REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 253 OF 2017

JOSEPH MUIRURI NJIRAINI.....PLAINTIFF /RESPONDENT

VS

JOYCE WANJIKU NGUGI.....1ST DEFENDANT/APPLICANT

LUCY WANJIRU MURIGI.....2ND DEFENDANT /RESPONDENT

THE LAND REGISTRAR MURANGA.....3RD DEFENDANT/RESPONDENT

RULING

1. The Applicant filed the Notice of Motion dated 26/4/2019 seeking orders that:

a. Spent

b. That this Court be pleased to review and thereafter set aside the Court order dated the 7/3/2018 and issued on the 21/3/18 and which order vested the property the subject matter of the dispute herein in the Plaintiff without hearing the Applicant.

c. That his Court be pleased to set the matter down for interpartes hearing at the earliest.

d. That pending the hearing and determination of this application the Plaintiff /Respondent either by himself his servants against or otherwise be restrained from using disposing off or interfering in any other manner with Land Reference No MAKUYU/MAKUYU/BLOCK1/9081

e. There be no orders as to costs

2. The application is grounded on the Supporting Affidavit of the Applicant and the grounds on the face of application. The Applicant avers that she was not served with the hearing notice and therefore did not attend the hearing of her case on the 17/7/2017. That the failure of her Advocate to attend Court was inadvertent and a bonafide mistake and or omission which should not be visited on her. Further that the orders made in the judgement are prejudicial to her and that it is in the interest of justice and fairness that the Court looks favorably to her application.

3. The 1st Respondent resisted the application through a Replying Affidavit dated the 28/9/19 sworn by Joseph Muiruri Njiraini who deponed that the Counsel for the Applicant was served severally with notices including the hearing notice, which notices were acknowledged by the said Advocates but on the hearing date neither the Applicant nor her lawyers were present. That despite being ordered to serve the 1st Respondent with the statement of defense and counterclaim, the 1st Defendant failed to do so leading to the application to strike out the said pleadings on account of non-service. Further that the Applicant demonstrated unwillingness to defend the case all through. The suit was heard by way of formal proof and the Court rendered its judgement on the 17/12/17 in favour of the 1st Respondent and a decree issued thereto.

4. The 1st Respondent maintained that the Applicant has been indolent and is guilty of laches in prosecuting its defence in the matter as seen in the delay in filing the application.

5. That the 1st Respondent has successfully executed the judgement and the application is being brought too late in the day and that it is in the interest of justice that the application is dismissed.

6. The parties filed written submissions which I have read and considered in arriving at the ruling.

7. The issues for determination are;

a. Whether the Applicant is entitled to the review of judgement

b. Whether the judgement should be set aside.

c. Costs

8. First the background of the case; this matter was filed on the 19/5/16 in Nyeri as No 88 of 2016. On the 14/7/2016 the 1st Defendant entered appearance through Beverly Mumbo c/o Federation of Women Lawyers. On 1/8/16 the Applicant filed her defense and counterclaim on record which statement of defense was never served on the 1st Respondent despite request in writing to do so. This led to the striking out of the defense and request for judgment entered against the Applicant and the matter proceeded for formal proof.

9. According to the Court record the Court concurs with the 1st Respondent that despite many instances of service including the hearing notice the Applicant and her Advocates failed to attend Court.

10. Order 45 Rule provides to whom the review should be made to ;

> "An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in Rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed".

11. The operative tone of the above Order demands that the application for review must be based on a). the discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or b). account of some mistake or error apparent on the face of the record or c). any other sufficient reason.

12. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be searched and fished out. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established.

13. It is the finding of the Court that the prayer for review is untenable. It is dismissed.

14. Order 12 Rule 7 provides as follows;

> "Where under this order judgment has been entered or the suit dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just. "

15. The wording of the above provision denotes discretion on the part of the Court. In the case of **Shah Vs Mbogo (1979) EA 116** gives guidelines on the exercise of discretion. It states thus;

> "I have carefully considered in relation to the present application the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

16. It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defense on merit; secondly whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the Court of Appeal in the case of **Mohammed & Another Vs Shoka (1990) KLR 463.**

17. In the case of **CMC Holdings Limited Vs James Mumo Nzioki, CA No. 329 of 2004 1 KLR 173**, in law, the discretion which the Court has in deciding whether or not to set aside ex parte judgement is meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error and it would not be proper use of such discretion if the Court were to turn its back to a litigant who has demonstrated such an excusable mistake inadvertence accident or error.

18. Does the Applicant have a defense that raises triable issues? In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998**, the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an ex parte judgement. It is on record that the Applicant has attached a draft defence and counterclaim which was never served on the Plaintiff despite the Court orders to do so.

19. That notwithstanding the Applicant is claiming land from the 1st Respondent based on an agreement entered between the 1st Respondent

and her late husband in 1998 in respect to parcel LOC.6/GIKARANGU/2220 which is not a subject of this suit and a further oral understanding to an alternative land parcel No. 9081, the subject of this suit. It is not for this Court to assess the merits of the said defence. In the case of **Patel – Vs – Cargo Handling Services *Ltd [1974] E.A. 75*** the Court of Appeal considered the meaning of defence and held that;

> "In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue'.

It is the Court's view that whether the defence has merit is best left to the trial Court to test its veracity at the hearing of the case. The Court however is satisfied that indeed there is a defence with triable issues.

20. As to whether there is explanation for the non-attendance of the Applicant and his Advocate on trial. The Applicant has explained that she was neither served with the notice transferring the case to Muranga or the hearing of the case. According to her admission the notices were served on her previous lawyers who did not realize that the case had been transferred to Muranga. That since the case had been registered under a different case number in Murang'a, the lawyers did not appreciate in time that the notices referred to her case. She stated that once it was brought to her attention that the matter had been heard and judgement rendered it took time for Federation of Women Lawyers office to assign her a lawyer to handle her matter and that is why she delayed in bringing this application.

21. In view of the explanation tendered by the Applicant the Court is satisfied that the conduct of the Applicant is excusable and is not intended to obstruct or delay the course of justice.

22. Is there any prejudice on the part of the Respondent? Though 1st Respondent has informed the Court that the decree has been executed, I note that the execution was by way of removal of caution. The title is in his name and I see no prejudice that the Respondent will suffer if the case is heard on its merits.

23. To serve the interest of justice, I exercise my discretion and allow the application subject to terms;

a. The judgment of this Court delivered on the 17/12/17 be and is hereby set aside in its entirety.

b. The orders of this Court issued on the 17/7/17 be and hereby vacated.

c. The Defendants are ordered and directed to refile and serve the defence and counterclaim upon the Plaintiff within 14 days from the date hereof and thereafter fix the matter for hearing.

d. A restriction be and is hereby registered on the suit land prohibiting any dealings pending the hearing and disposal of this suit.

e. The Applicant shall pay throw away costs to the Respondent/Plaintiff in the sum of Kshs 10,000/- within a period of 45 days.

24. The costs of the application shall be in the cause.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff/Respondent: Present in person.

Advocate is absent.

Ms Wambui HB for Ms Brenda Yambo for the 1st Defendant/Applicant

2nd & 3rd Respondent: Absent

Irene and Njeri, Court Assistants