REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1974 OF 2000

SAMUEL MBURU KAGO.....PLAINTIFF

VERSUS

JULIUS MAINA MUCHINA.....1ST DEFENDANT

MARY NYOKABI GAKURU.....2ND DEFENDANT

NAIROBI CITY COUNCIL.....3RD DEFENDANT

RULING

This suit was filed on 28th November, 2000. The hearing of the suit did not commence until 10 years later on 24th November, 2010 before Okwengu J. (as she then was). After Okwengu J. was moved from the former Environment and Land Division of the High Court, the matter remained part heard for another 6 years until 30th June, 2016 when the hearing of the suit resumed before me. The hearing date of 30th June, 2016 was taken at the registry by the advocates for the plaintiff and the 3rd defendant. The advocates for the 2nd defendant were invited by the plaintiff's advocates to come to the court registry for the purposes of fixing a hearing date but they did not turn up. After fixing a hearing date as aforesaid, the plaintiff's advocates served the 2nd defendant's advocates with a hearing notice on 23rd November, 2015.

When the matter came up on 30th June, 2016 for further hearing, the 2nd defendant and her advocates did not turn up. The plaintiff had closed his case while the 1st defendant did not defend the suit. The 3rd defendant's advocate who was present closed the 3rd defendant's case without calling evidence. In the absence of the 2nd defendant to give evidence in her defence, her case was marked as closed. The court thereafter directed the parties to make closing submissions in writing and fixed the matter for mention on 13th December, 2016 for allocating it a judgment date. The court directed that the 2nd defendant's advocates be served with a mention notice.

The 2nd defendant's advocates were served with the plaintiff's submissions and a mention notice on 7th September, 2016 informing them that the suit was coming up for mention on 13th December, 2016. What this means is that, the 2nd defendant's advocates were aware as at 17th September, 2016 that the suit had proceeded to hearing in their absence on 30th June, 2016. The 2nd defendant's advocates did not bother to find out what had transpired in court on 30th June, 2016. By the time the suit came up for mention on 13th December, 2016 for fixing a judgment date, the 2nd defendant's advocates had not taken any action in the matter although they had been aware for over 3 months that the hearing of the suit had proceeded in their absence. On 13th December, 2016, the 2nd defendant's advocate informed the court that the 2nd defendant wished to file an application to set aside the proceedings of 30th June, 2016. Since the other parties had filed their submissions as had been directed by the court earlier, the matter was fixed for judgment on 2nd June, 2017.

Even after the suit was given a judgment date, the 2nd defendant took no immediate action to file an application to set aside the proceedings of 30th June, 2016 so that she could be heard before judgment was delivered in the matter. It was not until 13th January, 2017, 4 months after the 2nd defendant's advocates had been notified of the proceedings which took place on 30th June, 2016 that the 2nd defendant moved the court to set aside the proceedings of 30th June, 2016 and the judgment date that had been fixed by the court. Since the matter was pending judgment, the 2nd defendant's application which was not urgent in view of what I have set out above was not heard. Judgment was ultimately delivered in the matter on 27th June, 2017 in favour of the plaintiff. After delivery of the judgment, the 2nd defendant filed a notice of appeal on 11th July, 2017.

What is now before the court is the 2nd defendant's application dated 3rd August, 2017 seeking the setting aside of the proceedings of 30th June, 2016 and the judgment delivered by the court on 27th June, 2017 so that she may have an opportunity to defend the suit. The application was brought on the grounds that the 2nd defendant was not aware that the suit was listed for hearing in the cause list of 30th June, 2016. The 2nd defendant contended that she was in court with her advocate on 30th June, 2016 and that her advocate did not see the suit in the cause list of 30th June, 2016. The 2nd defendant contended that a substantial miscarriage of justice would be occasioned to her if the

application was not allowed. The 2nd defendant contended that she had a strong defence to the plaintiff's claim which raises serious triable issues.

The application was opposed by the plaintiff through a replying affidavit sworn on 27th September, 2017. The plaintiff termed the 2nd defendant's application incompetent and an abuse of the process of the court. The plaintiff averred that the suit was listed for hearing on 30th June, 2016 and that apart from the plaintiff's advocate, the 3rd defendant's advocate was also in attendance. The plaintiff contended that no compelling reason had been given by the 2nd defendant that would excuse her failure to attend court on 30th June, 2016. The plaintiff contended that the 2nd defendant's failure to come to court immediately after being made aware of the proceedings of 30th June, 2016 was not explained. The plaintiff contended further that the 2nd defendant's application was an abuse of the process of the court in that the 2nd defendant had preferred an appeal against the judgment of the court made on 27th June, 2016 and as such it was not open to her to move this court for the orders sought in the present application.

The 2nd defendant's application was heard by way of written submissions. The 2nd defendant filed her submissions on 14th February, 2018 while the plaintiff filed his submissions on 13th March, 2018. I have considered the 2nd defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the plaintiff in opposition to the application. Finally, I have considered the submissions of counsel and the authorities cited in support thereof.

In the case of E.T Monks & Co. Limited *v* Evans [1985] KLR 584 it was held that:

"Public policy demands that the business of the court be conducted with expedition."

In the case of Phillip Kiptoo Chemwolo and Another *v* Angustine Kubede [1982 – 1988] KAR 1036 that was cited by the 2nd defendant, the court stated that:

"The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and the circumstances both prior and subsequent and of the respective merits of the parties."

In the case of Shah *v* Mbogo [1967] E. A. 116 it was held that:

"….the courts discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice…"

It is on the foregoing principles that the 2nd defendant's application falls for consideration. Due to the conduct of the 2nd defendant in the proceedings leading to the present application, I am not inclined to exercise my discretion in her favour. The 2nd defendant has not given any reasonable excuse as to why she failed to attend court on 30th June, 2016 when the suit was scheduled for hearing. The 2nd defendant's advocates' allegation that the suit was not listed in the cause list of 30th June, 2016 is not supported by any evidence. If indeed the matter was not listed, the plaintiff and the 3rd defendant's advocates would not have attended court. Even if it is true that through an oversight or mistake the 2nd defendant's advocates did not see this suit in the cause list, no evidence has been placed before the court of the effort that was made by the 2nd defendant to find out why the matter that was scheduled for hearing was not listed.

The 2nd defendant's conduct after she became aware that the suit came up for hearing on 30th June, 2016 and that orders were made against her was also not consistent with that of a person who was keen on defending the suit. As I have mentioned earlier, it took the 2nd defendant 4 months to file an application to set aside the proceedings of 30th June, 2016. The power to set aside judgment entered ex parte or in default of appearance of a party at the trial is discretionary. The court is a court of law and equity. The court is reluctant to exercise its discretion in favour of the indolent. Justice looks at both sides. I am of the view that it would not serve the interest of justice to resurrect this case which if re-opened will celebrate its 19th year in the corridors of justice on 28th November,2019. Public policy demands that litigation must come to an end. In this matter, the 2nd defendant was given an opportunity to defend herself against the plaintiff's claim. She did not utilise that opportunity. The plaintiff prosecuted his case and upon review of the evidence presented to court, the court was satisfied that the plaintiff had proved his case against the defendants. The 2nd defendant has only herself and her advocates to blame for her failure to defend the suit.

In conclusion, I find no merit in the Notice of Motion dated 3rd August, 2017. The application is dismissed with costs to the plaintiff.

Delivered and Dated at Nairobi this 21st day of March 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nyangena h/b for Mr. Oyugi for the Plaintiff

N/A for the 1st Defendant

Ms. Serem h/b for Ms. Gathaara for the 2nd Defendant

N/A for the 3rd Defendant

C. Nyokabi - Court Assistant