REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 176 OF 2017

JOSEPH PKERKER NGOLEPUS.....PLAINTIFF

VERSUS

WILLIAM LONAPA.....DEFENDANT

RULING

1. The application dated **16/5/2019** which was filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-

(1) …spent

(2) …spent

(3) That pending the hearing and determination of this application interpartes a temporary injunction be issued restraining the defendant/respondent, whether by himself, his servants, agents and/or any other persons acting through him from constructing, demolishing any building and/or harassing tenants on Plot No. D/3 Makutano Town within West Pokot County and/or the status quo be maintained.

(4) That the court be pleased to set aside the order issued on the 11th February, 2019, dismissing the suit for non-attendance.

(5) That at the interpartes hearing and after determination of this application, the orders granted in terms of prayer 2 above be confirmed to operates till the hearing and determination of this suit.

(6) That matter be fixed for hearing so soon hearing of both the plaintiff and the defendant's case.

(7) That costs of the suit be provided for.

2. The applicant has brought the application under the provisions of ***Section 1A, 1B, 3A 3(c) and (e)*** of the ***Civil Procedure Act Cap 21, Order 50 Rule 1.***

3. The grounds upon which the application is made are contained at the foot of the application. They are that the plaintiff was not notified by his advocate of the hearing date which the advocate had taken and neither the plaintiff nor his advocate attended court on the date of the hearing which lead to dismissal of the suit for non-attendance.

4. In his affidavit the plaintiff depones that on **14/5/2019** his tenants on the suit premises called him and informed him that they were being harassed by police at the instance of the defendant.

5. The applicant avers that he tried to obtain details regarding the status of this suit from his advocate to no avail; that he resorted to a visit to court registry to find out the status of the matter where he learnt that the suit has been fixed for hearing for the **11/2/2019** on which date the suit was dismissed for non-attendance on his part and that of his advocate. He blames his advocate for fixing the case hearing date and subsequently failing to communicate that date to him and also failing to attend court on the said hearing date.

6. The applicant claims that vide a letter dated 6th November, 2018 and received in court on 8th November, 2018, the defendant's advocates wrote to then plaintiff's advocate seeking that they meet at the court's registry on the 8th November,2018 for purposes of fixing a hearing date in the matter; that apparently such date for hearing of the matter was fixed by the plaintiff's advocate who either neglected, refused or forgot to notify the plaintiff of the hearing date and "suspiciously" failed to attend court on the date fixed for hearing leading to the suit being dismissed for non-attendance that the plaintiff has always been ready to be heard in this matter and still wants to be given such an

opportunity; that this mistake of the plaintiff's erstwhile advocate should not be visited upon the plaintiff; that it is in the interest of justice and fairness that the orders sought herein be granted and none of the parties herein shall be prejudiced if the orders sought herein.

7. The application is supported by an affidavit of the applicant dated **16/5/2019** which lays emphasis on the above grounds.

8. In reply to the application the respondent filed a replying affidavit sworn on **19/6/2019.** He depones that the plaintiff does not have any tenants on the said premises and he has been the land lord all through since the dismissal of the application; that the plaintiff and his advocate were not keen on prosecuting the matter; that there has been delay in lodging the instant application; that the plaintiff has a duty to liaise with his advocate regarding the case and that he was already developed the premises extensively since the dismissal of the suit.

9. The application was canvassed orally before this court on 8/7/2019 by Mr. Wanyama for the plaintiff and Mr. Changorok for the defendant. Mr. Wanyama's submission was that since the defendant has filed a counterclaim seeking to enforce a contract which the plaintiff had sought to have rescinded in his suit the defendant has extracted a decree which has not resolved the issue as no directions as to the hearing of the counterclaim were given. He submitted further that it is in the interest of both parties that that the application be granted.

10. Mr. Changorok on the other hand emphasized that the hearing date was taken by consent and the only ground in support of the application is the mistake of the plaintiff's former advocate. Secondly he submitted that the plaintiff never had possession of the plot since the application which had sought a temporary injunction against the defendant was dismissed. I have confirmed from the record that that application was dismissed on 26/3/2018. According to Mr. Changorok his client has been in control of the premises since he bought it and it will be just for any order to be issued against him.

11. Mr. Wanyama in reply submitted that though date was taken by consent it was never communicated to the plaintiff and that the conduct of the plaintiff's erstwhile counsel appeared suspicious and therefore the plaintiff should not be punished for his counsel's conduct. He submitted that the plaintiff is not seeking control of the suit property but only its preservation pending the hearing and determination of the suit. He denied that there was any material non-disclosure and that no prejudice will be occasioned to the respondent. In his view this court is required to consider whether the agreement was capable of specific performance.

12. A defence to a counterclaim is a necessary pleading in any proceedings and I do not find any filed in this case, and that jeopardizes the plaintiff's position in the instant suit. That however, an issue that does not affect this application and I note that the main thrust of the plaintiff's application is that he was failed by his erstwhile advocate.

13. I have perused the court record and noted that the hearing date 11/2/2019 was taken by consent of the advocates for the two parties herein on 8/11/2018.

14. In the case of **Kitale Land Case No. 86 of 2010 Jane Kanda Kipkorir -vs- Dorcas Chebet & Others (eKLR)** the court noted that the defendants' case was closed without any evidence from the defendants but the defendants' lawyer had however filed submissions. It dismissed the application of the 1st defendant who had alleged that she was never served with the process to enable her appear and defend her interest in this matter.

15. In **Marcellus Lazima Chegge -vs- Mary Mutoro Sirengo & Others Kitale ELC No. 97 of 2008** the court observed as follows:

> **"In my view where a chance to be heard has been availed to the party, and out of his own unexplained default he is finally locked out of the hearing, he cannot simply invoke Article 50 of the Constitution so as to reopen the proceedings".**

16. In this case there is no evidence from the defendant to controvert the plaintiff's averments regarding his counsel's conduct and I would not expect any because matters between the plaintiff and his counsel are privileged. I am inclined to believe it when the plaintiff avers that his counsel failed him.

17. Mistakes of counsel have occurred many times in the past and formed the basis of setting aside orders. Cases captured in our jurisprudence on the issue include **Belinda Murai & others vs Amoi Wainaina, [1978]** and **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]** in which the court exercised its discretion in favour of the applicants over their counsels failings.

18. In **Belinda Murai & others vs Amoi Wainaina, [1978] KLR 2782** (CALL) Madan, J.A. observed as follows:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."**

19. Conduct that reeks of intent to obstruct or delay the proceedings will not be condoned by the court. Declining an application for setting aside proceedings and judgement obtained in the absence of the defendants and their counsel, the court stated as follows in **Kitale Land Case No. 87 of 2009 Ewoton Leonard Ekutian Pius Atok Ewoton Versus Michael Kore Rotich** and others:

> **"A mistake on the and their counsel have assumed a blissful pose that presumes that what is in the supporting affidavit rhymes with the contents of the court record, which is not the case.**

Try as this court may, it finds no explanation forthcoming from the applicants to shrive their past conduct and cleanse them from the stain of conduct associated with deliberate delay calculated to obstruct the onward march of this suit to its denouement.

It must be recalled that a cardinal rule in setting aside proceedings is that the court should never be seen to aid a party who has demonstrably attempted to delay or obstruct the course of justice."

20. In the case of **Patel -vs- E A Cargo Handling Service Ltd [1974] EA 75** the court stated as follows:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as are 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. Secondly as Harris J said in Shah -vs- Mbogo, 1967 EA 116 at 123B, "This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. That judgement was approved by the Court of Appeal in Mbogo -vs- Shah [1986] EA 93."

21. I have considered those decisions relative to the situation the defendants find themselves in. Contrary to the **Ewoton Leonard Ekutian case** the defendants in the instant suit have specifically addressed the issue of their counsel's absence. Though I do not take it to be the gospel truth I find that the narrative demonstrates a probability that they suffered some setbacks in the hands of their erstwhile counsel.

22. A perusal of the ruling delivered by the court on **26/3/2018** reveals that this court recognized the defendant's presence and control over the suit plot. This court also noted that there was a sale agreement for the suit land and that the plaintiff seeks rescission of that contract. I have not heard the defendant to contradict that position.

23. The defendant also does not dispute that the hearing date was taken by counsel for the parties. He has also not effectively controverted the plaintiff's allegation that the plaintiff's counsel never communicated the hearing date to him or that there is a counterclaim filed by the defendant which is still pending in this suit, or that he has not taken steps to fix the counterclaim for hearing, or that the orders that he obtained upon the dismissal of the plaintiff's claim is an order that does not dispose of both the suit and the counterclaim at the same time. I agree with Mr. Wanyama's view that there is some irregularity in the defendant's action in view of the fact that the counterclaim has not been concluded.

24. Consequently, I am inclined to exercise my discretion in favour of the plaintiff herein more so because there is a counterclaim pending and the evidence required to prosecute or oppose the counterclaim may be that which would have been applicable in the prosecution and defence in the plaintiff's case.

25. I therefore find that the application has merit. Having said that, I grant the application dated **16/5/2019** in terms of prayer No. **(3), (4), (5)** and **(6).**

26. The costs of the application shall be in the cause.

Dated, signed and **delivered** at **Kitale** on this **30th** day of **July, 2019.**

MWANGI NJOROGE

JUDGE

30/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bungei holding brief for Changorok for the respondent

Mr. Wanyama for applicant/plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE