



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 44 OF 17

JOHN MUKUHA MBURU.....PLAINTIFF /RESPONDENT

VERSUS

CHARLES MWENGA MBURU.....DEFENDANT/APPLICANT

RULING

1. The Defendant filed the notice of motion dated 11th May 2018 seeking orders that :

- a) Spent
- b) Spent
- c) Spent
- d) Subsequent prayer to No. c above the Hon. Court be further pleased to set aside the exparte judgment entered herein against the Defendant and the matter be set down for hearing afresh.
- e) Costs of the application be provided for.

2. The application is grounded on the supporting affidavit of Charles Mwenga Mulwa and the grounds on the face of application .The Defendant/Applicant avers that his Advocate (former) failed to attend Court and /or advise him on the proceedings of the case. That as a result the matter proceeded exparte without the participation of the Defendant. That the former Advocate Nzavi & Co Advocates filed the application to cease acting after exparte judgment was entered and this application was as a cover up to enable Counsel exonerate himself from his mistake. That consequent to the exparte judgement a decree has been extracted dated the 6/4/18 and is due for execution.

3. The application is contested. The Respondent averred that the suit proceeded in the absence of the Applicant and his Counsel who had notice of the hearing dates. That the Plaintiff filed his replying affidavit and contends that the application is based on falsehoods and an abuse of Court process .That the Defendant duly entered appearance and filed defence thus judgement is not exparte .Further that his Counsel was all along served with notices.

4. The Applicant submitted that the Applicant did not attend the hearing because his Advocate on record Messrs. Nzavi Advocate did not inform him. That it was not intentional but due to the mistake of Advocate. That the said Advocate ceased acting once the judgement was delivered in the case. In addition, that the Applicant has a triable defence. He stated that he is the registered owner of the land and he will challenge the claim of the Respondent by presenting certain documents that though were on record were not translated in the language of the Court. He relied on the case of **Weld-con Limited Vs China National Aero- Technology International Engineering Corporation & Anor HCCC No 5 of 2017**.

5. The Respondent submitted that the hearing notice in this case was duly served and that the Applicant has not disputed this in his application. Further that the judgment being a regular judgment. That setting aside the judgment would prejudice the Plaintiff who would have to wait to enjoy the fruits of judgment he urged the Court to exercise discretion judiciously and strike out the application with costs.

6. The Respondent relied on the case of **Kiminisi Ole Nganda Vs Mataiya Kantai & Anor (2017) EKLK**, Order 12 rule 7 of the Civil Procedure Rules and **Shah Vs Mbogo (1979) EA 116 116** to persuade the Court not to grant the application.

7. Having read and considered the application, the affidavits and the submissions and the material placed before the Court the key issue that falls for determination is whether the judgment should be set aside. I say so because prayers a-c were granted by consent of the parties before the hearing of the application.

8. The background leading to this application is significant. This suit was filed in Kerugoya on the 14/11/14. The claim is based on adverse possession. At the establishment of an ELC Court in Muranga in February 2017, the file was duly transferred to this Court. The Applicant filed his defence and the parties having attended to the preliminaries fixed the matter for hearing. It is not in dispute that the Applicant was served with the hearing notices scheduled for the 12/10/17. The matter however was taken out because it could not be reached on the cause list. The Applicant and his Counsel were absent on this date. The Respondent then served the hearing notice for the 13/11/17. Come the 13/11/17, the Applicant and his Counsel were absent from Court. The Court being satisfied that notice of hearing was duly served, directed the matter to proceed *ex parte* under Order 12 rule 2(a). At the close of the Respondents case the Respondents Counsel fixed the matter for the defence case on the 18/12/17. Again, on the 18/12/17 the Applicant and his Counsel were absent. The hearing of the case then closed and at the request of the Respondents Counsel, the Court directed the parties to file and serve their written submissions. Thereafter the Court rendered its decision on the suit on the 8/3/18.

9. The Applicant has not disputed service of the hearing notice. He has attributed his absence in Court to the mistake of his then Counsel on record. That the Counsel did not communicate to him about the hearing dates. That he would not have known of the hearing dates if he was not informed by the Advocate. He faulted his Counsel for ceasing to act for him immediately judgement was entered citing lack of cooperation and frustration from him. He has accused his Advocate for not properly conducting his defense on account of his absence on several occasions.

10. Order 12 rule 7 provides as follows;

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

11. The wording of the above provision denotes discretion on the part of the Court. In the case of **Shah Vs Mbogo (1979) EA 116** gives guidelines on the exercise of discretion. It states thus;

“I have carefully considered in relation to the present application the principles governing the exercise of the Court’s discretion to set aside a judgment obtained *ex parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

12. Similarly in the case of **Patel Vs EA Cargo Handling Services Ltd (1974) E A 75** the Court stated as follows;

“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 wider discretion given to it by the rules.”

13. It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defense on merit; secondly whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the Court of Appeal in the case of **Mohammed & Another Vs Shoka (1990) KLR 463**.

14. In the case of **CMC Holdings Limited Vs James Mumo Nzioki, CA No. 329 of 2004 1 KLR 173**, in law, the discretion which the Court has in deciding whether or not to set aside *ex parte* judgement is meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error and it would not be proper use of such discretion if the Court were to turn its back to a litigant who has demonstrated such an excusable mistake inadvertence accident or error.

15. Does the Applicant have a defense that raises triable issues? In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998**, the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an *ex parte* judgement. It is on record that the Applicant filed a defence by way of a Replying affidavit in which he denied the Respondents claim. In it he claimed that he is in possession of the whole land and that the agreement of sale is not specific as to what parcel of the land the Respondent is claiming. The Respondent is claiming adverse possession on two acres of the suit land. In the case of **Patel – Vs – Cargo Handling Services** the Court of Appeal considered the meaning of defence and held that;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a ‘triable issue’.

It is the Court’s view that whether the defence has merit is best left to the trial Court to test its veracity at the hearing of the case. However the Court is persuaded that the Applicant has a defence that raises triable issues.

16. As to whether there is explanation for the non attendance of the Applicant and his Advocate on trial. With respect the Applicant has not persuaded the Court on this limb. It has been held that a litigant should not suffer due to the transgressions of their Advocates. However, litigants are also duty bound to ensure that their Agents/Advocates attend Court and prosecute the cases as they should.

17. Section 1B of the Civil Procedure Act which refers to the overriding objectives of the Court and gives a further duty to litigants to ensure that their matters are prosecuted without delay and within the minimal judicial resources available and such resources that are less costly. As such the Defendant has a role to play in the course of justice to follow up from Counsel and Court and ensure apt and timely prosecution of matters to enable the Court achieve the overriding objectives.

18. This Court must be keen not to assist a party who is bent to defeat justice through evasion or indolence .The Court considers the record

and expresses concern on the conduct of the defence during the pendency of the suit. The Defendant was served twice and did not enter appearance until the last day when the matter was almost heard. He also took more time to comply and file his defence. His conduct suggests indolence. The Applicants Advocate in his application to cease acting cited frustration and lack of cooperation on the part of the Applicant. The Applicant did not controvert this. He did not oppose the application either. The former Advocate did not file any affidavit to explain the reasons for his non attendance to Court as required. The Court can only conclude that the Applicant had something to do with it. The Court cannot find the non attendance in Court as inexcusable, mistake or inadvertent in this regard. There is no evidence to show that the Advocate was entirely to blame for this.

19. Is there any prejudice on the part of the Respondent? In the case of **Sebei District Administration -vs- Gasyali & Others (1968) E.A. 300** the Court noted that :-

“..... Courts should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the Court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court. It is wrong under all circumstances to shut out a Defendant from being heard. A Defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defend.

20. In the interest of justice, I exercise my discretion and grant the application on conditions set out below. Any prejudice suffered by the Respondent may be adequately compensated in costs.

21. Final orders;

- a. The application is allowed.
- b. Exparte Judgement entered on 8/3/18 is hereby set aside.
- c. The Applicant to pay the Respondent all the costs thrown away todate in the sum of Kshs 20,000/- within the next 21 days from the date hereof.
- d. The Applicant be and is hereby directed to set the matter for hearing within the next 30 days from today. The Applicant shall be allowed to reopen the case by recalling the Plaintiff for cross examination and the hearing of the defense case.
- e. In default of c and d the application shall stand dismissed and any consequential orders shall be vacated thereof without any further orders.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 11TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Mwaura HB for Mrs Kimani for the Plaintiff

Defendant – Absent but were served.

Njeri and Kuyiki, Court Assistants