



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC No. 745 OF 2015

DICKSON OPOLA OKUMU.....PLAINTIFF/RESPONDENT

VERSUS

TOM ODHIAMBO ODARI

JOHN OWINO ODARI..... DEFENDANTS/APPLICANTS

RULING

Summary of Facts

1. Dickson Opolo Okumu (*hereinafter referred to as the Plaintiff*) filed this suit against John Owino Odari (*hereinafter referred to as the Defendants*) primarily seeking orders of injunction preventing the Defendants from trespassing upon land parcel number KISUMU/KOGONY/1649 and an order for eviction directing the Defendants to vacate the suit property; damages for trespass; mesne profits and costs of the suit with interest thereon.
2. The Plaintiff made his case fully, including giving testimony and filing submissions, the Defendants did not proceed with making their case beyond entering appearance and filing a statement of defence. In the course of proceedings, the Defendants' Counsel stated that they had problems communicating with their client and intended to file a formal application to cease acting for the Defendants but did not do so. The defence case was declared closed on 29th May 2018 and judgment delivered against the Defendants on 13th March 2019.
3. The Defendants have subsequently filed an application dated 12th June 2019 seeking to stay execution of the judgement dated 13th March 2019, to set aside the same judgment and to be allowed to re-open the defence case and defend the suit in entirety. The application is brought under Order 22 Rule 22 and Order 51 Rules 1 and 15 of the Civil Procedure Act. The Defendants claim that their failure to attend court during the defence hearing was due to loss of contact between them and their Advocates thus the failure was unintentional and excusable. The Defendants state that they will be greatly prejudiced if the application is not allowed. They cited Article 159 of the Constitution which requires the court to proceed without undue regard to procedural technicalities.
4. The Plaintiffs have filed the following grounds of opposition:
 1. That the application is misconceived, misdirected and an abuse of process of the court.
 2. That the ground upon which the Applicant application is based cannot afford the orders sought.
 3. That the application offends the provision of Order 45 of the Civil Procedure Rules and Sections 2 and 80 of the Civil Procedure Act.
 4. That the application is made in bad faith and with intent to frustrate the Plaintiff from enjoying the fruits of his judgment.
 5. the application is entirely unmerited, frivolous and vexatious, and the same ought to be dismissed with costs to the Plaintiff.
5. *M/S Imbaya learned counsel for the Defendants* eloquently submits that the Defendants were not allowed to defend themselves contrary to the rules of natural justice and Article 50 (1) of the Constitution. Counsel contended that the Plaintiff had not proved his case beyond the balance of probability, and that their defence had raised triable issues. Counsel submitted that the application had been filed timeously and that the Plaintiff would suffer no prejudice if the application was allowed.
6. *Mr Mirembe learned counsel for the plaintiff* strongly submits that after the close of the Plaintiff's case on 30th January 2017, the defendants were afforded multiple opportunities to defend themselves but squandered them and only had themselves to blame. Counsel

submitted that the issue of whether the Plaintiff had obtained the title deed fraudulently had already been adjudicated upon by the court and was subject to an appeal or review, not setting aside.

7. Conditions for setting aside an ex-parte judgment are clearly provided in order 7 rule 12 of the Civil Procedure Rules, thus:-

“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.”

8. The Court of Appeal in *Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd* [2016] eKLR laid out the principles for setting aside ex-parte judgments as follows:

“The principles for the setting aside of ex-parte judgments are well-settled and have been for long. The issue falls within the discretion of the judge and it is a discretion that is to be exercised in a judicial and judicious way on the basis of clear principle, not capriciously or on a whim. It is exercised “to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice” as was famously stated by the High Court of Kenya in *SHAH VS. MBOGO & ANOTHER* [1967] EA 116 and upheld by the predecessor of this Court in *MBOGO VS. SHAH* [1968] EA 93.

... The learned Judge was also obligated to consider in an application to set aside an exparte judgment whether the defendant had a defence that was not frivolous, a sham, or shadowy or, put another way, that raised a triable issue. If it did raise such an issue, the defence ought to have been allowed to be ventilated on merit at a trial for it should never be lost sight of that courts exist for the purpose of determining rights and entitlements of parties substantively and on merit upon hearing them and considering such evidence as they may tender.”

9. In *Philip Ongom, Capt v Catherine Nyero Owota* ((Civil Appeal No. 14 of 2001)) [2003] UGSC 16 (page 6) the Supreme Court of Uganda held that such an application must fulfil one of two conditions, namely:

“(a) either that the defendant was not properly served with the summons,

(b) or that the defendant failed to appear in court at the hearing, due to sufficient cause. ... However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”

10. Citing with approval the above case, *Mativo J. in Wachira Karani v Bildad Wachira* [2016] eKLR elaborated further on the condition of demonstrating “sufficient cause” to warrant the exercise of the court’s discretion in the applicant’s favour as follows:

“The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.[14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

11. In *Sebei District Administration v Gsayali and others* [1968] EA 300 the Court held that it would still have discretion to set aside an ex-parte judgment even where it seemed that the judgment seemed to have been approbated by the client:

“As was said by Ainley, J. (as he then was) in *Jamnadas V. Sodha v. Gordhandas Hemraj* ((1952), 7 U.L.R. at p. 11):

‘...The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.’”

12. The Defendants filed a defence on 19th July 2012 not only denying that the Plaintiff’s claims but also stating that the plaintiff had himself registered as the proprietor of the land fraudulently. Counsel for the Defendant had also cross-examined the Plaintiff on the identity of the person who had sold him the land parcel. These are undoubtedly triable issues which should have been canvassed by the Defendants on merit were it not for their default.

13. On whether loss of contact between the Defendants and their Advocate is a sufficient cause for setting aside the judgment of 13th March 2019, I do find that the same is not sufficient.

14. *Njoroge J. in Rukenya Buuri v M’arimi Minyora & 2 others* [2018] eKLR while considering this issue examined the conduct of the applicant after losing contact with his advocate and the ex-parte judgment delivered:

“However, the advocate had made it clear that he had lost touch with him. This was a clear indication that the plaintiff was not

interested in prosecuting his case diligently. This case having been filed in 2006, it is clear that the plaintiff was indolent. Blaming his former advocate is not enough. A litigant must be diligent enough to follow up how his case is being handled by his advocate. It is pellucid that the plaintiff had failed in his duty to give his advocate proper instructions... It is also noted that this application was filed on 12th June, 2018, four months after the impugned judgment was delivered. This four month delay does not evince any diligence that can be ascribed to the plaintiff."

15. In this particular case, it can be reasonably inferred that the Defendants were still in contact with their counsel as late as 22nd February 2018 but had still not complied with the court orders of 15th June 2017, particularly the order to file an affidavit giving details of the reason behind their failure to be present for the defence hearing slated for the same date. Both the Defendants and their Counsel have been economical with the circumstances surrounding their loss of contact

16. Along with their filing of this application 3 months after the delivery of the ex-parte judgment and service of the decree, the Defendants' conduct seems to indicate that they were disinterested in diligently canvassing their defence beyond filing their statement of defence.

17. The upshot of the above is that the Defendants have failed to demonstrate a sufficient cause for setting aside the ex-parte judgment and therefore their application is dismissed with costs.

Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 25TH DAY OF OCTOBER, 2019.

In the presence of:

Mr. Odeny for Plaintiff

Mr. Juma for Defendant

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE