REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 87 OF 2009

EWOTON LEONARD EKUTIAN.....1ST PLAINTIFF

PIUS ATOK EWOTON.....2ND PLAINTIFF

VERSUS

MICHAEL KORE ROTICH.....1ST DEFENDANT

PETER NGETICH.....2ND DEFENDANT

ALLAN CHELIMO.....3RD DEFENDANT

JOHN KIPKOSGEI CHELIMO.....4TH DEFENDANT

KENNETH KIBET CHELIMO.....5TH DEFENDANT

JANE CHESANG.....6TH DEFENDANT

RULING

1. This is a ruling on the application dated **25/3/2019** and filed in court on **27/3/2019**. The application has been brought by the defendants/applicants seeking for orders that there be stay of execution and setting aside of the judgment delivered on **29/1/2019** and all consequential orders. They also prayed for reinstatement of this suit and costs of the application be provided for.

2. The application is premised on the provisions of **Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 1** and **15** of the **Civil Procedure Rules, Section 1A, 1B** and **3A** of the **Civil Procedure Act.**

3. The grounds on which the said application is made are that the matter proceeded in absence of the defendants leading to entry of judgment and issuance of decree; that there was misapprehension of facts by the court largely due to misguiding testimony of the plaintiffs and their witnesses; that it is trite constitutional and statutory principle that justice shall be administered without undue regard to procedural technicalities; that regard should be given to the substance of the matter; that the balance of convenience favours the applicant and that the defendants' defence has a merit that raises triable issues.

4. The application is supported by the affidavit of Allan Chelimo the 3rd defendant/applicant sworn on **25/3/2019** which he swears on his behalf and of all the other defendants. That affidavit reiterates the same matters set out in the grounds above.

5. In their opposition to the application, the plaintiffs filed replying affidavit sworn by the 2nd plaintiff/respondent on **18/4/2019** on behalf of both plaintiffs. In summary he states that the application has no merit since when the hearing proceeded on the 20/9/2018 the applicants and their counsel were present in court and that he was even cross-examined on the same but when the matter came up at the next hearing date which had been taken in their presence, they all absented themselves and they have not explained the failure to attend court on 27/9/2018 when the defence case was deemed closed. The conduct of the defendants with regard to substitution of the original 3rd defendant William Chelimo Katamet is also faulted; that the deponent was compelled to effect revival and substitution due to the reluctance of the defendants to substitute one of their own and this is attributed to the comfort the defendants enjoy in being in possession of the suit land yet the plaintiffs' fathers' estate is entitled to justice. Further it is averred that an earlier application dated **26/2/2019** secured a stay of execution and was not prosecuted; instead it was withdrawn and instant application was filed.

6. The defendants filed a further affidavit dated 23/4/2019. Without stating any date, the deponent who is the 3rd applicant depones that his advocate did not appear in court and neither did he advise the defendants of the hearing date for unclear reasons and that they are now ready

and willing to table their evidence before the court if given a chance.

7. The defendants filed submissions on **8/5/2019** while the plaintiffs filed on **6/6/2019**.

8. The defendants submissions cites **Karatina Garments -vs- David Nyanarua [1976] KLR 2** and **Pithon Waweru Maina -vs- Thuku Mugiria [1982-1988] KAR 171** for the proposition that court should adopt a policy of deciding cases on their merit rather than encourage ex-parte judgment based on procedural technicalities.

9. The plaintiff on the other hand cited **Kisumu Civil appeal No. 85 of 1998 Stallion Insurance Co. Ltd -vs- Rosemary Orao** where an application to set aside judgment in circumstances similar to those of defendants in this case was declined on the ground that the reasons for failure by the appellant and its counsel to attend the hearing as scheduled was not given and no attempt was made or shown to have been made to obtain the explanation from counsel who then had the conduct of the case. They also cited **Kitale ELC No. 44 of 2011 Jane Cherutich Maswai -vs- Samuel Kiplagat Misoi** where an adjournment application by counsel for the defendant was refused and counsel opted not to proceed and the case was heard and judgment delivered in favour of the plaintiff and a subsequent application for setting aside was dismissed on the basis that the applicant had demonstrated an intention to delay of the finalization of the suit just like the defendant's herein have purportedly done. The plaintiff distinguished the cases cited by the defendants, stating that in **Karatina Garment case** the facts are different from the instant case. In distinguishing the **Pithon Waweru** case the plaintiff submits that in that case unlike in the present case, the defendant's advocate had written a letter to the court on the hearing date to the effect that he was engaged in the High Court and had telephoned the clerk but neither message reached the magistrate before the case proceeded.

Determination

Issues for Determination

(a) Whether the applicants have satisfied the condition requisite for setting aside of judgment.

(b) What orders should issue?

(a) Whether the applicants have satisfied the condition requisite for setting aside of judgment

10. It is trite that the power of court to set aside judgment is unfettered. The numerous cases around this point include **Patel -vs- EA Cargo Handling Services Ltd.**

11. In **Patel -vs- EA Cargo Handling Services Ltd [1974] EA 76**, the court held as follows:

> **"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. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."**

12. Order 10 rule 11 of the Civil Procedure Rules on which the applicant relies 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."**

13. The heading to **Order 10** is as follows:

"Consequence of non-appearance, default of defence and failure to serve."

14. Since it is clear that there was a defence and the matter had been set down for hearing, in my view, the applicants' application for setting aside the judgment of this court does not fall under this order.

15. In the circumstances of the instant application, the applicants may therefore be deemed to be relying more on the substantive provisions of **Sections 1A 1B** and **3A** of the **Civil Procedure Act.**

16. However, focus is on **Order 12 Rule 7** which provides as follows:

> **"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

17. As stated earlier the court's discretion to set aside judgment is unfettered. The only condition is that the court must satisfied there is sufficient cause for doing so.

18. In the instant application the affidavit of the applicants must be examined for evidence of good grounds for setting aside.

19. It is devoid grounds except that contained in **paragraph 8** therefore to the affect that the defendants were not informed of the hearing date of the suit for reasons not clear to them.

20. It is must be noted that according to the record of proceedings in this case there was representation for the defendants on **16/11/2017, 1/2/2018, 20/4/2018, 26/4/2018, 19/9/2018, 20/9/2018** and **27/9/2018**.

21. The two last dates are of considerable significance in the instant application because on those days the matter was scheduled for hearing.

22. Whereas the plaintiffs gave evidence in the presence of the defendants' counsel on **20/9/2018** and closed their case, the defendants and their counsel were notably absent on **27/9/2018** which date had been fixed in open court in the presence of their counsel.

23. The defendants have not denied that they were in court on **20/9/2018** when the plaintiffs' case proceeded to its closure and the date for the defence hearing was issued.

24. I am inclined to believe the respondents' affidavit evidence that the defendants were actually in court on **20/9/2019** when the hearing date for the defence case was set by the court in the presence of their counsel.

25. The defendants do not give any account of why they were not in court on **20/9/2019**. There being no explanation forthcoming from the defendants as to why they did not attend court this court must look out for reasons why their advocate never attended court on that date. In certain instances the court may set aside judgment in favour of an applicant where a mistake on the part of counsel has occurred so as not to penalize an innocent party. Nevertheless this court must be cautious while on such an inquiry to avert abuse of the process.

26. Ordinarily the court would consider an advocate to be having the litigant's mandate when it comes to positive action during the pendency of a suit but the same may not be said to be the automatic presumption where the advocate does not attend court.

27. In the case of **Nairobi Civil Case No. 1079 of 1980 Sammy Maina Versus Stephen Muriuki** the court observed as follows:

> **"As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham. What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalised due to his advocate's faults (see Shabir Din v Ram Parkash Anand (1955) 22 EACA 48)."**

28. However the applicants in the instant suit do not give any impression of having attempted to secure the reasons for not attending court from their erstwhile advocate before engaging the services of the current advocate.

29. Can the applicants be said to be innocent and not privy to the default of their counsel? In my view if they were, nothing would have been easier than stating it expressly in their application. The answer therefore is a plain "No".

30. Now the applicants present this court with a dual problem because they will not in the application reveal with clarity why they were absent in court on **20/9/2018** and neither will they say anything about their advocate's reasons, or reported reasons, for similar default on the same date.

31. In my view a competent application would include both explanations and anything short of that should be declared to be lack of candour on the applicant's part.

32. In the face of the facts that I have set out above, I am perplexed by the lack of any denials that the applicants were in court on the date the hearing date was fixed and the failure to account soundly for their own and their advocate's reasons for default in attending court.

33. In the case of **Belinda Murai & Others -vs- Amos Wainaina, [1981] eKLR** the Court of Appeal 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."**

34. A mistake on the part of counsel would have merited some consideration by this court. It was upon the applicants or that counsel to establish that there had been a mistake. In this case however the applicants 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 and automatically exonerates them from blame in respect of the default in attending court, which is not the case.

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

36. 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. In the case of **Richard Nchapai Leiyangu -vs- IEBC & 2 Others,** the Court expressed itself as follows:-

> **"We agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."**

37. The same general principle is contained in the case of **Philip Chemwolo & Another -vs- Augustine Kubende, [1982-88] KAR 103 at 1040,** with the court in that case stating that the broad equity approach of putting right error or default by payment of costs would not be applicable if there is fraud or intention to overreach.

38. The analysis herein above rules out error on the part of the applicants or their counsel.

39. There being no other ground raised in the application I find that the application dated **25/3/2019** has no merits and I am unable to exercise my discretion in the applicants' favour. I hereby dismiss the application dated **25/3/2019** with costs to the plaintiffs.

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

MWANGI NJOROGE

JUDGE

18/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Mufutu holding brief for Kiarie for Respondent

N/A for the applicants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

18/7/2019