REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 103 OF 2016.

MARGARET ODHIAMBO NELIMA.....PLAINTIFF

VERSUS

MINISTRY OF INDUSTRY, TRADE

AND CO – OPERATIVES.....1ST DEFENDANT

THE LAND REGISTRAR, BUNGOMA COUNTY.....2ND DEFENDANT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

The Notice of Motion dated 21st February 2020 was scheduled for hearing on 24th March 2020. However, following the **COVID – 19** pandemic and the scaling down of Court functions, it was not until 17th July 2020 that this file was brought to my attention by the Deputy Registrar upon receipt of the letter dated 24th June 2020 from the plaintiff's counsel to the effect that the parties had already filed their respective submissions.

By a Judgment dated 28th March 2018, **MUKUNYA J** ordered that the 1st and 3rd defendants pay the plaintiff Kshs. 9,200,000/= as compensation for the illegal compulsory acquisition of her land parcel **NO MALAKISI/TOWNSHIP/ 396** on which the Government had put up a soya bean processor. That Judgment followed an ex – parte hearing as none of the defendants, though served, had filed any defence to the plaintiff's claim.

The 1st, 2nd and 4th defendants have now moved to this Court by their Notice of Motion dated 21st February 2020 and anchored upon the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Article 50 of the Constitution** seeking the following remedies: -

1. That the ex – parte hearing and resultant Judgment delivered on 28th March 2018 and all consequential orders thereto be set aside and the case be heard on merit.

2. That the Defendants/Applicants be granted leave to file defence out of time within such reasonable time as the Court deem just and expedient.

3. That costs of the application be provided for.

The Notice of Motion which is the subject of this ruling is predicated on the grounds set out therein and supported by the affidavit of **GILBERT C. TARUS** a **SENIOR STATE COUNSEL** in the Office of the 4th defendant.

The gravamen of the application is that the 1st, 2nd and 4th defendants (the defendants) have a good and plausible defence to the plaintiff's claim and that it is fair that they be accorded an opportunity to be heard on merit in line with the rules of Natural Justice.That this Court has inherent jurisdiction to set aside the said Judgment and do justice to the parties. That the plaintiff is likely to execute the said Judgment as she has already filed at the **BUSIA ENVIRONMENT AND LAND COURT** a Judicial Review Application No. 2 of 2019 in which she is seeking orders of mandamus.

In the supporting affidavit, it is averred, inter alia, that at the time when the case was heard and Judgment delivered, it was the **ELDORET** office of the 4th defendant which was handling the matter and the file was only transferred to the **KAKAMEGA** office in June 2018. That

the service of the hearing notice at the **ELDORET** office was improper since matters falling within the jurisdiction of **BUNGOMA COUNTY** were being handled by the **KAKAMEGA** office a fact that was known to the plaintiff's counsel. That it is in the wider interest of justice that the said Judgment be set aside so that the matter is heard on the merits. That the delay in filing this application was occasioned by the fact that Counsel had been un – well for sometime in the year 2019 and could not therefore attend to this case. Annexed to the application is a copy of the letter dated 29th January 2019 which counsel wrote to the 1st defendant informing them of the Judgment, a copy of the letter dated 7th December 2017 advising the plaintiff's counsel to serve the hearing notice to the **ELDORET** office and a copy of the Judicial Review Application No 2 of 2019 filed at the **BUSIA ENVIRONMENT AND LAND COURT** – annextures **GCT 1 – GCT 3**.

The application is opposed and by her replying affidavit dated 15th May 2020 **MARGARET ODHIAMBA NELIMA** (the plaintiff herein) has deponed, inter alia, that she filed this suit after the 1st defendant demolished her home claiming that her land parcel NO **MALAKISI/TOWNSHIP/396** was Government land set aside for a soya bean processing project. That the defendants were duly served with the Plaint and Summons to Enter Appearance but none of them filed any Memorandum of Appearance nor attend the hearing though served with notices. That the Judgment was delivered with notice to all the parties and neither did the defendants protest when served with the bill of costs. That this application has been filed after 2 years and the defendants will not suffer any prejudice as the Judgment simply ordered the 1st defendant to compensate her after compulsorily acquiring her land. That the defendants have not annexed any credible defence nor a notice appointing **MR G TARUS** to act for them and therefore he has no right of audience. That plaintiff's counsel had been advised to be serving the **KAKAMEGA** office of the 4th defendant which was done without any protest and the defendants are therefore playing ping pong with the Court and cannot run away from their own file. That the defendants have displayed a lack of seriousness in this matter and their application ought to be dismissed with costs since the Judgment in **BUSIA ENVIRONMENT AND LAND COURT** Judicial Review Application is due for delivery. Annexed to her replying affidavit are copies of the Summons to Enter Appearance duly served upon the defendants and the affidavit of service.

The plaintiff having filed and served her submissions upon the **ATTORNEY – GENERAL'S KAKAMEGA** office on 5th June 2020, no submissions have been filed by the defendants. Indeed, the 3rd defendant filed no response to the application.

Submissions are not evidence and notwithstanding the failure by the defendants to file the same, this application can properly be determined on the basis of the rival affidavits herein.

Although counsel for the plaintiff faults the role of **MR G. TARUS** in these proceedings citing a violation of **Order 9 Rule 7 of the Civil Procedure Rules**. That provision which provides as follows is inapplicable: -

> ***"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."*** Emphasis added.

I do not think that the above provisions, or even the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** which refer to change of advocate after Judgment can apply in the circumstances of this case. This is for the simple reason that the defendants neither entered appearances nor filed any defences to the plaintiff's claim. The case against them proceeded ex – parte and therefore it is perfectly in order for **MR G. TARUS** to come on record for the defendants.

Although the application is premised on the provisions of **Sections 1A**, **1B and 3A of the Civil Procedure Act** and **Article 50 of the Constitution**, the correct provision is **Order 10 Rule 11 of the Civil Procedure Rules**. That lapse is however not fatal to the application which I shall consider on its merits.

The Court's power to set aside an ex – parte Judgment is a matter of discretion. The main concern of the Court is to do justice to the parties. The principles that have evolved over time is that where service was not proper, the resultant ex – parte Judgment being irregular will be set aside as a matter of law – ex debito justitiae. However, even where the ex – parte Judgment was regular, the Court still retains the discretion to set it aside if satisfied that it is in the interest of justice to do so and, most importantly, that there is a defence which ought to go to trial.

In **PATEL .V. EAST AFRICA CARGO HANDLING SERVICES LTD 1974 E.A 75 SIR DUFFUS** stated thus: -

> ***"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."*** Emphasis added.

That discretion is not designed to assist a party who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Rather, it is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error – **SHAH .V. MBOGO 1967 E.A 116**.

In **TREE SHADE MOTORS LTD .V. D.T. DOBIE & ANOTHER 1995 – 1998 E.A 324**, the Court held that: -

> ***"Even if service of summons is valid, the Judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default Judgement, the Court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the Court could set the ex – parte Judgment aside."*** Emphasis added.

See also **CMC HOLDINGS .V. JAMES NZIOKI 2004 1 KLR 173** where the Court of Appeal stated that the discretion to set aside an ex – parte Judgment must be exercised upon reasons and judiciously and the Court must also consider if there is a defence that raises triable issues. Those are the principles that will guide this Court.

In urging this Court to set aside the ex – parte Judgment herein, **MR GILBERT TARUS** in his supporting affidavit has placed a lot of premium on the fact that the hearing notice was served upon the **ATTORNEY GENERAL'S KAKAMEGA** office rather than the **ELDORET** office which would ordinarily handle matters filed at the **BUNGOMA HIGH COURT**. That may be so but surely, the office of the **ATTORNEY – GENERAL** is a public institution with offices situated in most major towns. It is not a private entity. Indeed, some of the documents including the mention notice for 10th April 2017 were served at the **ATTORNEY – GENERAL**'s offices in **NAIROBI** as per the Affidavit of Service filed by **SEBASTIAN TIKOLO** on 10th April 2017. There is also the Affidavit of Service filed by **R. KAMAU** on 13th August 2018 showing that on 10th August 2018, a taxation notice was served upon the **ATTORNEY – GENERAL'S ELDORET** office yet the record shows that when the plaintiff's bill of costs came up for taxation before the Deputy Registrar on 15th August 2018, there was no representation from that office. It is not clear why, if documents were being served in the wrong office of the **ATTORNEY GENERAL**, they were not promptly forwarded to the right office for appropriate action. In any event, there is the clear finding by **MUKUNYA J** at page 5 of his Judgment that: -

> ***"The plaintiff's claim has not been opposed or controverted in any way by the defendants who were duly served with the pleadings and hearing notices."***

It is instructive to note that even though the **ATTORNEY GENERAL'S KAKAMEGA** office was duly served with the plaintiff's submissions on 5th June 2020 through its clerk one **MARGARET**, as per the Affidavit of Service dated 3rd July 2020 and filed by **STEPHEN OTAGET OFULA** a Process Server of this Court, no submissions have been filed by the defendants. To her credit, the plaintiff not only served the **NAIROBI** office of the **ATTORNEY GENERAL** but also the **ELDORET** office and it is strange that no representative from those offices attended Court at any time. In the circumstances, this Court can only agree with the averment in paragraph 35 of the plaintiff's replying affidavit that the defendants have ***"displayed a clear lack of seriousness in this matter."***

Having found that the ex – parte Judgment herein was a regular one, this Court still has the discretion to set it aside. However, the defendants must demonstrate that they are entitled to the exercise of this Court's discretion in their favour.

The Judgment sought to be set aside was delivered on 28th March 2018. This application was filed on 24th February 2020 which is 2 years later. The explanation, as per paragraph 10 of the supporting affidavit by **MR G. TARUS** is that he ***"had been un – well for some time in the year 2019 and hence could not attend to the case."*** That however does not explain why this application was not filed earlier. There is also the letter dated 29th January 2019 (annexture **GCT 1**) in which **MR G. TARUS** wrote to the 1st defendant informing it about the said Judgment and seeking instructions. It is not clear why it took the 1st defendant a whole year to file this application.

This application appears to have been filed only as an attempt to scuttle the proceedings in **BUSIA ENVIRONMENT AND LAND COURT CASE NO 2 OF 2019** in which the plaintiff is seeking an order of mandamus with regard to the said Judgment. That is clear from paragraph 8 of the supporting affidavit of **MR G. TARUS** where he has averred as follows: -

> ***"That the plaintiff/Respondent has already filed for Judicial review orders of mandamus to compel the Applicants/Defendants to make payment being BUSIA ENVIRONMENT AND LAND COURT JUDICIAL REVIEW NO 2 OF 2019 (annexed and marked as GCT 3 are copies of the pleadings)."***

This is a clear demonstration that the defendants are deliberately seeking whether by evasion or otherwise, to obstruct or delay the course of justice by not satisfying the decree herein. It cannot be described as the conduct of a party seeking to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake – **SHAH .V. MBOGO** (supra).

Finally, in exercising my discretion to set aside the Judgment herein, this Court must consider whether there is infact a defence that raises any triable issues – **PATEL .V. EAST AFRICA CARGO HANDLING SERVICES LTD** (supra). In **JAMES KANYITTA NDERITUY & ANOTHER .V. MARIOS PHILOTAS GHIKAS & ANOTHER 2016 eKLR**, the Court of Appeal stated as follows with regard to the setting aside a regular ex – parte Judgment: -

> ***"In such a scenario, 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 others."*** Emphasis added.

It was therefore important that the defendants annexed to the supporting affidavit a draft defence to enable this Court gauge whether or not it raises triable issues that ought to go for adjudication. Other than seeking leave to file their defence out of time, the defendants have not annexed any draft defence without which, this Court will not be in a position to decide whether infact they have any defence to the plaintiff's claim. That explains why the plaintiff in paragraph 28 of her replying affidavit has deponed as follows: -

> ***"That I have not seen a memorandum of appearance nor a credible defence nor a notice of appointment by MR TARUS to appear for the other parties i.e. Judgment debtors."***

In the circumstances, there can be no basis upon which this Court can exercise it's unfettered discretion in favour of the defendants.

The up – shot of all the above is that the Notice of Motion dated 21st February 2020 and filed herein on 24th February 2020 is devoid of any merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

24th July 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 24th day of July 2020. To be delivered through electronic mail with notice to the parties in line with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

24th July 2020.