REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 469 OF 2011

MARY WAIRIMU MUTURI.....PLAINTIFF

VERSUS

JOHN WAKIBI MURUA.....DEFENDANT

RULING

This suit was brought by the plaintiff to enforce an agreement of sale that was entered into between the plaintiff and the defendant on 18th December, 2006. The suit was filed at the Chief Magistrate's Court at Thika on 25th May, 2010 and was transferred to this court through an order made on 12th November, 2010. The suit was fixed for hearing on 11th April, 2016 by the plaintiff. From the record, the said hearing date was taken ex-parte at the registry on 28th October, 2015 after the defendant's advocates who had been invited to come to the registry for the purposes of taking a mutually convenient hearing date failed to turn up. The plaintiff's advocates served the defendant's advocates with a hearing notice.

When the suit came up for hearing on 11th April, 2016, neither the defendant not his advocates appeared in court. The court having satisfied itself that the defendant's advocates had been served with a hearing notice allowed the plaintiff to prosecute her case. The plaintiff gave evidence and closed her case. The court thereafter ordered the parties to make closing submissions in writing and fixed the matter for mention on 7th July, 2016 for the purposes of fixing a date for judgment. The court directed the plaintiff's advocates to serve a mention notice upon the defendant's advocates. On 7th July, 2016, the matter was not listed. On 8th July, 2016, the plaintiff's advocates fixed the matter for mention on 31st October, 2016. The defendant's advocates were duly served with a mention notice.

When the matter came up for mention on 31st October, 2016, the defendant's advocates once again did not turn up in court. Since the plaintiff's advocates had already filed submissions on behalf of the plaintiff, the court fixed the matter for judgment on 10th April, 2017. The judgment was however delivered on 28th April, 2017.

What is now before the court is a Notice of Motion application dated 31st August, 2018 brought by the defendant seeking an order for the setting aside of the judgment that was made herein on 28th April, 2017 so that the suit may be heard afresh. The application that was brought by the firm of Nyambura Njuguna & Co. Advocates who had taken over the conduct of the case on behalf of the defendant from the firm of Mundia & Company Advocates was brought on the ground that the defendant was not informed of the hearing date and that he only came to know that judgment had been entered in the matter on 22nd August, 2018. The defendant's said advocates contended that the defendant's failure to attend court was not as a result of the defendant's own fault but that of his previous advocates and their office staff. The defendant's advocates contended that the mistake of the defendant's previous advocates should not be visited upon the defendant.

In his affidavit in support of the application, the defendant averred that he was informed by his previous advocate, Isaac Munene Mundia that the hearing notice and subsequent mention notices that were served upon his firm relating to this matter were concealed from him by his secretary who he ultimately sacked for engaging in similar activities in other matters. The defendant averred that his said former advocate informed him that he only became aware of the judgment in this matter when the plaintiff's advocates forwarded to him a copy of the decree under cover of a letter dated 19th July, 2018. The defendant averred that he had an arguable defence that he should be given an opportunity to put forward.

The defendant's application was opposed by the plaintiff through grounds of opposition dated 13th March, 2019. The plaintiff contended that the application was brought after inordinate delay that was not explained. The plaintiff contended that the defendant had no reasonable defence to the suit and as such setting aside the judgment that was delivered on 28th April, 2017 and hearing the suit afresh would be an exercise in futility.

The defendant's application was heard by way of written submissions. The defendant filed his submissions on 16th August, 2019 while the plaintiff filed his submissions on 16th January, 2020. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed in opposition to the application. Finally, I have considered the

submissions by the respective advocates for the parties. The issue that I have been called upon to determine is whether the defendant has put forward sufficient grounds to warrant the setting aside of the judgment that was entered herein on 28th April, 2017. Order 12 Rule 7 of the Civil Procedure Rules gives the court a discretionary power to set aside judgment entered in the absence of a party.

The court's discretionary powers as is often said must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in Patriotic Guards Ltd. *v* James Kipchirchir Sambu [2018] eKLR as follows:

> **"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."**

The principles applied by the court in applications for setting aside of ex parte judgments were set out in the case of Shah *v* Mbogo [1967] E.A 116 as follows:

> **"….the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice**."

Applying the said principles to this case, I am not inclined to exercise my discretion in favour of the defendant. I am not satisfied that the defendant has put forward sufficient grounds to warrant the grant of the orders sought. I am of the view that if judgments were to be set aside on the grounds similar to some of those put forward herein by the defendant, no judgment or ruling made ex-parte would stand because any reason would be sufficient to set aside the same however fanciful. The reason that has been given by the defendant why the defendant and his former advocates did not attend court for the hearing of this suit is that the secretary who was working for the defendant's former advocates received the hearing notice but for reasons which have not been disclosed, decided to conceal the same from the advocate who was dealing with the matter. I have noted that the defendant's former advocates did not swear an affidavit in support of the application before the court. The facts deposed to by the defendant as to what happened in his former advocates' office is what he was told. I find the reason given by the defendant for his failure to attend court unconvincing.

I am also in agreement with the plaintiff that the application was brought after unreasonable delay. The judgment sought to be set aside was delivered on 28th April, 2017. The application before the court was filed on 6th September, 2018; more than a year from the date of the judgment. In his affidavit in support of the application, the defendant claimed that his former advocates were not aware of the judgment of the court until 19th July, 2018 when they were served with a copy of the decree by the plaintiff's advocates. This cannot be true. From the record, I have noted that on 19th January, 2018, the plaintiff filed an application for the enforcement of the said judgment of 28th April, 2017. The application was supported by the plaintiff's affidavit to which she annexed a copy of the said judgment. The court directed the plaintiff to serve that application upon the defendant's former advocates for hearing on 12th April, 2018. There is an affidavit of service on record filed on 5th February, 2018 showing that the said application was served upon the defendant's former advocates on 31st January, 2018 which means that even if the said advocates were not aware of the said judgment prior to that date, they became aware of the same on that date. The application before the court was filed seven (7) months from that date. This long delay has not been explained by the defendant's present or former advocates. This court cannot lend its aid to the indolent.

In the final analysis, I find no merit in the defendant's application dated 31st August, 2018. The application is dismissed with costs to the plaintiff.

Delivered and Dated at Nairobi this 22nd Day of October 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyangau for the Plaintiff

N/A for the Defendant

Ms. C.Nyokabi-Court Assistant