



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 194 OF 2011

PRISCILLA NDUTA KAIRU

WAITHIRA KARANJA

PERIS WAMBUI

HENRY NJOROGE KAMANDE

ALL TRAINING AS EXCEL BAMBOO

PREPARATORY SCHOOL :::PLAINTIFFS

-VERSUS-

KEZIAH NJERI GACHANJA

D. K MWANGI TRAINING AS KENYA

SHIELD AUCTIONEERS ::: DEFENDANTS

RULING

1. Before the Court is the Plaintiffs **Notice of Motion** dated 14th October 2013 and filed on even date. It is taken out under **Order 36 rule 10** of the **Civil Procedure Rules, Section 3A of the Civil Procedure Act** and **Article 159** of the **Constitution** seeking to set aside the *ex parte* judgment entered against them on **24th January 2013**.
2. The application was made on the grounds that the Plaintiffs were unaware of the proceedings leading to the *ex parte* judgment as their former Advocates did not inform them of the same. It was also the Plaintiffs' claim that their former Advocates acted without instructions in the said proceedings.
3. The Application was supported by the affidavit of **Waithira Karanja** sworn on **14th October 2013**.
4. In the said affidavit, the deponent gives the background to the current application. The deponent also gives their facts pertaining to the current suit. In my view, this suit has been determined by

- the ruling that the Plaintiffs are seeking to set aside. If I were to go into the merits of the said facts that would amount to sitting on an appeal of a Court with equivalent jurisdiction. I will therefore confine myself to that which is necessary for the determination of orders of setting aside.
5. It is the deponent's assertion that the Plaintiffs came to learn of the ruling dated **24th January 2012** delivered by Honourable Justice Mutava when they attended the Dagoretti Districts Land Disputes Tribunal on **19th September 2013**.
 6. The Plaintiffs had attended the Tribunal for the hearing of a land case they had filed against the 1st Defendant. It is averred for the Plaintiffs that in 2005 they had bought land parcel No. Dagoretti/Riruta/5378 from the husband (now deceased) of the 1st Defendant which had not yet been transferred to them. The Plaintiffs sought the intervention of the tribunal after hearing rumours that the 1st Defendant was trying to sell the said property.
 7. It is the Plaintiff's case that their former Advocates did not inform them of the proceedings in this matter culminating in the *ex parte* Ruling of 24th January 2012. It is also their case that the said Advocates never sought their instructions in response to the several applications filed by the Defendants culminating to the *ex parte* Ruling. According to the Plaintiffs there was collusion between the 1st Defendant's Advocates and their former Advocates in concealing the said proceedings from them.
 8. The deponent urges this Court to exercise its discretion in their favour and to set aside the *ex parte* Ruling on the basis that they have a strong case against the Defendants.
 9. The Application is opposed. There is an undated replying affidavit of the 1st Defendant filed on **31st December 2013**. The Defendants also filed a Notice of Preliminary Objection and Grounds of Objection dated **25th March 2014** on even date.
 10. In the Replying affidavit the deponent replies to the issues raised by the Plaintiffs in their supporting affidavit as relates to the facts of the case. As I have earlier stated the same are not of relevance to the current application for setting aside and I will not delve into the same.
 11. The 1st defendant in her affidavit admits that there was a case at the District Land Disputes Tribunal only that the same was filed by the Plaintiffs in an attempt to shop for favourable orders. It is the deponent's assertion that no evidence has been adduced to establish that the Plaintiffs were unaware of the proceedings before the Court culminating to the *ex parte* ruling. According to the Defendants, the claim by the Plaintiffs of the ignorance of the Court proceedings is merely a gimmick aimed at misleading the Court into granting the orders sought.
 12. In the Preliminary objection, it is the Defendants' position that there is no *ex parte* Judgment as alleged capable of being set aside. Further, it is their position that the Advocates filing the Application on behalf of the Plaintiffs are improperly on record.
 13. The Defendants raised several grounds of objection which can be summarised as follows. It is the Defendants' position that the grounds in support of the Application are mere unsupported and baseless allegations of fact. It is averred for the Defendants that the allegations made by the Plaintiffs against their former Advocates should not be entertained in the absence of clear evidence. According to the Defendants, the said Advocates should be given an opportunity to defend themselves against such allegations.
 14. It is the Defendants' case that the *ex parte* Ruling was issued subsequent to the matter being heard and determined on its merits.
 15. The Application was orally canvassed before me on **22nd May 2014** whereby Mr. Kamunya appeared for the Plaintiffs while Mr. Gachanja appeared for the Defendants.

ANALYSIS

16. I have considered the Application, the affidavits on record and the Grounds of Objection as filed by the Defendants. I have also considered the oral submissions by Counsel in coming up with this ruling.
17. I will begin with the preliminary issues as raised by the Defendants in their Notice of Preliminary Objection dated **25th March 2014**. It is the Defendants' position that there is no *ex parte* Judgment as alleged capable of being set aside.

18. The Plaintiff in their application refers to an *ex parte* Judgment entered against them on **24th January 2013**. I believe that was an error on their part. From the pleadings on record it is clear that the Plaintiffs seek to set aside the Ruling delivered on **24th January 2012**. Therefore, I consider this a normal error which can cause no prejudice to the parties herein.

19. On the issue of whether the Plaintiffs' current Advocates are properly on record, it was Counsel's submissions that the said Advocates did not seek the leave of the Court and also there was no Consent as required under **Order 9 rule 9** of the **Civil Procedure Rules**. On the other hand, Counsel for the Plaintiff submitted that leave of the Court to come on record was not necessary since a final decree in the suit had not been issued.

20. **Order 9 rule 9** of the **Civil Procedure Rules** provides as follows:-

"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court

***(a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."** Underlining Supplied*

The said provision is categorical that once Judgment has been passed one has to seek the leave of the Court when there is a change of Advocate. Therefore, Counsel's argument that a final decree in the suit has not been issued cannot stand.

21. The ruling in question was entered pursuant to the Defendants' application dated **2nd September 2011** seeking to strike out the Plaint and for Judgment to be entered as prayed in the Counterclaim. The Court made orders, *inter alia*, that judgment be and is hereby entered in favour of the **1st Defendant** as prayed for in the Counterclaim. In that case, there is a Judgment in place in this matter and the Plaintiff's Counsel ought to have sought leave of the Court to come on record.

22. Consequently, I find that the Plaintiffs' Advocates are not properly on record and the Notice of Motion dated **14th October 2013** and filed on even date is incompetent. The provision in **Order 9 rule 9** of the Civil Procedure Rules is couched in mandatory terms and therefore this Court cannot breathe life into the Plaintiffs' Application by applying either **Section 3A** of the **Civil Procedure Act** or **Article 159** of the **Constitution**.

23. In view of the foregoing it is evident that there is no need of going into the merits of the application.

24. In the upshot, the Notice of Motion dated **14th October 2013** and filed on even date is hereby dismissed with costs to the Defendants.

DATED, READ AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kamunya for Plaintiffs

No appearance for Defendants

Teresia – Court Clerk