REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 44 OF 2011

JANE CHERUTICH MASWAI.....PLAINTIFF

VERSUS

SAMUEL KIPLAGAT MISOI.....DEFENDANT

RULING

1. By a Notice of Motion dated **10/ 12/2018** brought under **Order 45(2)(1),** and **order 51** of the **Civil Procure Rules of 2010**, **Section 3** and **3A** of the **Civil Procedure Act** and any other provisions of the law, the Applicant Samuel Kiplagat Misoi is seeking the following orders:

(a) That this application be certified urgent and service be dispensed with in the first instance and interim orders be granted.

(b) That there be a stay of execution of the decree and certificate of costs pending the hearing and determination of this application.

(c) That the court do review its orders of 31/7/2018 and set aside the proceedings therein.

(d) That the judgment delivered on 18/9/2018 be set aside with all costs and consequential orders.

(**e) That costs be in cause**

2. The application is based on the grounds on the face of the motion namely:-

i. That the applicant was never informed of the hearing date by M/S Katama Ngeywa & Co. Advocates then on record for him.

ii. That the Applicant was never accorded a chance to engage another advocate after Mr. Katama Ngeywa withdrew from participating in the trial on 31/7/2018.

iii. That the Applicant was rendered vulnerable after his previous advocate withdrew from proceedings.

iv. That the application dated 30/7/2018 ought to have been heard and determined first before proceeding for hearing.

v. That the mistake, omission or failure of an advocate cannot be visited upon an innocent litigant.

vi. That there is an apparent mistake on the face of the record or proceedings.

3. The application is supported by the affidavit of the Applicant sworn on **10th December 2018** and a supplementary affidavit sworn on **4 /3/2019** in which he depones that on **22/ 8/2018**, he visited his advocate in his office to follow up on his case only to be served with an application dated **30/7/2018** which was coming up for hearing on **17/9/2018** which application was for the advocate to cease acting for him in the matter; that the matter proceeded on **31/7/2018** in his absence and therefore he was never given a hearing; that due to the nature of his work as a medical doctor, he rushed back to his station without properly resolving the said issue but sadly came to find out much later that the matter had been concluded and that judgement was delivered already on **18/9/2018**.

4. It is the Applicant's further deposition that the respondent has taxed costs in his absence and likely to execute against him; that he was not made aware by his advocate on record that he was intending to withdraw from representing him to enable him seek representation from

another advocate. He contends that there is a mistake apparent on record since the application dated **30/7/2018** ought to have been heard before the matter proceeding for trial.

5. The Applicant has denied being served with the application before it proceeded for hearing and that as a result he was condemned unheard.

6. The Applicant further depones that it is important that the court reconsiders its position, review its orders of **31/7/2018** and allow him to participate in the trial with representation of an advocate.

7. The plaintiff opposed the application and filed a replying affidavit sworn by herself on **7/2/2019** in which she contends that the matter had proceeded with the full knowledge of the Defendant/applicant as per the sentiments of his advocate who was on record.

8. It is the plaintiff's case that on the said **31/7/2018** when the matter came up for hearing, the Defendant/ Applicant's advocate informed the court that he had ceased acting for the defendant and an application had been filed to that effect and that had even gone ahead to inform the defendant of the same; that the sentiments by Mr. Ngeywa which amounted to an adjournment for the hearing of the matter being sought were opposed by the plaintiff's counsel who made at the last minute prior to the hearing of the said suit; that the court in its ruling noted that the hearing date for the said suit had been taken by consent which was **5** months earlier on of which the defendants advocate had sufficient time to cease acting and that the court ordered the hearing to proceed.

9. The plaintiff has raised an issue to the effect that the current advocate, Mr. Barongo is not properly on record as no notice of change of advocate has been filed by said advocate. That failure to file the said notice renders irregular, null and void all orders emanating after leave was granted a nullity.

10. The court gave directions that the application be canvassed by way of written submissions which were duly filed by the applicant. I have perused the court file and it seems that the respondent did not file her submissions.

11. The applicant submitted *inter alia*, that the suit herein proceeded for hearing though the applicant was not present. That although counsel for the applicant was in court, he had filed an application to cease acting dated **30/7/2018** which application was to be heard on **17/9/2018** but the court proceeded to allow trial to proceed nevertheless on the **31/7/2018**. The applicant further submitted that after his counsel withdrew from participating in the trial, the applicant was rendered vulnerable. He contends that he was condemned unheard.

12. I have carefully considered the application, the affidavits both in support and against, the rival submissions and the authorities cited as well as the pleadings herein. The main issues that I am supposed to determine in my considered view, are as follows:

> **i. Whether I should set aside the ex parte judgment and decree that was entered into by the court in favour of the plaintiff on 18/9/2018 and all other consequential orders;**

13. The dispute in this suit revolves around the property known as **Plot Number 89** and being part of **L.R No. 6614/8** commonly known as **Tulon Farm**. By a plaint dated **19/4/2011**, the plaintiff filed this suit on **20/4/2011** against the defendant, Samuel Kiplagat Misoi seeking a declaration that **Plot No. 89** and being part of **L.R. No. 6614/8** solely belong to the plaintiff and a permanent injunction restraining the defendant from interfering with the plaintiff's user of the said plot. After several hiccups on hearing dates, the matter eventually proceeded on **31/7/2018** on which date the defendant's counsel filed an application to cease acting and informed the court that he had communicated his intention with the defendant. By a judgement delivered on **18/9/2018**, I granted the plaintiff the reliefs sought in the plaint.

14. On **10/12/2018**, the applicant filed this application. The main grounds in support of the application are that the defendant's counsel on record then did not inform him of the hearing date and that he was never accorded a chance to engage another advocate after Mr. Ngeywa withdrew from participating in the trial on **31/7/2018**. The applicant has contended that he has been condemned unheard.

14. Order 10 Rule 11 of the **Civil Procedure Rules** provides as follows:

> ***"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

15. In the case of **James Kanyiita Nderitu & Another [2016] eKLR,** the Court of Appeal stated thus:

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling Services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.***
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> ***In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is***

irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

16. The Court of Appeal went on and cited the Supreme Court of India which forcefully underlined the right to be heard as follows in the case of **Sagram Singh -vs- Election Tribunal, Koteh, AIR 1955 SC 664, at 711:**

"There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

17. The applicant has on his part proffered the case **Wachira Karani versus Bildah Wachira, Nyeri HCCC No. 101 of 2011. [2016] eKLR** which case is to the effect that a court ought to exercise its discretion to reinstate a suit if it is satisfied that there are sufficient grounds.

18. Taking into account all the circumstances of this case, and the authorities above, the court is guided by the overriding objective spelt out in **Section 3** of the **Environment and Land Court Act,** and also the overriding objective of **Section 1A(1)** of the **Civil Procedure Act**. The overriding objective captured in those statute is to enable the court to facilitate just, fair, expeditious proportionate and affordable resolution of disputes.

19. This is a suit that was filed in the year **2011**. There are scanty details of what transpired between **2011** and **2017**. The applicant has stated that his advocate on record then never informed him of the hearing date of **31/7/2018** as a result which the matter proceeded without him. I am not inclined to believe this explanation. I have no doubt that the defendant was informed of the hearing date. I have no reason to doubt his erstwhile counsel in this matter for counsel must always be taken to have full instructions and to act in the interests of his client unless the contrary is proved. It is clear from the record that had the defendant availed himself to his advocate and before court on **31/7/2018** the matter may not have proceeded *ex-parte*.

20. I have perused the court file and from the record, it truly seems there was no evidence of service of the application to cease acting to the applicant. But it must be remembered that the application was filed on the same morning of the date on which the matter was to be heard and it is clear to see why the application had not been served. This court deemed the advocate to be still acting for the defendant as at the date of hearing.

21. In my view, an application filed on the day of the hearing, while all along the advocate has known that they are not on good terms with the client, or that the client has failed to avail him instructions can not be said to be filed in good faith. The fault lies somewhere between the advocate and his client, and not with the court which, having allowed the matter to be set down for hearing on **31/7/2018**, proceeded to hear the matter ex-parte as provided for by the rules.

22. It would be improper to deem an application filed on **31/7/2018** as a good basis for adjournment, or to have entitled the defendant to an adjournment, of the hearing coming up on the same date which hearing date had been taken by consent of the parties on **12/3/2018.**

23. It is also clear that had the application been filed earlier than the actual date of hearing this court may have considered it a serious application that was not meant to simply scuttle the hearing.

24. This court has already issued a judgment in which it stated that it was satisfied that the defendant had been informed of the hearing date by his advocate but failed to attend court.

25. In **Pithon Waweru Maina V Thuku Mugiria [1983] eKLR** the Court of Appeal stated as follows:

"Firstly, there are no limits or restrictions on the judge's discretion 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. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E b) Secondly, 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48."

26. In my view the defendant's conduct in the period immediately preceding the hearing had all the hallmarks of intention to delay the hearing and determination of this suit and this court should not exercise its discretion in his favour.

27. Having noted that the defendant's counsel knew of the hearing date and that he conceded to having informed the defendant of that hearing date, I am of the view that the instant application should not be allowed.

28. In the circumstances, I find that the Applicant's application dated **10/12/2018** is not merited and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 18th day of March, 2019.

MWANGI NJOROGE

JUDGE

13/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiarie for plaintiff/respondent

Mr. Barongo fro defendant/applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

18/03/2019