



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 260 OF 2018

(FORMERLY NAIROBI ELC NO. 103 OF 2001)

NGOINGWA COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

DORCAS WANJIKU IKINU.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **7th January 2019** by the Defendant/ Applicant seeking for orders that;

- 1. THAT the proceedings of this Court of the 13th December, 2018, be set aside forthwith.**
- 2. THAT the provisions of Order 11 be expressly complied with.**
- 3. THAT in the alternative, this suit be struck out forthwith.**
- 4. THAT costs of this suit be expressly provided for and be borne by Counsel for the Plaintiff .**

The Application is premised on the grounds that the Defendant's/ Applicant's Advocates were never involved in the proceedings leading to the transfer of the suit to Thika and were thus never informed of the transfer of the suit to **Thika Environment & Land Court** either by the Court or the Plaintiff's/ Respondent's Advocates. Further that the order of the Court transferring the suit to Thika Environment & Land Court was express and that it ordered that it be transferred and be mentioned on **17th December 2018**, and has never been varied.

That the Plaintiff's/ Respondent's Advocates on record was aware on **13th December 2018** as at **9.24 a.m** that the Defendant's/ Applicant's Advocates were not aware that the suit was coming up for hearing on **13th December 2018**. It was further contended that the hearing of the suit on **13th December 2018**, had no legal basis either in law or in fact. Further that the suit is based on fraud and the fact that the parties were aware of the Defendant's/ Applicant's claim in **1994/1995**, then this suit having been filed in **2001**, is statutorily barred. That the suit property changed hands before filing of the suit and there has never been any leave to file the suit outside time and none could be granted.

The Application is supported by the Affidavit of **Moses N. Siagi**, Advocate for the Defendant/ Applicant. It was his contention that the suit was last dealt with in **2007**, and that since then until **10th December 2018**, the Plaintiff's/ Respondent's Advocates and the Court have never communicated anything to his office. Further that on **10th December 2018**, the Plaintiff's/ Respondent's Advocate served upon his office a mention Notice of **17th December, 2018**, before ELC Court in Thika. That prior, the Plaintiff's/ Advocate served upon his office a mention notice on **8th November 2018** in respect of **ELC 36 of 2017**, which indicated that the said suit would come up on **17th December 2018**.

That the parties in both cases are the same and that **ELC 36 of 2017** has been fully heard and given a Judgment date. He further averred that his Secretary who worked for his office informed him that upon perusal of both notices she assumed that the notices were in respect of the same suit and informed him that **Ngoingwa Case** is scheduled for mention on **17th December 2018**. He further averred that on **11th December 2018**, he received a phone call from **Esther of Thika Environment & Land Court** who informed him that the suit would be coming up on **13th December 2018**, and he indicated that there would be no problem. That at that time, he thought it was **ELC 36 of 2017**, of Thika that he had fully participated in and that **Esther** did not explain to him that the same was a different case .

Further that on **13th December 2018**, at about **9.00 a.m**, he spoke to the Plaintiff's Advocate on cell phone when she informed him that it was the instant suit that was coming up for hearing and disconnected the line and his efforts to reach her were not fruitful.

He further averred that at **9.35 a.m**, he sent the Plaintiff's/ Respondent's Advocate a text message indicating that the Defendant/applicant could not proceed with the case as the counsel for the Defendant was not aware that suit (matter) had been transferred to Thika Environment & Land Court. It was his contention that on the same day, he had a High Court matter being Nairobi **116 of 2014**, for hearing but the same did not proceed and his efforts to reach the Plaintiff's/ Respondent's Advocate were once again not fruitful. However, he sent her a text message informing her that he was on his way. That he arrived in Thika at **11. 40 a.m**, and when he located the physical location of the Court, he found it closed. That when he traced the Court Assistant at the registry, he was informed that the matter had proceeded to full hearing and set down for mention on **20th December 2018**, to which he voiced his frustrations to the Plaintiff's Advocate .

That on **18th December 2018**, he received a mention notice from the Plaintiffs Advocates and on **20th December 2018**, he attended Court and was informed that the files were to be sent to **Meru Environment & Land Court**. That its is the interest of justice that the order sought to be granted.

The Application is opposed and the Plaintiff filed a Replying Affidavit through **Damaris Njoki Kamau**, sworn on **16th July 2019** and averred that the suit was heard on **13th December 2018**, during the **Service Week** and the parties were notified of the hearing date by the Court through their respective Counsels. That she has been informed by her Advocate on record, which information she believes to be true that the Court reached out to the Defence Counsel first and then called her Advocate and told her that the Defendant had confirmed attendance and that the Defence Counsel **Mr. Moses Siagi** called her **Advocate Grace Gichuhi** severally and confirmed service and attendance.

That the Court can legally proceed with a case ex parte once satisfied that **notice** had been given to all parties as was the case herein. She contended that the Court's time is likely to be unduly wasted as the matter has already been heard and the Defendant does not deny that he was aware of the date only that he decided to attend the Court at Milimani first. It was her contention that the Defendant only seeks to delay the matter further and that the allegations that the suit was last in Court in **2007**, and that her Counsel never communicated with the Defence Counsel are baseless. Further that the Defendant/ Applicant was served with a mention notice for **ELC 36 OF 2017** for **17th December 2018**, and a mention notice for the instant suit also for **17th December 2018**, and that the change in the date for this suit was done by the Court at its discretion and the matter was fixed for hearing on **13th December 2018**, and that each notice is indicated that it is for a different file and the matter was coming up for a different purpose. That the Defence Counsel admits that **ELC 36 of 2017**, had been fully heard and therefore he cannot claim that he thought that it was the one coming up for hearing. She contended that the proceedings of **13th December 2018**, should not be set aside and that the Defence Counsel is trying to argue the main suit in an application and issues which should have been raised from the onset not at the conclusion of the case

The Defendant/ Applicant swore a further Affidavit on **13th January 2020**, by **Moses N. Siagi**, who averred that on **28th January 2009**, there was no appearance before a Judge, but that there exists evidence of taking a hearing date. It was his contention that in respect of **27th May 2009**, there exists nothing on the Court file which position affects the hearing Notices of **26th June 2009**, **28th September 2009**, **24th March 2010** and **1st February 2011** and that between **2007/8** and **2017** when the present Advocates came on record, there was no appearance before any Judge. He further averred that it is not stated who moved the Deputy Registrar who set down the matter for hearing on **13th December, 2019**.

The Plaintiff/ Respondent filed a further Affidavit sworn on **15th March 2020** by **Annah Vundi**, its Advocate on record. She averred that by the look at the Plaintiff and Defence, they did not see what purpose setting aside the proceedings would serve, as there was a similar matter arising from the same facts involving the same matter concerning a different subject matter that the Court ruled in favour of the Plaintiff/ Respondent . She contended that Counsel continues to contradict himself about him being informed of the date while admitting knowledge of the date.

She further averred that she was present when the counsel was called and was asked whether he was coming to which he asked the Counsel to wait for him. That the Court waited, but he did not show up and he stopped picking calls. That it was the Defendant's/ Applicant's Advocates who had obtained orders staying the proceedings in the matter on **27th March 2008**, and the Plaintiff's Advocate made a formal application for the orders to be lifted and fixed the matter for hearing several times. Further that the Defendant's / Applicant's has been aware of all proceedings in the matter.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the Application, the Affidavits and the provisions of law and finds the issues for determination are;

1. Whether the Proceedings of 13th December 2018 should be set aside.

2. Whether the Applicant is entitled to the orders sought

1. Whether the Proceedings of 13th December 2018, should be set aside

The Defendant/ Applicant has sought for setting aside of the proceedings of **13th December 2018**. It is not in doubt that a Judgment has since been delivered on this matter dated **2nd May 2019**. It is also not in doubt that if the Court was to find that there is merit in the instant Application and set aside the proceedings, the resultant effect would be to set aside the said Judgment.

The provisions of law that guides the Court in deciding whether or not to set aside ex parte orders/ Judgment is to be found in **Order 12**

Rule 7 of the Civil Procedure Rules which provides that;

“where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment or order upon such terms as may be just.”

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

Further it is not in doubt that the power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. See the case of *Patel...Vs...E.A Cargo Handling Services Ltd (1974) EA 75*, where the Court held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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.”

It is also not in doubt that the Court in exercising its discretion ought to be guided by whether the Applicant has given sufficient reasons and in this case the Court ought to consider whether the Defendant/ Applicant has given sound reasons for non attendance of Court when the matter was set down for hearing. See the case of **Wachira Karani ...Vs... Bildad Wachira (2016) eKLR** where the court held that:-

"The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."

Further the Court in **Wachira Karani ...Vs... Bildad Wachira (supra)** held that;

“The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it. [13] The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. [14] Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

Has the Defendant/ Applicant in this case given a sufficient cause for non-attendance. It is not in doubt that there are two cases between the two parties. One being the instant suit and another being **ELC 36 of 2017** which has since been heard and determined in favour of the Plaintiff/ Respondent. The two suits though relate to two distinct subject matters, have the same parties. The Defendant’s/ Applicant’s Advocate has averred that when his secretary was served with two mention notices, one for the instant suit and another for **THIKA ELC 36 OF 2017**, she thought that the two notices refers to the same case. It is thus his contention that she informed him that the **Ngoingwa case** was coming up on **13th December 2018** and he did not think that it referred to the instant case, as he was not aware that the instant suit had been transferred to Thika.

He further acknowledges that **Esther** who is the Court Administrator for **Thika, Environment & Land Court** called him on **11th December 2018**, and further informed him that the suit was coming up on **13th December 2018**, for hearing and again he thought that she was referring to the other suit. The Court has seen the two mention notices served upon the Defendant’s / Applicant’s Advocates and notes that each clearly indicates the correct case number. Further, the Court concurs with the Plaintiff/ Respondent that each case was coming up for a different purpose.

That while the instant suit was coming up for directions, the other suit was set to come up for mention to get a Judgment date. Further the Defendant’s/Applicant’s Advocate has acknowledged that his Secretary has worked for his office for several years. Seeing that the notices were served on diverse dates, the Court is not convinced that the said Secretary having worked in the said office for several years did not properly read the two **Notices** due to the fact that the Advocate acknowledged that she perused the said Notices. The Defendant’s/ Applicant’s Advocate has further acknowledged that he was informed by the Court of the hearing date set for **13th December 2018**.

While he contends that he was not informed that it was the instant suit that was coming up for hearing, the Court again concurs with the Plaintiff/ Respondent that given that the other suit was already heard and what remained was only submissions, it would have been expected that if the said Advocate could not understand why it was coming up for hearing and if indeed the Court Administrator did not inform him of which case was coming up, he would have been curious enough to inquire from the said **Esther**, why the matter was coming up for hearing while the same had been heard. While he contends that the said **Esther**, did not explain that the instant suit was the one coming up, he however does not state if she gave an indication that it was **Thika ELC 36 OF 2017**.

Even with the knowledge that one of his cases was coming up on **13th December 2018**, assuming that it was **ELC 36 of 2017**, that was coming up on **13th December 2018**, the Defendant’s/ Applicant’s Advocate did not attend Court on that particular day. It is his contention that he only learnt that particular morning that it was the instant suit that was coming up for hearing. However, he had Knowledge that he had a case in **Thika ELC** and no reason has been given as to why no efforts was made to secure attendance of any representative in the matter.

What is clear is that the Defendant's/ Applicant's Advocate had knowledge of the date that the instant suit was set down for hearing. It is not in doubt that the same was set down during the **Service Week** and therefore it cannot be said that there is no basis in law. From the Defendant's/ Applicant's Advocates averment, he clearly indicated that there was no problem with the hearing date, when he was informed of the same by the Court. Further, the said Advocate has not denied that upon being informed of the date by the Court, he confirmed attendance. The Court is thus not satisfied that the reasons given by the Defendant's/ Applicant's Advocate for non attendance are sufficient. It is the Court's considered view that the Advocate has shifted the blame to his Secretary and to the Court Administrator for his lack of due diligence.

While the Court acknowledges that a Court should strive to give a party its day in Court, the Court also acknowledges that the other party should also be given an opportunity to have its matter heard and determine expeditiously. This matter having been filed in **2001**, and there being no sufficient reasons as to why the Defendant did not attend Court for hearing on **13th December 2018**, the Court finds and holds that the prayers seeking to set aside the proceedings of **13th December 2018**, are **not merited**.

2. Whether the Applicant is entitled to the orders sought

Having held that the proceedings of **13th December 2018**, were regular, it then follows that the Judgment on record is also regular and the prayer seeking to strike out the suit, is **not merited**.

The Upshot of the foregoing is that the Defendant's/ Applicant's **Notice of Motion Application** dated **7th January 2019**, is not merited, and the same is **dismissed** entirely with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed and *Delivered* at Thika this 5th day of November 2020

L. GACHERU

JUDGE

5/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Respondent

Mr. Siagi for the Defendant/Applicant

L. GACHERU

JUDGE

5/11/2020