



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 174 OF 2013

SAID JUMA SAID & 19 OTHERS.....PLAINTIFFS

VERSUS

ALI MOHAMED MWIZANGU.....DEFENDANT

RULING

1. The application coming up for determination is the Notice of Motion dated 19th August, 2019 brought under Section 3A of the Civil Procedure Act, Order 12 Rule 7, Order 51 Rule 1, Order 45 Rule 1 and Order 22 Rule 22 of the Civil Procedure Rules. The Application seeks stay of execution of judgment delivered on 9th May 2019 and the decree extracted therefrom as well as to set aside the said judgment with all consequential orders therefrom and for the plaintiffs/applicants to be granted leave to file their reply to defence and defence to counter-claim.

2. The application is supported by the affidavit of Said Juma Said sworn on 19th August 2019 and is premised on the following grounds:

- 1. Judgment has been entered against the plaintiffs/applicants.**
- 2. There are currently active orders of eviction from the suit property and demolition of the applicant's structures thereon. If the prayers sought are not granted the applicant will suffer irreparable loss.**
- 3. The applicants' case was dismissed and judgment entered in default of attendance owing to the plaintiffs/applicant advocates then on record Messrs Kedeki & Co. Advocates failure to inform them of the hearing date and therefore they should not be punished for the mistake of their counsel.**
- 4. The plaintiffs/applicants were not informed by their then advocates on record when the matter was coming up for hearing on various dates.**
- 5. The plaintiffs/applicants were never served with any notice of entry of judgment nor execution as required under the law.**
- 6. The plaintiffs/applicants have a strong arguable case and the ends of justice will be defeated if they are not allowed to canvass the same at full trial.**
- 7. The respondent will not be prejudiced if the judgment is set aside.**
- 8. The plaintiffs/applicants should not be punished for the mistakes of their counsel and it would be in the circumstances just and equitable to grant the prayers sought by the applicants.**

3. Mr. Said Juma Said has deposed inter alia, that they lodged this matter in court through the firm of Kedeki & Co. Advocates whom they instructed to represent them. That during the pendency of the case, their advocate would continually inform them that she was litigating on their behalf as expected and that she would communicate to them in case she required their presence for anything in the case. He avers that they were never served with any application by their advocate to cease acting nor any notice of hearing for the same, hence were not aware that the said firm had stopped attending court on the applicants' behalf. The applicants aver that there is no plaintiff by the name Said Mwatasi who is indicated to have received the application. That failure by their advocate to serve the applicants meant that the subsequent mentions and/or hearing were conducted in their unintended absence. The applicants state that they were never served with notices for mention or hearing for 13th December, 2018 and 19th March 2019 as well as notice for judgment on 5th May, 2019. The applicants state that despite the application to cease from acting having been allowed a hearing notice dated 16th November, 2018 and judgment notice for the plaintiffs was served by the court upon the firm of Kedeki & CO. Advocates. That it is only upon perusing the court file on 12th August 2019 after the firm of Kedeki & Co. Advocates had indicated they had ceased acting for the applicants that the applicants learnt of the judgment

and immediately filed the present application.

4. In opposing the application the Defendant/Respondent filed a replying affidavit sworn by Joseph Karanja Kanyi Advocate on 4th September, 2019. He deposed that Kituo Cha Sheria the Applicant purported agents, have not locus to institute the application and the same is therefore a non-starter. That the applicants have not exhibited any evidence of any application to cross-examine the deponent of the affidavit of service of the application to cease acting. He further deposed that after the applicants then advocate was granted leave to cease acting for the applicants, the Respondent made an application for leave to serve the applicants through advertisement in the Daily Newspaper, and that subsequently the mention and hearing notices were effected by advertisement in the Standard Newspaper, but the applicants failed to attend court. That the applicants having been awakened by execution of the lawful decree are totally not deserving of the orders sought. That the respondent has since filed his party and party bill of costs which is due for taxation and the instant application is simply an attempt to obstruct the hearing of the said bill of costs. He avers that litigation must come to an end.

5. The application was canvassed by way of written submissions. The applicants filed their submission on 1st November, 2019 while the respondent filed his on 15th November, 2019.

6. I have considered the application, the affidavits in support and against as well as the rival submissions. The main issues for determination is whether the judgment herein should be set aside.

7. The applicants instituted this suit by the originating summons dated 13th August 2013 and filed on even date through the firm of Kedeki & Co. Advocates. The record shows that on 17th March, 2017, the firm of Kedeki & Co. Advocates filed an application for leave to cease acting for the reasons that they no longer had instructions as they had lost contact with their clients, the applicants herein. The record further shows that the court (Komingoi, J) after satisfying itself that service had been duly effected upon the applicants allowed the said application and granted leave to the firm of Kedeki & Co. Advocates to cease acting for applicants on 1st April, 2017. It is therefore not in dispute that from 1st April, 2017 the applicants were acting in person, their advocate having removed herself from the record.

8. The record further shows that pursuant to an application made by the Respondent, the court on 6th November, 2017 granted leave to the Respondent to serve notices on the applicants by means of advertisement in a daily newspaper. The record further shows that the matter was fixed for hearing on 5th December, 2018. The applicants were duly served by way of substituted service by advertisement in the Standard Newspaper of 28th November, 2018. When the matter came up on 5th December, 2018 before Waithaka, J, the applicants did not attend court. Only the Respondent was present in court. Upon satisfying itself that the applicants were duly served by way of substituted service through advertisement in the standard Newspaper, the court dismissed the applicants' case for non-attendance and proceeded to hear the Respondent's counter-claim.

9. The applicants have now moved the court to set aside the judgment that was subsequently entered by the court on 9th May, 2019. It is clear from the preceding paragraphs that the judgment entered herein was procedurally entered. The applicants main ground in the instant application is that their advocates then on record Messrs Kedeki & Co. Advocates failed to inform them of the hearing date, hence their failure to attend court during the hearing. It is clear, however, that by 5th December, 2018, Messrs Kedeki & Co were no longer on record for the applicants and therefore the applicants were in person. It is also quite clear that the applicants were duly served by substituted service through advertisement in the Standard Newspaper on 28th November 2018. The applicants have chosen not to refer to the notice that was served on them through the newspaper and instead attribute their non-attendance to their previous advocates. To me, the applicants are not candid. I find the explanation given by the applicants for their non-attendance to be irrelevant and not credible.

10. In the case of **Shah –v- Mbogho (1967) EA EA 116**, the court has discretion to grant the orders sought herein. Such discretion is intended 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 evasions or otherwise, to obstruct or delay the course of justice. The essence of justice is to allow each party to ventilate his/her case in full and courts ought to be slow to shut out a party from presenting his/her case. Where there is good reason provided, the court generally ought to allow an application to set aside.

11. In the circumstances of this case, I think no adequate reason has been provided as to the absence of the applicants in court on 5th December, 2018. The reasons given are not convincing and I am unable to believe them. This is so because for reasons only known to the applicants, the applicants never made any reference to the service that was effected upon them personally and not through their previous advocates. The inference one can draw is that the applicants deliberately evaded the issue of service on them by substituted service through advertisement in the newspaper even when the same has been brought to their attention, to obstruct or delay the course of justice.

12. For the above reasons, I am of the view that the applicants' notice of motion dated 19th August 2019 lacks merit. I am not convinced that good reason has been provided as to the absence of the applicants on the day that the applicants' suit was dismissed for non-attendance and the respondent's case heard. I dismiss the application with costs to the respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant