



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND CASE NO.59 OF 2017

JOHN NDEDA.....PLAINTIFF/APPLICANT

VERSUS

DAVID MUKANGULA SAIZI.....DEFENDANT/RESPONDENT

R U L I N G

1. Before the Court for determination is the Plaintiff's Application dated and filed on 5th February 2020 filed under Order 9 of the Civil Procedure Rules and section 3 of the Procedure Act. The applicant seeks the following orders:

i. Spent

ii. That the proceedings and order made on 23rd January 2020 be set aside or reviewed

iii. That costs of the application be provided for.

2. The application is supported by the affidavit sworn by counsel on record for the Applicant, Erick Jumba on 5th February 2020. He pleads that their office was served with a Notice of Motion application under certificate on 6th January 2020. At the time he was on vacation and reported to work on 13th January 2020. He continued that they unsuccessfully tried to contact their client and assumed that he had obtained alternative representation. That the Court proceeded to grant orders on 23rd January 2020 in favour of the Respondent in the absence of the Applicant who is a Kenya Defence Forces service member currently stationed abroad. The deponent averred that the Applicant is the registered proprietor of the suit property. That the decree of the court was executed in September 2019 and as such there is nothing to stay as prayed for by the Respondent.

3. The Application is opposed vide the Defendant's replying affidavit filed on 9th March 2020 and a further affidavit filed on 10th July 2020. He depones that the order made on 23rd January 2020 was mainly about setting aside the judgment herein and all consequential orders. That the dispute between the parties is essentially a boundary dispute between LR Nos. Bukhayo/Bungeng'i/12077 and 20184. He maintains that the applicant is misleading the Court yet he acknowledges in his amended Plaint that the boundary dispute had been corrected by the Land Registrar where the resultant report revealed that it was the Applicant who had trespassed on the Respondent's parcel and planted trees thereon which he was required to remove.

4. It is the Respondent's case that he had instructed his advocates earlier but they failed to file a Defence resulting in entry of default judgment and formal proof proceedings to his detriment. That he has since acquired alternative representation to correct the same and if possible file a counterclaim for eviction against the Applicant. He avers that the decree herein has never been effected and that he still occupies his portion peacefully hence there is no breach of peace as alleged by the Applicant.

5. Parties canvassed the application by way of written submissions. I have considered the application, submissions and the applicable law. The first port of call is the Court record. The Applicant seeks to set aside orders issued on 23rd January 2020 which allowed the application of 11th December 2019 whose effect was:

i. Temporarily stayed the arrest warrant and order of committal to civil jail issued against the Defendant and discharged the judgment debtor pending the hearing and determination of the application

ii. Stayed/vacated the injunctive orders restraining the Defendant from trespassing or in any other way interfering with the Plaintiff's quiet enjoyment of his land parcel LR Bukhayo/Bugeng'i/2084

iii. Set aside the judgment herein as well as all consequential orders.

6. In as much as cogent reasons for the delay have not been proffered, the Court recognizes that the mistakes of counsel should not be visited upon a litigant. In this application, the Applicant brings to the fore facts that were not within the Court's knowledge and requires determination of the Respondent's application on its merits. That the impugned injunctive orders sought to be vacated concern a property that is registered in the name of the Applicant. The Respondent also seeks to set aside a final judgment that was at the execution stage. These are indeed weighty issues requiring the Applicant's input.

7. In the case of *Shah Vs Mbogo (1967) EA 116* where the Court of Appeal held that the principles governing the exercise of Judicial discretion to set aside an ex parte judgment obtained in the absence of appearance or defence or upon failure of other party to attend the hearing stated that the discretion is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, then the motion should be refused.

8. The orders sought to be set aside were granted in an application that also sought to set aside an ex parte judgement. Since the Respondent wants to be heard, it is imperative that he should expect equal treatment to be extended to his counter-part. The equitable doctrine states that **"he who seeks equity must do equity"** explain the scenarios the parties are in. Therefore, it is my belief and I so hold that the Applicant should be granted an opportunity to defend the application dated 11/12/2019.

9. Consequently, I do allow the present application by setting aside the orders of 23/1/2020. For avoidance of doubt the earlier interim orders issued on 17/12/2019 remains in force pending inter partes hearing of the application dated 11/12/2019. Costs of this application is awarded to the defendant/respondent.

Dated, signed & delivered at BUSIA this 5th day of November, 2020.

A. OMOLLO

JUDGE