



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC CASE NO. 18 OF 2015**

**(FORMERLY E.L.C. KERUGOYA 659 OF 2013)**

**NGARI KIRANGA.....PLAINTIFF**

**VERSUS**

**JERUSHA MUCOGO KIURA.....DEFENDANT**

***(BY ORIGINAL ACTION)***

**JERUSHA MUCOGO KIURA.....PLAINTIFF**

**VERSUS**

**NGARI KIRANGA.....1<sup>ST</sup> DEFENDANT**

**SAMSON KIRIA NGARI.....2<sup>ND</sup> DEFENDANT**

**MARY MUTHONI KIRIA.....3<sup>RD</sup> DEFENDANT**

***(BY COUNTERCLAIM)***

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 10<sup>th</sup> June 2020 expressed to be brought under **Articles 48 and 50 (1)** of the **Constitution of Kenya 2010**, **Sections 1A, 3 and 3A** of the **Civil Procedure Act (Cap. 21)**, **Order 5 Rules 1, 2, 5 and 6**, **Order 7 Rules 5, 8, 9 and 10** and **Order 10 Rule 11** of the **Civil Procedure Rules** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought the following orders:

- a. Spent
- b. Spent
- c. That the Judgement and decree of this honourable court dated 20<sup>th</sup> February 2020 and all consequential orders be set aside.
- d. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim be granted leave to enter appearance to the counter claim, to file their defences and to defend the counter claim and that the suit and the counter claim be heard afresh and be determined on merits with all parties including the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counter claim participating.
- e. That costs be provided for.

**B. THE 2<sup>ND</sup> & 3<sup>RD</sup> DEFENDANTS' CASE**

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the

2<sup>nd</sup> Defendant on 10<sup>th</sup> June 2020. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that they were never served with summons to enter appearance to the counterclaim and that the suit had proceeded without their knowledge and participation. They contended that they had an interest in the suit property which they had occupied for a very long time and that it was a violation of their constitutional rights to condemn them unheard.

### **C. THE PLAINTIFF'S RESPONSE**

3. The Plaintiff in the counterclaim filed a replying affidavit sworn on 16<sup>th</sup> June 2020 in opposition to the said application on several grounds. First, it was contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were at all material times represented by the firm of Duncan Muyodi & Co. Advocates and that they duly filed a reply to the amended defence and defence to counterclaim in the suit. Second, it was contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants never raised the issue of service of summons to enter appearance at the trial of the suit. Third, it was contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had already filed a notice of appeal against the judgement and decree of the court hence they could not apply for setting aside. Finally, it was contended that the application was merely an afterthought which was intended to unduly prolong the dispute amongst the parties.

### **D. DIRECTIONS ON SUBMISSIONS**

4. When the said application was listed for hearing on 18<sup>th</sup> June 2020 it was directed that the application be canvassed through written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were granted seven days to file and serve their written submissions whereas the Plaintiff was granted seven days to do likewise upon the lapse of the period granted to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The record, however, shows that none of the parties had filed submissions by the time of preparation of the ruling.

### **E. THE ISSUES FOR DETERMINATION**

5. The court has considered the notice of motion dated 10<sup>th</sup> June 2020 together with the supporting affidavit and annexures thereto, the replying affidavit sworn on 16<sup>th</sup> June 2020 in opposition thereto and the entire material on record. The court is of the opinion that the following issues arise for determination:

- a. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have made out a case for setting aside the judgment and decree dated 20<sup>th</sup> February 2020.
- b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should be granted leave to defend the Plaintiff's counterclaim.
- c. Who shall bear costs of the application.

### **F. ANALYSIS AND DETERMINATIONS**

#### **a. Whether the judgement dated 20<sup>th</sup> February 2020 should be set aside**

6. The court has considered the grounds set forth in support of the prayer for setting aside. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contended that they were never served with summons to enter appearance to the counterclaim hence they were condemned unheard. They appeared to suggest that they were not aware of the counterclaim and they did not participate in the proceedings. The court has considered the material on record and finds that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appointed advocates to act for them and they duly filed a defence to counterclaim.

7. In paragraph 7 of their defence to counterclaim it was stated as follows:

**“The Defendants in the counterclaim admit the contents of paragraph 15 (a) and 15 (b) of the counterclaim in as far as the same are descriptive of the parties herein save to add that the address of service of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall be care of Duncan Muyodi & Co. Advocates, Neema Plaza, 2<sup>nd</sup> floor, Room 210 off Mama Ngina Street P.O. Box 646-60100 Embu.”**  
(emphasis added)

8. In paragraph 9 of their defence to counterclaim, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied that the Plaintiff had licensed them to reside on the suit property. The 2<sup>nd</sup> Defendant pleaded the he was born on the suit property and had lived thereon since birth hence he did not require the Plaintiff's permission to continue living there. They also denied being trespassers on the suit property.

9. The material on record shows that during the hearing the firm of Duncan Muyodi & Co. Advocates appeared for all the Defendants in the counterclaim. The record further shows that the 2<sup>nd</sup> Defendant is a son of the 1<sup>st</sup> Defendant who was the Plaintiff in the original action whereas the 3<sup>rd</sup> Defendant is the wife of the 2<sup>nd</sup> Defendant. Those family relations have not been disputed.

10. The court is of the opinion that once 2<sup>nd</sup> and 3<sup>rd</sup> Defendants voluntarily submitted to the jurisdiction of the court by appointing an advocate and filing a defence to counterclaim, the issue of whether or not there was service of summons to enter appearance became moot. Lack of service would have been of great significance had the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants not submitted to the jurisdiction of the court by filing a defence to the counterclaim. What happened in the instant suit is that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not choose to personally testify at the trial. However, the Defendants' advocate called 2 witnesses at the trial one of whom was the 1<sup>st</sup> Defendant.

11. Although the court has wide discretion to set aside an *ex parte* judgement, such discretion is judicial in nature. It must be exercised

judicially and upon reason. It cannot be exercised upon whim, caprice, or sympathy. In the case of **Shah V Mbogo & Another [1967] EA 116** at p. 123 Harris J summarized the applicable principles as follows:

**“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgement obtained ex parte. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice ...”**

12. The court is of the opinion that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fall perfectly into the class of litigants who are seeking to delay or obstruct the course of justice. They are simply seeking to have a second bite at the cherry after losing in the first instance. They did not personally attend court to testify on their behalf at the trial. No application for adjournment was made on their own behalf. They had not filed any witness statements by the time of trial. They were simply content to let their father and another witness testify on their behalf but sought to distance themselves from the trial after judgement.

13. The court is also concerned that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were less than candid in their disclosure of when they became aware of the proceedings and judgement. The impression they created was that they were surprised when the Plaintiff sought to reclaim the suit property in April 2020 or thereabouts. They appeared to feign ignorance of the proceedings leading up to the judgment. However, the material on record shows otherwise. There is a copy of a notice of appeal dated 4<sup>th</sup> March 2020 indicating that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were intending to appeal against the whole of the judgment and decree dated 20<sup>th</sup> February 2020. So, if the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were aware of the judgement of 20<sup>th</sup> February 2020 why did they wait until 12<sup>th</sup> June 2020 in order to file the instant application for setting aside? Although the court is aware of the prevailing Covid-19 situation the period of delay between February and June 2020 has not been satisfactorily explained. It may well be an indication that the instant application is merely an afterthought intended to delay the course of justice.

**b) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should be granted leave to defend the Plaintiff’s counterclaim**

14. This issue is clearly intertwined with the 1<sup>st</sup> issue. It is dependent upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants demonstrating a case for setting aside the judgment and decree dated 20<sup>th</sup> February 2020. Since they have failed in their quest to set aside the judgement, it would follow that they are not entitled to another chance to defend the Plaintiff’s counterclaim. Accordingly, this issue is answered in the negative.

**c) Who shall bear costs of the application**

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant in this matter should be deprived of costs. Accordingly, the Plaintiff shall be awarded costs of the application against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants only.

**G. CONCLUSION AND DISPOSAL ORDER**

16 The upshot of the foregoing is that the court finds no merit in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ notice of motion dated 10<sup>th</sup> June 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the Plaintiff. It is so decided.

**RULING DATED and SIGNED** in Chambers at **EMBU** this **9<sup>TH</sup> DAY** of **JULY 2020** and delivered via Microsoft Teams platform in the presence of Ms. Rose Njeru for the Plaintiff in the counterclaim and Ms. Nzekele holding brief for Mr. Okwaro for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim.

**Y.M. ANGIMA**

**JUDGE**

**09.07.2020**