paragraph 7. The Counsel was of the view that a litigant must take a position in order to enable the court to know the issue in dispute between the parties.

20. Having read the application, replying affidavit and the submissions filed by the Counsel on record for the Defendant/Applicant and the Plaintiff/Respondent, my finding is as follows: -

21. Firstly, whereas I agree with the Counsel for the Plaintiff/Respondent that this suit herein belongs to the Defendant/Applicant and not to his previous advocate and whereas I further agree that it was upon the Defendant/Applicant to follow up the progress of this suit with his

then Counsel, it is not in dispute that even though Nathan Mbullo & Associates Advocates indicated on the 19th January, 2018 on the hearing notice served on them on even date that they had no instructions from the Defendant/Applicant, the said law firm did not file an application to cease acting. Having failed to file such an application and having failed to inform the Defendant/Applicant in writing through his last known address that they were no longer willing to continue representing him in court, the said law firm remained on record for the Defendant/Applicant for all practical purposes. The Defendant/Applicant has explained in paragraph 10 of his supporting affidavits that he made several attempts to see his then advocate but all was in vain. Clearly, the Defendant/Applicant cannot be blamed for the eventual outcome of this matter as he expected his advocate to keep him posted on the progress of the suit and as stated, made several efforts to meet his Counsel. I would therefore agree with the Defendant's/Applicant's Counsel that given the circumstances of this matter, the mistakes of the Defendant's/Applicants previous advocate cannot be visited upon the Defendant/Applicant.

22. From the authorities that were referred to me, it is clear that the primary duty of the court is to do justice to the parties and having found that the mistakes of the Defendant's/Applicant's Counsel then on record cannot be visited upon the Defendant/Applicant, it behooves this court to exercise its discretion to avoid injustice that would occur to the Defendant/Applicant if the orders sought are not granted.

23. I have looked at the defence that the Defendant/Applicant dated 20th December, 2016 and I note that he raises the issue of trust and in the alternative, adverse possess. In my view, that is a good defence on merits. He has also proffered sufficient cause for the delay. It does not necessarily mean that his defence should succeed at the end of trial. Though the judgement herein is regular, as noted in my ruling there is defence on merits. In the circumstances, therefore, I am satisfied that the application has merits and I will proceed to grant it in terms of prayers 2, 5 in so far as it relates to the subsequent hearing of the main suit thereof and 6. The Plaintiff/Respondent shall have thrown away costs.

Signed, dated and delivered at Makueni via email this **28th** day of **July, 2020.**

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka