



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 942 OF 2016

OGEMBO ONDIEKI.....PLAINTIFF

VERSUS

SAMWEL BOSIRE ANGWENYI.....1ST DEFENDANT

KEROKA RIVERSIDE SELF HELP GROUP.....2ND DEFENDANT

MARGARET NYANGAU.....3RD DEFENDANT

RULING

INTRODUCTION

1. What is before me is the Plaintiff's Notice of Motion dated 3rd September 2019 brought pursuant to section 3, 3A and section 63 (e) of the Civil Procedure Rules in which the applicant seeks the following orders:

- i. Spent
- ii. Spent
- iii. That this honourable court do grant a stay of execution pending the hearing and determination of this application
- iv. That this honourable court be pleased to set aside the judgment entered on 25th April 2018.
- v. That the costs of this application be provided for

2. The application is based on the grounds stated on the face of the Notice of Motion which include the following:-

- a) The judgment was entered irregularly
- b) There is an error apparent on the face of the record as the report by the Assistant County Commissioner Mosochi was not filed and adopted as a judgment of the court.
- c) The adjudication was not voluntary as the Plaintiff did not participate in the said proceedings and there are no proceedings to show that this matter was indeed mediated upon in the presence of the parties.
- d) The Applicant/Plaintiff did not consent and/or participate in the entry of judgment herein. He wanted the matter fixed for hearing instead.
- e) There is no trial or any adjudication of this matter determining the questions of the suit.
- f) The plaintiff/ applicant was not afforded an opportunity to accept the report or not.

3. The application is supported by the affidavit of Thomas Ogembo, the plaintiff herein sworn on the 3rd September 2019 in which he deposes that he is the registered proprietor of land parcel number WEST KITUTU/BOGEKA/2997. Judgment was delivered on 25th April 2018 and warrants of attachment and sale of movable properties in execution of the decree have been issued for the sum of Kshs. 3,905,925.

He further depones that the adjudication was not voluntary as he did not participate in the said proceedings as there are no proceedings to show that both parties participated in the same. He depones that there is an error apparent on the face of the record as the report by the Assistant Commissioner Mosochi was not filed and adopted as a judgment of the court. He ends by stating no prejudice will be suffered by the defendant if the application is allowed.

4. The application is opposed by the defendant through his Replying affidavit sworn on the 14th day of October 2019 in which he gives a detailed background of this matter leading upto the entry of judgment. In essence he maintains that this matter was referred to mediation vide a court order dated 16th March 2017 wherein the Assistant Deputy Commissioner was to chair the mediation process and file his report. Subsequently, both parties attended the mediation process and reached an agreement that the plaintiff was to refund the 1st Defendant KShs.3,000,000. He has annexed a copy of the summons and report/award that was filed in court by the Assistant Deputy Commissioner as annexure SB 5(a and b). The consent judgment was recorded in the presence of both parties but the plaintiff failed, neglected and/or refused to settle the decretal sum thus necessitating the setting in motion of the process of execution. He maintains that the judgment entered in favour of the respondent was as a product of a consent and the law is clear that a consent judgment cannot be set aside unless there is fraud. He argues that there is no basis for disturbing the said consent judgment which was entered more than a year ago on 25th April 2018.

5. He depones that both parties submitted themselves to mediation whereupon a verdict was arrived at by agreement of the parties. Thereafter, the matter came up in the presence of the honourable judge whereupon he adopted the award of the Assistant Deputy Commissioner as a judgment of the court and no protest was registered by the plaintiff. He further states that in the circumstances, the application is an afterthought and an abuse of the court process.

6. The application was argued orally and counsel for both parties presented their submissions.

Mr. Kerosi learned counsel for the plaintiff submitted that even though article 159 of the Constitution of Kenya provides for alternative methods of resolving disputes including mediation, mediation should be voluntary and it should be understood. He submitted that the parties herein did not understand what mediation entails. He argued that even though the mediator's report was filed in court on 22nd May 2017, the said report was not adopted by the court.

7. In his response Mr. Otieno learned counsel for the 1st defendant relied on the Replying affidavit sworn on the 14th October 2019 and submitted that the application was an afterthought and a scheme to delay and frustrate the defendant from enjoying the fruits of his judgment. He argued that the applicant was seeking an equitable remedy and equity does not assist the indolent. He stated that this matter had been in court on various occasions since the mediator's report was filed way back in May 2017, yet the applicant had never expressed any disquiet with it. He submitted that the idea of mediation was proposed by the plaintiff and he could not now feign ignorance of the process. He submitted that the parties voluntarily submitted themselves to the mediation process and if any party was aggrieved by the outcome they ought to have appealed against the decision that was arrived at. He submitted that this matter had been in court for 9 years and the plaintiff was merely engaging in machinations aimed at delaying the finalization of the case. He submitted that the application was an abuse of the court process and it ought to be dismissed.

ISSUES FOR DETERMINATION

8. Having considered the Notice of Motion, affidavits and oral submissions, The following issues fall for determination:

1. Whether an order of stay of execution of the judgment and decree dated 22nd November 2018 ought to be granted
2. Whether the court should set aside the judgment and decree issued on 22nd November 2018.

ANALYSIS AND DETERMINATION

9. The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment are well settled.

10. In the case of **Patel V East Africa Cargo Handling Services Limited (1974) EA 75** Justice Duffus P stated 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 to 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”

11. Similarly, the case of **CMC Holdings Ltd V Nzioki 2004 KLR 173** in the court held as follows:

“The law is now well settled that in an application for setting aside an ex-parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date, but also whether the defendant has a reasonable defence... which raises triable issues.”

12. It is the applicant's contention that the award or settlement agreement arrived at by the parties after the mediation process was not adopted as a judgment of the court. I have perused the court record and I note that on 20.9.2017 the court observed that the mediation report had been filed and gave a mention date (26.10.2017) for purposes of recording a consent judgment in line with the report. It would appear that the court did not sit on the said date. On 25.4.2018 counsel for both parties attended court and counsel for the 1st defendant briefed the

court on what had transpired during the mediation. He informed the court that the plaintiff had failed to comply with the terms of the mediation agreement. The court then proceeded to enter judgment in terms of the settlement agreement thereby adopting the report of the Assistant Commissioner filed in court on 22.5.2017 as the judgment of the court. The said agreement is therefore binding on the parties and is enforceable as a judgment of the court. The court ordered that in the event the plaintiff failed to pay the agreed sum of Kshs. 3 Million as agreed, the defendant would be at liberty to apply for execution.

13. It is therefore not true that the agreement was not adopted by the court. The said agreement having been arrived at by consent at a mediation session attended by both parties, resulted in a consent judgment which can only be set aside by consent of the parties or for reasons that would vitiate a contract. The court has not been given any such reasons. In the circumstances the application lacks merit and is dismissed with costs to the 1st defendant.

Dated, signed and delivered at Kisii, this 22nd day of November 2019.

J. M. ONYANGO

JUDGE.