



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
ELC CIVIL CASE NO. 430 OF 2013

MARY CHEPKEMOI TERES.....PLAINTIFF

VERSUS

BENJAMIN ARAP CHESURUT.....1ST DEFENDANT

KIROBON FARMERS LIMITED.....2ND DEFENDANT

RULING

1. The Applicant, **Mary Teres Kositany**, filed a Notice of Motion dated 29th July, 2012 seeking the following orders:-

1) **spent**

2) **That this Honorable Court be pleased to set aside the Ex parte Orders granted on 19th May, 2010 and consequently reinstate the Decree dated 8th April, 2002.**

3) **spent**

5) **That costs of the application be in the cause.**

2. The Application is premised on the grounds set out therein and is supported by an affidavit sworn by the Applicant and dated 29th July, 2012. She deponed that she is the rightful owner of 14 acres comprised in land reference number 545/111 having obtained a judgment and decree in her favour; that subsequently the respondents successfully applied to have the judgment set aside ex-parte; the applicant avers that she was not informed by counsel nor did she instruct the counsel.

3. Despite service of the application to the respondents, the respondents did not file any response.

4. I have considered the said application and written submissions filed by the Applicant on 6th November, 2013.

5. The principles guiding the setting aside of ex-parte judgments were comprehensively dealt with by the Court of Appeal in **CMC Holdings Limited vs Nzioki [2004]** 1 KLR 173 where it was held that:

“In an application for setting aside *ex parte* judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised judiciously... in law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.

6. In our instant case, counsel submitted that he was not present in court when the respondent's application came up for hearing. He had however engaged a counsel with instructions to adjourn the matter in order to allow him seek further instructions from his client (the applicant herein). The court ruled that the reason adduced was not sufficient and ordered the application to proceed immediately. It was counsel's submission that the applicant is an elderly person and not readily reachable through modern communication and only relies on information from her relatives. I do believe that if this was clearly brought out on the date of hearing, the presiding judge would have reached a different conclusion.
7. For this reasons, I do find that if the court does not exercise its discretion, an injustice shall be visited upon the applicant as a result of inadvertence on the part of her counsel. It is my view that the counsel ought to understand the peculiar circumstances of her client. However, it may be difficult as submitted by counsel, to get instructions on time.
8. As a result, I do hereby allow the application and set aside the Ex parte orders granted on 19th May, 2010. Costs of this application to be in the cause.

Dated, signed and delivered on this 14th day of February 2014.

L N WAITHAKA

JUDGE.

PRESENT

Mrs Mbeche holding brief for Mr Kipkoech for plaintiff/applicant

N/A for Defendant/Respondent

Emmanuel Maleo: Court Clerk

L N WAITHAKA

JUDGE