



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 477 OF 2014

RAMJI MEGJI GUDKA LIMITED.....PLAINTIFF

VERSUS

GEOFFREY OTUOMA.....1ST DEFENDANT

KISII COUNTY GOVERNMENT.....2ND DEFENDANT

EXECUTIVE COMMITTEE MEMBER

LANDS, KISII COUNTY GOVERNMENT.....3RD DEFENDANT

RULING

INTRODUCTION

1. This Ruling pertains to the Plaintiff's Notice of Motion dated 25th March, 2019 seeking the following orders:

a) Spent

b) That there be a stay of execution of the ex-parte orders of the court issued on 21st March, 2019 and any or all consequential orders emanating therefrom pending the hearing and determination of the instant application.

c) That the ex-parte order entered herein be and are hereby set aside and the 2nd and 3rd Defendants/Applicants be allowed to file the requisite responses and the suit be heard on the merits.

d) That leave be granted to the Defendants/Applicants to file their Replying Affidavit to the application dated 4th February, 2019 out of time.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the supporting Affidavit of **Kennedy C. Onsembe Advocate** sworn on the 25th day of March, 2019. The long and short of it is that Defendants' Advocates failed to attend Court on the 21st March, 2019 when the matter came up for the hearing of the application dated 4.2.19 due to a mix-up in the diary. It is therefore the Applicants' contention that the mistake of their Advocate should not be visited on them.

3. The applicants aver that the suit land is owned by the 2nd Defendant who holds it in trust for the citizens of Kisii County. They further aver that among the orders issued is a mandatory injunction evicting the 2nd Defendant from the suit property without due process, consent and/or authority of the Defendants hence the determining the suit with finality before hearing the parties' evidence. The Defendants contend that they have a defence that raises triable issues which ought to be heard on the merits.

4. The application is opposed by the Plaintiff through the Replying Affidavit of **Joseph Mboya Oguttu Advocate** sworn on the 29th day of March, 2019 in which he states that despite being served with the application dated 4th February, 2019 in which the Plaintiff sought an injunction against the Defendants, the Defendants neither filed a Replying Affidavit nor attended Court on the 21st day of March, 2019 with the result that ex-parte orders of injunction were issued against them. He deposes that the suit property belongs to and is registered in the name of the Plaintiff and the Defendants' acts of erecting temporary structures on the suit property without the Plaintiff's authority have deprived the Plaintiff of the use and enjoyment of his property. He deposes that the Defendants' application is an abuse of the process of the Court and does not disclose any reasonable cause of action.

6. The application was canvassed by way of written submissions and Counsel for both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

The main issues for determination are :

- i. Whether the mistake or error of the 2nd and 3rd Defendants' Advocate should be visited on his clients.
- ii. Whether the Court should exercise its discretion in favour of the 2nd and 3rd Defendants.

ANALYSIS AND DETERMINATION

7. With regard to the first issue, it has been submitted by counsel for the Respondent that where an instructed counsel chooses to misdiarize and/or fail to diarize, the said counsel should not benefit from such laziness and/or default at the expense of a party who exhibited due diligence. He has cited the case of **Delila Kemunto Asiago V Commissioner of Lands & 5 Others [2018] eKLR** where the Court refused to set aside an order granting the Respondent leave to commence proceedings for Judicial Review and such leave was to operate as a stay restraining the Respondent from interfering with the Applicant's occupation of the suit property. The Court observed that legal business can no longer be handled in such a sloppy and careless manner and whenever a solicitor deprives a client of his cause of action the client can claim damages against him.

8. On the other hand Counsel for the Applicant has explained that he misdiarized the date when the application was set for hearing. He has acknowledged that the mistake was his. As was observed by **Apaloo J.A** (as he then was) in the case of **Philip Keipto Chemwolo & Another V Augustine Kibende [1986] eKLR**:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits. I think the broad equity approach is that unless there is fraud or an intention to overreach, there is no error that cannot be put right by payment of costs. The court, as it often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”

9. In view of the above authority which is binding on this Court, and considering the circumstances of this case where a mandatory injunction was issued without hearing both parties, I am persuaded that the Applicant should not suffer because of the blunder of his Advocate.

10. I will now move on to consider whether I should exercise my discretion in favour of the 2nd and 3rd Defendants by setting aside the ex-parte order of injunction.

11. The principles of setting aside an ex-parte Judgment or order are now well settled. The Court has an unfettered discretion to set aside ex-parte orders as long as the discretion is exercised Judicially. This was so held in the case **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR**

and Mbogo V Shah 1967 EA 93.

12. Furthermore I have taken into account the oxygen principles in Sections **1A** and **1B** of the Civil Procedure Act provide that the overriding objective of the Civil Procedure Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. I am of the view that it would not serve the interests of justice to lock out the Applicant on account of his Advocate's mistake.

13. In view of the foregoing, I am inclined to exercise my discretion in favour of the Applicant. However, I am alive to the fact that justice cuts both ways and the Respondent must be compensated by way of costs for the inconvenience occasioned to him. I therefore grant the application in terms of prayers 3 and 4 of the Notice of Motion dated 25th March, 2019. The 2nd and 3rd Defendants shall file their Replying Affidavit within 21 days. The Applicants will however bear the costs of this application.

Dated, signed and delivered at Kisii this 18th day of December, 2019.

J.M ONYANGO

JUDGE.