REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 17 OF 2011

MAURICE ANTONY WANJALA MUSE................................PLAINTIFF

VERSUS

ANNA WANYAMA WANJALA......................................1ST DEFENDANT

JOHN SIMIYU WEPUKHULU.....................................2ND DEFENDANT

ISAAC WAFULA WANAKACHA.................................3RD DEFENDANT

OMOTO DAVID *ALIAS* OMOTO PHILIP..................4TH DEFENDANT

SOLOMON WANYONYI KHAEMBA..........................5TH DEFENDANT

ABRAHAM CHENGE WEKESA..................................6TH DEFENDANT

PENANA MTONYI...7TH DEFENDANT

MARY AMBOGO..8TH DEFENDANT

NELLY SIKHOYA BALANGA......................................9TH DEFENDANT

ANNE NEKESA WEKESA..10TH DEFENDANT

JOTHAM SIMITA..,............11TH DEFENDANT

WYCLIFFE AIRO SIRIKWA......................................12TH DEFENDANT

RULING

1. The motion dated **27/8/2019** and filed in court on **29/8/2019** has been brought by the 2nd - 12th defendants who seek the following orders:-

(1) …spent

(2) …spent

(3)That at the interpartes hearing of this application judgment entered on 31/7/2019, proceedings leading to the same, decree and all consequential orders be set aside.

(4) That further upon setting aside the judgment the matter to begin afresh and the 2nd - 12th defendants/applicant be accorded opportunity to defend the suit.

(5) That costs of this application be provided for.

2. The application is brought under provisions of **Order 10 rule 11 of the Civil Procedure Rules, Section 1A, 3 & 3A of the Civil Procedure Act.**

3. The grounds on which the said application is made are that the judgment in this suit was entered on 31/7/2019 without the 2nd - 12th defendants having testified and having filed defences; that the firm of Karanigrey & Co. Advocates represented only the 1st defendant and not the 2nd - 12th defendants; that the 1st defendant who sold the suit land to the 2nd - 12th defendants is the wife to the plaintiff; that the 2nd - 12th defendants were never accorded opportunity to state their case and have been condemned unheard owing to a mistake not of their making; that the firm of Karanigrey & Co. Advocates amended joint defence leaving the 2nd - 12th defendants out and without defendants knowledge and they view that there was confusion on the issue of representation; that the defendants are desirous of defending the suit and be heard by this court and that no prejudice shall be occasioned on the part of plaintiff if the orders sought are granted.

4. The application is supported by the affidavit of the 2nd applicant sworn on **27/8/2019.** That affidavit reiterates the same matters set out in the grounds above.

5. The plaintiff filed a replying affidavit dated **11/9/2019** and deponed as follows: that the defendants current advocates are not validly on record; that the applicants have mislead the court; that the applicants had a duty to follow up on the progress of the suit but did not do so; that they entered appeared through Bulimo & Co. Advocates who were subsequently replaced by Karanigrey & Co. Advocates and they are bound by the actions of their advocates on record; that no good explanation has been given for the applicants' failure to testify in the matter; that this is an order of 8 years old and it is unfair to restart it afresh and the defendants recourse is an appeal and that the defendants should not be allowed to benefit from their own negligence

6. The plaintiff filed written submissions on 23/9/2019 and the defendants filed theirs on 27/9/19 I have considered the application and the response including the submissions.

7. The discretion of the court in respect of applications for setting aside orders is unfettered and the court would in all circumstances take the cause that would ensure justice is done. Upon an examination of the record in this case I do find that the applicants and the 1st defendant sailed in the same boat by filing a joint statement of defence through Bulimo & Co. advocates on 7/4/2011. I do find that each and every defendant was addressed with a copy of the summons and indeed the copies thereof are in the court record. No allegation is made that they were not served with the summons or that Bulimo & Co. Advocates were irregularly on the record on their behalf. The affidavit of the 2nd defendant states that the change over from Bulimo & Co. Advocates to Karanigrey & Co. Advocates took place on 19/11/2018 without the applicants' knowledge and that on the same date the latter firm amended the defence. It is alleged in that affidavit that Karanigrey & Co. Advocates continued appearing in the case without the applicants' involvement and they never knew of the hearing.

8. I have seen the defence as amended by Karanigrey & Co. Advocates on 19/11/2018. In my view that amendment arose from an application dated 15/11/2018. In that application the 1st defendant swore the supporting affidavit. There was no indicated whatsoever in that application that the defence was being amended in favour of the 1st defendant alone. Indeed the contents of the counterclaim that came into being vide amendment favours the applicants in that prayer No. (a) and (b) thereof seek that the agreements entered into between the 1st defendant and the applicants be ratified and an order directing the plaintiff to transfer to each defendant the portion of land they had purchased.

9. It is noteworthy that the defendants have owned up to having instructed Ms. Bulimo & Co. Advocates who filed a defence which who had not sought such positive orders on their behalf. It is therefore incredible that that defence could have been amended in their favour without their knowledge or that there would have been need to amend it if they were not in contact with Karanigrey & Co. Advocates. The amended is signed off by Karanigrey & Co. Advocates as follows:

"Karanigrey & Co., Advocates for the defendants".

10. In my view Karanigrey & Co. advocates acted on behalf of all the defendants in the suit and there was no basis for this court to believe otherwise. They were therefore bound the acts of that firm at the hearing and this court need not be concerned with any happening regarding their relationship outside the court.

11. Nothing prohibited the applicants from joining the 1st defendant in defending the suit. However, the applicants acted as though they had tacitly appointed the 1st defendant to represent their interests in the matter and indeed her amendments to the plaint seems to confirm this picture.

12. In the case of **Bakari Sheban & 39 others v Said Bin Rashid Khamis [2017] eKLR** the Court of Appeal stated as follows:

> **"It is acceptable both under the Evidence Act (section 143) and the Civil Procedure Rules for one person to present evidence on behalf or instead of others and such evidence would be sufficient to prove the case if it meets the threshold of proof."**

13. Later on in the **Sheban Case (supra)** the Court of Appeal stated as follows:

> **"It follows that the person nominated by the group would be one who is conversant with the case of each claimant. In the alternative, nothing stops each of the claimants from giving evidence irrespective of the time it may take if there are numerous claimants. The delay that may result is the price to pay for justice. It would probably take the same time if each claimant were to file separate suits. In this case Bakari Sheban appeared to have forgotten that he was presenting the case on behalf of each appellant and instead concentrated his testimony to the ¼ acre he was claiming."**

14. It is strange that a suit directly relating to the interest of the applicants could last 8 years in court without the applicants recording even a single witness statement in accordance with the rules yet they had a counsel on the record.

15. In my view it is possible that they considered their defence so inextricably intertwined with the 1st defendant's such that they needed not file anything to supplement the witness statements and documents she filed or her oral evidence.

16. In this case it must be taken that the applicants never wanted to physically appear in court and defend the matter.

17. This court has also considered the nature of the judgment delivered against the defendants and the evidence tendered on behalf of the defendants and found that the defendant have not established that any other evidence in their possession was sufficient or crucial to enable the court arrive at any other determination.

18. In the case of **Patel -vs- East Africa Cargo Handling Services Ltd (1974) EA 75 as per Duffus P.** who held:-

> **"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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on 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."**

19. As observed in the above judgment a court will not set aside a judgment unless it is convinced that there is a defence on the merits on the record.

20. The application filed by the applicants is bare of any annextures. A copy of their proposed defence would have enable this court to compare it with the existing defence for any similarities. They have not put forward any copy of a defence that they would wish to rely on in the event the judgment was set aside as sought.

21. In my view the only reason such a defence is not attached to the application is that it would be similar to the amended defence and counterclaim filed on **19/11/2018** on their behalf.

22. Having regard to all the circumstances set out above I must consider whether it is fair and just to the plaintiff and the 1st defendant to set aside the judgment.

23. In my view the applicants have not convinced court that they would have any other case different from that put up by the 1st defendant and any orders of setting aside would make the parties go all over the same motions that the plaintiff and the 1st defendant went through at the hearing without any possibility of a different conclusion. They have not established that they suffered any prejudice in the circumstances of the process of the hearing of this case.

24. The application dated **27/8/2019** therefore has no merit and is therefore dismissed with no orders as to costs.

Dated, signed and **delivered** at **Kitale** on this **9th** day o**f October, 2019**.

MWANGI NJOROGE

JUDGE

<u>9/10/2019</u>

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Onyancha holding brief for Amasakha for plaintiff/respondent

N/A for applicants

<u>COURT</u>

Ruling read in open court at 12.35 p.m.

MWANGI NJOROGE

JUDGE

9/10/2019