



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 18 OF 2019

PROF. MIKE AMUHAYA IRAVO.....PLAINTIFF

VERSUS

RICHARD WAWIRE.....DEFENDANT

RULING

1. The suit herein was heard in the absence of the defendant on **3/10/2019** and judgment was delivered on **27/11/2019**. The defendant thereafter brought an application dated **8/5/2020** and filed in court on **14/5/2020** seeking the following orders:

1. ...spent

2. ...spent

3. That the *ex parte* proceedings, judgment, decree issued herein and all consequential orders be set aside and the defendant be granted leave to file a statement of defence, witness statements and documentary evidence in response to the plaintiff's claim.

4. Costs be provided for.

2. The application is brought under **Sections 1A, 1B 3 and 3A of the Civil Procedure Act, Order 10 Rule 11 and Order 50 Rule 1 of the Civil Procedure Rules**. The application is supported by the affidavit of the defendant sworn on **8/5/2020**.

3. The grounds on the face of the application and the supporting affidavit are that the defendant was duly served but due to age and his poor health he failed to comprehend and appreciate the need of filing a response to the pleadings; that the defendant was present in court on two occasions on the impression that his presence was vital to the proceedings; that the claim relates to a boundary dispute, which is essentially a land dispute hence it is of essence that all parties be accorded an open, fair and transparent hearing by way of filing documents and tendering oral evidence subject to cross-examination; that it is in the broad interest of justice that the *ex parte* judgment be set aside and the proceedings be opened. It is also alleged that the name of the defendant is "**Richard Wabwire Khisa**" and not "**Richard Wawire**," the person sued herein.

4. The plaintiff filed grounds of opposition dated **4/9/2020** on **8/9/2020** and a replying affidavit dated **4/9/2020** on **29/9/2020**. His response is that: he is the registered proprietor of the suit land which shares a common boundary with the defendant's parcel; that on **21/3/2018** the defendant acting in concert with his agents or relatives removed the survey beacons along the common boundary and encroached on the plaintiff's land; that the defendant was served; that the defendant attended court but never filed documents; that the application has been brought after inordinate delay; that the application is calculated to deprive the plaintiff of the fruits of his judgment; that the final judgment was premised on the formal reports of government officers who had visited the site in the course of resolving the dispute according to the law and that the proposed defence is a sham and does not raise any triable issues.

5. The defendant filed his submissions on **29/9/2020**. I have perused through the court file record and found no submissions filed on behalf of the plaintiff.

6. I have considered the application and the response and the submissions. The issues that arises for determination in the application are as follows:

(1) Whether the judgment dated 27/11/2019 ought be set aside.

(2) Who should bear the costs of this application?

(1) Whether the judgment dated 27/11/2019 ought to be set aside.

7. The court has unfettered discretion to set aside judgment provided that it deems it just to do so and subject to any conditions it may find fit. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76**, the court held:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

8. In the case of **Sammy Maina Versus Stephen Muriuki Nairobi Civil Case No. 1079 of 1980** the court stated as follows:-

“The court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence.”

9. In the instant application the court must examine three vital issues that arise and their implication on the application made by the defendant. First, the defendant admits that he was served and secondly, that he attended court but did not file any documents. Thirdly that the government officers concerned with land matters visited the parcels owned by the plaintiff and the defendant and made adjustments to the common boundary.

10. The fact that the defendant admits service on him means that he was made aware of the suit in the normal manner by which parties should be made aware of proceedings. That he concedes that there has been a conflict between him and the plaintiff is proof enough that he knew upon service of summons and plaint that the plaintiff had sued and served the right party by whatever name he was referred to in the pleadings.

11. On **27/2/2019**, when the matter first came for hearing the defendant was present. Having been made aware of the matter it was incumbent upon him to find out what should be done in the circumstances and respond to the suit besides attending court. If he never understood the court process it would have been wise for him to seek the services of a legal expert as is the normal course of action. The defendant claims ignorance but it has been a long held principle that ignorance of the law is no defence. If this excuse were allowed it may open the floodgates for other similar applications and possibly subject the court process to abuse by unscrupulous persons. I must reject that excuse.

12. The second complaint raised by the applicant is that he was not served with the notice of the hearing that led to the judgment. The **Civil Procedure Rules** however envisage that only a litigant who having been served with summons and plaint has entered appearance in a suit should be served with a hearing notice. Failure to serve him a hearing notice did not therefore render the hearing and the proceedings null or in breach of any law.

13. The third complaint raised by the applicant is that the name on the documents served upon him was not his. To this the court observes that nothing would have been easier than for the applicant to call the courts attention to that fact during the first appearance in court, for the remedial measures of amendment to be ordered or taken immediately. The court also takes note that such measure can be taken at any stage of the proceedings.

14. This court must also examine if there is any inordinate delay in the lodging of the application. The fact that the applicant was served and was aware of the existence of the suit and attended the first hearing of the injunction application warrants the conclusion that he was obligated to keep abreast of the events in the suit including the judgment and lodge the instant application within reasonable time. In the circumstances, this court finds that a delay of **5 months** before lodging the instant application amounts to inordinate delay and makes the defendant undeserving of the favourable exercise of this court’s discretion to set aside the judgment.

15. As to whether the defendant has a good defence, this court has perused the draft defence attached to the application. It is correct that the impugned judgment of the court was premised on reports that were made by the proper lands officials mandated with the task of addressing boundary disputes, that is the County Surveyor and the County Land Registrar. Those reports are on the court record and the applicant has failed to comment on them.

16. The applicant has only alluded to possible misuse of the office of County Land Registrar by the plaintiff to harass him but he has not demonstrated how that has been done. These are the same officials who would be mandated to conduct the boundary re-alignment exercise afresh and in the absence of any allegation in the defence or evidence of impropriety in the application that may warrant the conclusion that they misconducted themselves in any way, this court is inclined to believe that the defendant’s draft defence as drawn raises no triable issue.

17. The upshot of the foregoing is that the application dated **8/5/2020** has no merit and the same should be dismissed.

(2) Who should bear the costs of this application?

18. Each party will bear their own costs of the application.

19. In the final analysis I find as follows:-

a. The application dated 8/5/2020 is hereby dismissed.

b. Each party shall bear their own costs of the application.

Dated, signed and delivered at Kitale via electronic mail on this 15th day of October, 2020.

MWANGI NJORGE

JUDGE,

ELC,

KITALE.