

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 954 OF 2012

SAMUEL THUO MUGURE.....PLAINTIFF

VERSUS

ERASTUS MUNGAI KIARIE.....1ST DEFENDANT

LAND REGISTRAR, THIKA.....2ND DEFENDANT

GITHURAI CONSTITUENCY

RANCHING COMPANY LIMITED.....3RD DEFENDANT

RULING

Through the application dated 28/05/2019, the 1st Defendant seeks stay of execution of the judgement of this court delivered on 24/04/2019 pending hearing and determination of the application and the hearing and determination of the suit or until further orders are given by the court. The 1st Defendant also seeks to have the Plaintiff's case re-opened for hearing afresh on priority basis and that the 1st Defendant be granted unconditional leave to participate in the trial and defend the suit by filing his witness statements, list of exhibits and the pre-trial questionnaire. He also seeks an order that that the judgement and decree issued on 24/04/2019 together with all consequential orders and proceedings be reviewed or set aside, and costs of the application.

The application was supported by the 1st Defendant's supporting affidavit sworn on 28/05/2019 in which he admitted that upon being served with summons in this matter, he instructed Gathii Irungu and Co. Advocates to represent him in the matter. He deponed that recently when he went to his advocate's office, he was shocked to learn that judgement had been entered in favour of the Plaintiff. He deponed that he learnt that his Advocates did not file a defence despite him giving them instructions to do so. He deponed that he believed that his previous advocates' failure to put forth his defence was the mistake of counsel which should not be visited upon him. He deponed that he felt that he was not getting proper legal representation from the said Advocates hence he sought advice from his current Advocate, who filed this application on his instructions. He deponed that he was aggrieved by the judgement entered *ex parte* since he was not given an opportunity to adduce evidence and present his defence to the claim, and now seeks to set aside the judgement. He also deponed that the Tribunal's decision adopted in the judgement was annulled through a judgement issued by **Justice C.W Githua** delivered on 29/05/2012 in **JR ELC Misc. Civil application No. 42 of 2011**, and annexed a copy of the said judgment. He contended that the *ex parte* judgement was prejudicial to him and unless it is set aside, it would cost him irreparable loss and great injustice.

The Plaintiff opposed the 1st Defendant's application through his replying affidavit sworn on 04/07/2019. He deponed that the firm of M/s Gathii Irungu Advocates entered appearance on behalf of the 1st Defendant vide the notice of appointment of Advocates dated 15/01/2013. He further deponed that on several occasions, the 1st Defendant's advocates were served with hearing notices but they failed to appear in court for the hearing of the suit. He annexed the affidavit of service dated 17/04/2019. He further averred that the 1st Defendant is his cousin and they always met and the Plaintiff kept on reminding him about the case but he was not taking the matter seriously. He further deponed that although the case proceeded *ex parte*, the judgement delivered by the court was well reasoned and that counsel for the 1st Defendant was served with the judgement notice but he failed to attend court when the court delivered judgement. He deponed that the application is an afterthought as the 1st Defendant was given an opportunity to be heard but he was not keen on the matter. He urged the court to dismiss the application.

Counsel for the 1st Defendant submitted that the 1st Defendant's previous counsel was served but the 1st Defendant was not aware of the case going on. The Plaintiff's counsel submitted that the 1st Defendant had not advanced good reasons for setting aside judgment as the suit was filed in 2012 yet it appears that the 1st Defendant follow up the progress of the matter with his advocates.

The court has considered the application, the Plaintiff's response and submissions by the parties. In **James Wanyoike & 2 others V. CMC Motors Group Limited & 4 others [2015] eKLR**, while noting that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgement, the court outlined the principles for setting aside an *ex parte* judgement as including whether there is a defence on the merits; whether there would be any prejudice to the Plaintiff; and the explanation for the delay. The 1st Defendant did not file a defence in this suit, neither did he file his documents for the court's consideration. The 1st Defendant was a party to **Nairobi JR ELC Misc. Application No. 42 of 2011**, which he now seeks to introduce as a new fact, yet he failed to file his documents within the stipulated timelines under the law. The 1st Defendant did not annex a draft defence to his application for consideration by this court. As such, the court cannot determine whether the 1st Defendant has a good defence that should be considered on merit which would warrant the setting aside of the judgement. This suit was filed in 2012 and the record shows that the 1st Defendant and his counsel were absent on numerous occasions when this matter came up before the court. It has taken seven years for this matter to be determined. The court is convinced that starting this matter *de novo* would greatly inconvenience the Plaintiff. The 1st Defendant's explanation for not participating in this matter beats logic for seven years is a long time for a party to cite mistake of counsel without any plausible explanation. A litigant must be vigilant and keen to

follow up the progress of suits to ensure they are determined expeditiously. The long period of time taken before the 1st Defendant took action in this case only goes to show that the 1st Defendant had little regard for these proceedings.

The reasons given by the 1st Defendant are not sufficient to warrant the setting aside of the judgement of the court. The 1st Defendant's application dated 28/05/2019 is dismissed with no order as to costs.

Dated and delivered at Nairobi this 8th day of August 2019.

K.BOR

JUDGE

In the presence of: -

Ms. Amwanzo holding brief for Mr. G. Mulanya for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants