



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 552 OF 2008

MARK NJUGUNA MWAURA.....PLAINTIFF/RESPONDENT

=VERSUS=

JOHN OKUNDO KIRONZI T/A

BETHANY NURSERY SCHOOL.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 7th April 2017 brought under Order 22 Rules 22 and Order 50 Rule 8 of the Civil Procedure Rules and Section 3A of the civil procedure Act Cap 21 Laws of Kenya.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That this honourable court be pleased to set aside the ex-parte judgment entered herein ex debito justitiae together with all the consequential orders.

(4) That the defendant/application be granted leave to file defence out of time.

(5) That costs of this application be borne by the plaintiff/respondent in all event.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.

4. The application is supported by the affidavit of John Okundo Kironzi, the defendant/applicant sworn on the 7th April 2017 and a further affidavit sworn on the 21st July 2017.

5. The application is opposed. There is a replying affidavit sworn by Mark Njuguna Mwaura, the plaintiff/respondent sworn on the 21st November 2017.

6. On the 19th December 2017, the court directed that the application be disposed of by way of written submission.

The Defendant's/Applicant's Submissions

7. It is the defendant's/applicant's submission that he instructed the firm of M/S Githaya & Associates to file a defence on 21st January 2000. The said defence was struck out for having been filed out of time without leave of court. Interlocutory judgment was entered on 16th July 2009. On 18th February 2015 he instructed the firm of M/S K. A. Nyachoti advocates to apply to set aside the judgment.

8. He has been in occupation of the said land continuously and openly since 1996. He has invested and has put up permanent structures. The plaintiff is in breach of the agreement and should not be allowed to benefit from the said breach. The delay was caused by his firm of advocates **M/S Githaya & Associates**. He has put forward the case of **Trust Bank Ltd vs Amolo Company Ltd CA Civil Appeal No. 215 of 2000**. He prays that this court does exercise its discretion in his favour and set aside the exparte judgment.

The plaintiff's/Respondent's Submissions

9. The defendant/applicant admits that he has deliberately lied to the court on his claim that he was not served with submissions showing that he is not an honest person. He has put forward the case of **Habo Agencies Ltd vs Wilfred Odhiambo Musingo [2015] eKLR**.

The defendant/applicant is guilty of laches. He has never sought to set aside the interlocutory judgment. The eviction was issued two years from the date the defendant/applicant had requested for leave to file a response to the application for eviction. He has also put forward the case of **Tana and Athi River Development Authority vs Jeremiah Mwakio and 3 Others [2015] eKLR**.

10. The defendant/applicant has not given the court any basis or material on which to set aside these proceedings. After the defence was struck out in 14th July 2010, the matter was set for formal proof on 11th November 2013 which is three (3) years later. The defendant/applicant previous counsel has not filed any affidavit to dispute that he was served with hearing notices. The defendant/applicant herein has been extremely indolent. He has also put forward the cases of **Rajesh Raghani vs Fifty Investments Limited & Another [2016] eKLR; Staneley K Ketter vs Henry Kessio [2015] eKLR**. The defendant/applicant has been extremely careless and negligent in his own cause and is precluded from blaming his advocates.

11. The defendant/applicant has already been evicted from the premises. The defence raises no triable issues. The plaintiff/respondent prays that the application be dismissed with costs.

12. I have considered the notice of motion, the affidavits in support and the annextures. I have also considered the replying affidavit and annextures, the written submissions and the authorities cited. The issue for determination is whether this application is merited.

13. It is the defendant/applicant's case that he purchase the suit property being LR No. Dagoretti/Riruta/1173 in 19th August 1996. He paid a deposit of Kshs.120,000/- and the balance of Kshs.430,000 was to be paid upon completion. He later paid a further Kshs.140,000 and he was allowed to take possession of the suit premises. It is also his contention that the delay in setting aside judgement was caused by his former advocates on record.

14. I have gone through the court record. On 14th July 2010 the defendant's defence was struck out as it had been filed without leave of the court. The record also shows his advocate had been served but he was absent.

15. The plaintiff then set down the matter for formal proof on the 11th November 2013. The court was satisfied that the defendant had been served. The matter then proceeded. Judgment in favour of the plaintiff was delivered on 30th January 2014. The defendant/applicant was aware of all the court processes at all time. His claim therefore that he was not informed of what was going on cannot be true. There is no affidavit from his previous advocates confirming that they never informed him of what was going on.

16. The defendant/applicant has also failed to take any steps to set aside the interlocutory judgment entered on 24th July 2009. He also did not file any response to the plaintiff's application seeking his eviction. The defendant/applicant has brought this application after a long delay. The delay is inordinate. No explanation has been given.

17. It also appears that the said purchase was not completed. He admitted that he did not pay the full purchase price though he claims to have put up developments to the tune of Kshs 5,000,000. I have seen the sale agreement dated 15th August 1996. The completion dated was given as 20th November 1996. It is not clear whether land control board consent was procured as per clause (4) of the said agreement.

18. I have also seen the defence which was struck out. I find that the same raises no triable issues.

19. I find that the defendant/applicant has not put before the court, sufficient material to warrant this court to exercise discretion in his favour. I find no merit on this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 2ND day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant