



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 460 OF 2017

SAMWEL MWAURA NDERI.....PLAINTIFF/ APPLICANT

VERSUS

NELSON MUCHIRI.....1ST DEFENDANT/RESPONDENT

THIKA DISTRICT LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

MARY MUTHONI MAINA.....3RD DEFENDANT/RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING COMPANY LTD....4TH DEFENDANT/RESPONDENT

JOHN MAINA MBURU.....5TH DEFENDANT/RESPONDENT

KIMANI MWAURA.....6TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **14th May 2019**, by the Plaintiff/ Applicant seeking for orders that;

- 1. That the orders made on 3rd December 2018, dismissing the Plaintiff's case be set aside.**
- 2. That further Judgment entered herein on 2nd May 2019 against the Plaintiff and all the proceedings and consequential orders issued pursuant thereto be set aside.**
- 3. That costs of this Application be provided for**

The Application is premised on the grounds that the Plaintiff's/ Applicant's suit was dismissed on **3rd December 2019**, on a Notice to show cause which was never served on the Plaintiff/ Applicant or his Advocates. That the 3rd, 4th and 5th Defendants/ Respondents proceeded *ex parte* out of no making of the Plaintiff, the Plaintiff's/ Applicant's Counsel having been served on **5th December 2018**, at **2.04 p.m.**, for a hearing that was to take place on **6th December 2018** at **9.00a.m** for hearing and determination of their Counter Claim. That the Plaintiff's/ Applicant's Advocates having not been served with **Notice to Show Cause**, could not attend the hearing on **3rd December 2018**. Further that the Plaintiff's/ Applicant's Advocate having been served late for hearing of the Counter claim could not make arrangement to travel to Court the following day as he was engaged and had confirmed various other hearings at **Milimani Environment and Land Court**, and two other hearings before the **Chief Magistrates Court - Milimani Nairobi**. It was contended that the non-service of the hearing Notice for **3rd December 2018**, and short notice to attend Court was very prejudicial to the Plaintiff/ Applicant as the Advocate could not attend Court or reach his client on time.

That Justice demands that the Plaintiff/ Applicant be given a chance to be heard to prosecute his case and the **Civil Procedure Act** demands service of at least **7 days** to the hearing for preparation together with his Advocate.

In his Supporting Affidavit, **Samwel Mwaura Nderi**, the Plaintiff/ Applicant herein averred that his Advocate advises him that having been supplied with a copy of the Judgment on **9th May 2019**, he learnt for the first time that his case was dismissed on **3rd December 2018**.

Further that he has been advised by his Advocate that he was never served with a **Notice to Show Cause**, why his suit should not be dismissed and as such he was not aware that his case was before the Judge on **3rd December 2018**, when it was dismissed. That from the records, he amended his Plaintiff on **19th April 2017**, and the **3rd, 4th and 5th Defendants/ Respondents entered appearance** and filed Defence and Counter claim on **25th October 2018**, and on **2nd November 2018**, he applied for a mention date so that the matter can be listed for hearing. He contended that as he waited to be given a mention date to list his matter for hearing, the Court issued the **Notice to Show Cause**, which was not served on him.

That he has been diligent in taking steps to have the matter fully heard and determined and that the orders of **3rd December 2012**, could not have been given if he was served, as he would have shown proper cause. Further that on **5th December 2018**, at **2.04 p.m** his Advocate was served with a set of hearing notice dated **5th December 2018** for hearing on **6th December 2018**, and his Advocate advises him that the late service happened when he was attending to a client out of his office and only managed to see the Notice on the morning of **6th December 2018**. As such, the Advocate could not communicate to the Plaintiff/Applicant to prepare. That his Advocate having seen the Notice in the morning of **6th December 2018**, he could not call any Advocate at such a short notice to hold brief for him to either adjourn the matter or proceed. That his advocate was busy attending to other matters and consequently the case was heard in his absence and judgment entered against him.

It was his contention that he has always been ready to conduct his case to conclusion as demonstrated by the various steps he had taken. He averred that the Application has been brought without delay and could not have been done earlier as the file had been moved to Meru ELC and he had to wait for the file to be returned. It was his further contention that setting aside the Judgment will not prejudice the Defendants/ Respondents and it is in the interest of Justice that the Application be allowed.

The Plaintiff's/ Applicant's Advocate **Francis Njonjo**, swore an Affidavit on **14th May 2019**, and reiterated the contents of the Plaintiff's/ Applicant's Supporting Affidavit and further averred that at the date when the case was dismissed, pleadings had just been closed as the **3rd, 4th and 5th Defendants/ Respondents** had just filed their Defence on **30th October 2018**, the same having been filed on **25th October 2018**. That the Plaintiff/ Applicant should not be condemned unheard and were it not for the short service, he would have reached out to the Plaintiff/Applicant. That he learnt from **Mr. Kanyi** for the Defendants/ Respondents that the date of **6th December 2018**, had been served upon him by the Court meaning that if it was the Court that was meant to effect service, no service at all was effected on the Plaintiff/Applicant and that no attempt was made to call him and thus Judgment should be set aside.

The Application is opposed and **John Maina Mburu**, swore a Replying Affidavit on **14th June 2019**, and averred that the matter was first filed in **Nairobi in 2015**, and it is an old matter and had to be determined during the Service Week, a fact that had been communicated to all Advocates. It was his contention that the Court served all the parties with **Notice to Show Cause** as he has been advised by his Advocate that he received a **Notice to Show Cause** dated **16th November 2018**, that the matter would come up for dismissal on **3rd December 2018**. He also averred that on **3rd December 2018**, they attended Court for hearing of the case but the same did not proceed and their Advocate informed them to come back to Court on **6th December 2018**, for hearing. Further that their Advocate effected service and on **6th December 2018**, none of the parties attended and the same proceeded in their absence and the matter was given a date for submissions on **20th December 2018**. He contended that the Plaintiff/ Applicant and his Advocate have not informed the Court of what actions they took from **6th December 2018**, whilst the matter was pending for submissions. He further contended that the annexure marked **2nd November 2018**, attached to the Plaintiff's/Applicant's Application purporting to seek for a mention date has no Court stamp hence has no authenticity. He further averred that since the land was registered in the names of the **1st Defendant/ Respondent**, he had already deponed an Affidavit stating that the land did not belong to him. It was his contention that the Court in its Judgment considered all the documents vis a viz the Plaintiff's/ Applicant's documents and found that their case was duly proved. He contended that there was no need to re-open the case as it would not change a thing.

The Plaintiff/ Applicant **Samwel Mwaura Nderi**, swore a Further Affidavit on **26th June 2019**, and averred that the **Service Weeks** details were not served on him. That he has been advised by his Advocates that he was never served with a **Notice** for the submissions date and only learnt that matter had proceeded without his evidence when they met in a separate matter with Counsel for the Defendants/ Respondents. Further that no evidence was adduced on his behalf and no documents were adduced on his behalf. It was his contention that service is crucial and lack of it or inadequate time to attend Court is a case worth consideration.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Plaintiff/ Applicant has sought to have the proceedings of **3rd December 2018**, set aside and further that the Judgment delivered on **2nd May 2019**, be set aside. It is the Court's considered view that the issue for determination is **whether the Plaintiff/ Applicant is entitled to the orders sought**.

For the Court to decide whether or not it ought to set aside the said proceedings and Order dismissing the Plaintiff's/ Applicant's suit and the subsequent Judgment dated **2nd May 2019**, the Court is guided by the provisions of **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 said Judgment.

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**, 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 to it by the Rules.”

Further, it is this Court's considered view that in deciding on whether or not to grant the orders sought and exercise its discretion, the Court is

also guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed and thereby prejudice occasioned to the Respondents. See the case of Wachira Karani ...Vs... Bildad Wachira (2016) eKLR, in allowing an application to set aside an *ex parte* judgment, the Court held that:-

"The rationale for this rule lies largely on the premise that an *ex parte* 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."

In this instant suit, there are two scenarios in which the Plaintiff/ Applicant seeks for orders to be set aside. The first limb is that the Plaintiff/ Applicant seeks that orders dismissing his suit on 3rd December 2018, be set aside for the reason that he was never served with the Notice to Show Cause, nor was his Advocate served with the said Notice.

The Respondents are however opposed to the said Application and averred that the Court served all parties with the Notice to Show Cause. The Respondents have further averred that the instant Application has been brought with inordinate delay having been brought over 4 Months after the 3rd of December 2019.

It is not in doubt that the instant Application was necessitated by the fact that the Plaintiff's/ Applicants suit was dismissed for want of prosecution. When the Court on its own Motion called upon the parties to **show cause** why the suit should not be dismissed for want of prosecution, a Notice to such effect should be served. The Court has perused the Court filed and notes that the Notice issued by this Court dated **16th November 2018**, was to be served upon the parties for the hearing of the Notice to Show Cause. Further the Court notes that the said Notice to **Show Cause** though served upon the Law Firm of **Kanyi Kiruchi & Company Advocates**, the Advocates for the 3rd, 4th and 5th Defendant's, there is no evidence that the Plaintiff's/ Applicant's Advocates were ever served with the said Hearing Notice and were aware of the Hearing in Court.

Further it is not in doubt that the **Notice to Show Cause** was issued on the basis that no step had been taken by either party for one year. While the Court may not have been aware, it is not in doubt that with the pleadings before it the **Notice to Show Cause** was not proper as the 3rd, 4th and 5th Defendants/ Respondents had filed and served their Statement of Defence and Counter Claim on the **25th October 2018**, and therefore it was not the proper position that no steps had been taken to prosecute the case.

Order 17 Rule 2(1) of the Civil Procedure Rules provides that;

"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

It is a clear requirement that the parties to the suit ought to be served with the said **Notice**. As already held above, it is not in doubt that the Plaintiff/ Applicant through its Advocate was **never** served with the **Notice to Show Cause**, and consequently did not get a chance to **Show Cause** why the suit was **not** to be dismissed as required in law. Therefore, the Plaintiff/Applicant should be afforded an opportunity to prosecute his case. See the case of Eunice Soko Mlagul....Vs...Suresh Parmar & 3 others (2018)eKLR where the Court held that;

"it is clear from the above that notice was not issued to either party before the suit was dismissed. In the circumstances the dismissal of the suit under Order 17 Rule 2(1) was to say the least unfortunate and unprocedural."

This was clearly not done in the present case rendering the dismissal without Notice prejudicial to the Plaintiff/ Applicant. The rules of natural justice require that before an order adverse to any party is made by a Court, that party ought to be heard and allowed to make representations. The Court finds and holds that the Plaintiff/ Applicant has satisfied the Court that it ought to exercise its discretion and set aside the proceedings and subsequential order made on **3rd December 2018**, dismissing the Plaintiff/Applicants suit.

The Plaintiff/ Applicant has also sought for the setting aside of the Judgment dated **2nd May 2019**. As the Court has already set aside the orders and proceedings of **3rd December 2018**, it is the Court's considered view that in allowing the Plaintiff/ Applicant to prosecute his case., it automatically follows that the orders against him have been set aside and therefore the Judgment in favour of the Respondents must also be set aside to allow the Plaintiff/ Applicant ventilate his case. However, the Court will further give reasons why it will set aside the said Judgment.

It is not in doubt that when the Court dismissed the Plaintiff's/Applicant's suit, it also gave the Respondent an opportunity to prosecute their Counter claim and the hearing date was set for **6th December 2018**. The Court has seen the **Hearing Notice** served upon the Plaintiff's/ Applicant's Advocate and notes that the same was served upon the Applicant's Advocate on **5th December 2018 at 2.04p.m**. Further the Court notes that the witness statement and the List of documents that the Respondents sought to rely on were also filed on **5th Decembers 2018**. It is thus the Court's considered view that the time within which the Plaintiff/ Applicant would have prepared for the said hearing was not sufficient. The Applicant's Advocate has averred that he was not able to organise himself and come to Court on **Short Notice** as he only learnt of the hearing on the morning of **6th December 2018** and could not contact the Plaintiff/ Applicant for preparation. It is the Court's considered view that the Plaintiff/ Applicant has given sufficient cause on why the said Judgment ought to be set aside.

The Court further recognises that the Respondents have averred that there has been inordinate delay in bringing the Application, The Plaintiff's / Applicant's Advocate has contended that they were never served with the Mention Notice for filing of submissions and when they sought to deal with the file, the advocate learnt that the same was with the Judge at Meru ELC and therefore could not access it. The Court finds and holds that the Judgment having been delivered on **2nd May 2019**, and the Application having been filed on **14th May 2019**, there was no inordinate delay taking into consideration that indeed this was case heard during the **Service Week** and when a matter is

reserved for Judgment , the file is usually in the custody of the Judicial Officer who heard the matter.

The Court also takes cognisance of the fact that in exercising its discretion, it is intended to be exercised to avoid injustice. In this case the Plaintiff's/ Applicant's suit was dismissed for failing to **Show Cause** which **Notice** was never served on him. See the case of **Shah....Vs... Mbogo (1967) EA 166** , the Court stated that:-

“this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.”

In its Judgment, the Court noted that having perused the Plaintiff's/Applicant's pleadings, none of the documents reveal the nexus between the Plaintiff/ Applicant and parcel 3762. Maybe the Plaintiff/ Applicant should be given an opportunity to have his case heard on merit and defend his claim.

Therefore, the Court finds and holds that the Defendants/Respondents will not be prejudiced, if the suit is reinstated as the Defendants will have a chance to present their case. Consequently, the Court finds that this is a case which warrants it to exercise its discretion in favour of the Plaintiff/ Applicant.

Having now carefully read and considered the instant Application, the affidavits and annexures thereto together with the rival written submissions, the Court finds that the Notice of Motion Application dated **14th May 2019**, is **merited** and the same is allowed entirely with costs being in the cause

The parties should prosecute the reinstated suit expeditiously.

It is so ordered.

Dated, signed and Delivered at Thika this 14th day of December 2020.

L. GACHERU

JUDGE

14/12/2020

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 **Judgment** 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/Applicant

No appearance for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

No appearance for the 4th Defendant/Respondent

No appearance for the 5th Defendant/Respondent

No appearance for the 6th Defendant/Respondent

L. GACHERU

JUDGE

14/12/2020