REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC CASE NO. 54 OF 2013

AS CONSOLIDATED WITH ELC NO. 344 OF 2013

GRACE CHEROTICH KEMBOI

(Suing through her duly appointed attorney

ELIJAH KIPRUTO RONO.....PLAINTIFF

VERSUS

SIMON KIPKOECH NGOTWA.....1ST DEFENDANT

DADSON NJUGUNA GACHOKA.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 23rd April, 2020 by the defendant respondent seeking for the following orders:

a) That pending the hearing and determination of this application, this Honourable Court be pleased to stay the execution of the ex parte Judgement delivered on 26th February, 2020 and all other consequential orders therein.

b) That this Honorable Court be pleased to set aside the ex parte Judgement delivered on 26th February, 2020 and any other Consequential orders therein and the matter be set down for hearing.

c) Costs of this application be provided for.

Counsel agreed to canvass this application vide written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel submitted that the matter herein proceeded ex parte and judgment was entered against the defendants. Counsel admitted that indeed there was service which inadvertently was not communicated to the advocate on the 10th December, 2019 who only came to learn of the judgment that was delivered on the 26th February, 2020.

Counsel further submitted that the defendants have always been willing to attend court and the hearing of this matter to conclusion and that mistake of the advocate should not be visited on the defendants who may lose greatly their investments. That the court has the discretion to set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Mr Chepkilot counsel for the defendant cited the case of **Patel vs EA cargo handling services ltd (1974)EA 75** where the court held as follows:

> *There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."*

Counsel stated that the defence has triable issues that should go for trial for a just determination for both parties. Counsel therefore urged the

court to exercise its discretion in favour of the defendant and set aside the ex parte judgment.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

The plaintiff/respondent opposed the application vide a replying affidavit. Counsel submitted that the defendant's Advocates on record Tarus and Company Advocates were duly served with a hearing notice dated the 28th September, 2019 on 2nd October, 2019 which was duly acknowledged as per annexures 'A' and 'B' to the replying affidavit.

Mr. Mogambi also submitted that the defendants and their advocate had sufficient time to prepare to attend court and that no reason has been given for the failure of both the advocate and the defendants to attend court on the date of the hearing.

It was counsel's submission that even after the matter had proceeded ex-parte, the defendants were again through their advocates informed well in advance that judgment was scheduled to be delivered on the 11th February, 2020 and the notice was well acknowledged as evidenced by annexure 'C' to the replying affidavit. No application was made to arrest the delivery of the judgment. Further that the applicants have failed to give a proper reason to enable the court exercise the discretion to set aside the judgment in this matter. They have failed to demonstrate sufficient or good cause for the same.

Counsel cited the case of **Honourable Attorney General v The Law Society of Kenya & Another, Court of Appeal Civil Application no. 133 of** 2011 in where it was held;

> *"Sufficient cause or good cause in law means: The burden placed on a litigant usually by a court, rule or order to show why a request should be granted or an action excused. (See Blacks Law dictionary 9th Edition Page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and trustful. It should not therefore be an explanation that leaves doubt in the Judges mind The explanation should not leave unexplained gaps in the sequence of events".*

That the applicants have also raised the issue that if at all their Advocate was served with the hearing notice then they were never informed and that the mistake should not be visited upon them. Counsel alluded to the history of the matter which he submitted that it confirms that the defendants have been delaying the conclusion of this matter and that it is not enough for the defendants to simply blame their advocate for all manner of transgressions.

Mr. Mogambi relied on the case of **Rajesh Rughani v Fifty Investment Ltd & Another,**

> **(2005) eKLR** in where the court held;
>
> *"It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy. "*

Counsel therefore submitted that setting aside of the judgment will cause undue hardship to the plaintiff who based on the fact that the defendants never moved with speed to set aside the proceedings or lodge an appeal. Mr Mogambi urged the court to dismiss the application with costs to the plaintiff/respondent as it lacks merit.

ANALYSIS AND DETERMINATION

The issues for determination in an application for setting aside ex parte judgment are as to whether there was proper service of a hearing notice, whether the judgment on record was regular or irregular, and whether the applicants are entitled to stay of execution of the decree and order of the court.

The first issue is whether there was proper service of a hearing notice on the advocates for the defendant. It is not disputed that a hearing notice was served on the advocate for the defendant, what counsel contends is that they were served but inadvertently did not inform the client of a hearing date. The history of this matter shows that on the date when the matter came up for mention on 31st October 2018 for purposes of confirming filing of submissions, counsel was present and a judgment date was given in his presence. He just told the court that he noticed that the matter had proceeded ex parte. Counsel did not bother to make an application to arrest the delivery of judgment.

On 28th February 2018 when matter was due for delivery of judgment counsel for the defendant filed an application for setting aside the ex parte proceedings of which they filed a consent allowing the recall of the plaintiff for cross examination which was adopted as the order of the court. The matter was therefore fixed for hearing on 10th December 2019 when the defendant and his counsel were absent. The matter proceeded and a judgment date given.

From the above it is clear that the defendant's counsel was duly served with a hearing notice, given a second chance to avail his client but did not do so. The tired phrase of mistake of counsel should not be visited upon a client does not apply in this case. No other reason or sufficient cause has been advance to enable the court exercise its discretion in favour of the applicant.

In the case of ***Bl Mech Engineers Ltd v James Kahoro*** Mwangi, (2001) eKLR in which Justice Waki J.A as he then was held;

> *"The applicant had a duty to pursue his advocate to find out the position of the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.*

If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with some sympathy. "

The court can only sympathize with the applicant and go no further than that.

On the issue as to whether the judgment was regular or irregular, the court is guided by the case of **James Kanyiita Nderitu & Another =Versus= Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)**,the learned Judges of Appeal had this to say;-

"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. 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 other. See Mbogo & Another v. Shah (supra), Patel v. EA. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456)'.

This case falls under the category of regular judgment. It should be noted that the defendants entered appearance, filed defence and have been participating in the case through their advocate on record. Further the Advocate made a case for them and were allowed to reopen the case and cross examine the plaintiff but they did not show up. They were accorded the right to be heard but squandered the opportunity. I therefore find that the judgment was regular.

This matter was consolidated with E &L No 344 of 2013 which was analyzed in the judgment and a verdict rendered which dismissed it with costs. The applicant also delayed in filing the application as the judgment was delivered on 26th February 2020 and the application was filed on 23rd April 2020, that is a period of two months. No explanation was given for the delay. Note that this was before the Covid Pandemic so that should not be an excuse for the delay.

The court will therefore not look at the issue of stay of execution as the applicant has failed to give reasons why they did not attend court during the hearing.

Having found that there was proper service and that there was inordinate delay in bringing an application for setting aside I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

DATED and **DELIVERED** at **ELDORET** this **21ST** DAY OF **JULY, 2020**

M. A. ODENY

JUDGE