



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 13 OF 2018**

**(Formerly Nairobi ELC Case No. 30 of 2018 'OS')**

**KILEU NALOTUESHA LEMUTU.....PLAINTIFF**

**VERSUS**

**LEONARD NJAU T/A KINYANJUI & NJAU ADVOCATES.....DEFENDANT**

**RULING**

What is before Court for determination is the Defendant's Notice of Motion application dated the 11<sup>th</sup> April, 2018 and amended on 2<sup>nd</sup> July, 2018 brought pursuant to Order 51 and Order 12 Rule 7 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Defendant has sought for the Court to set aside the order delivered on 15<sup>th</sup> March, 2018. The Application is premised on the grounds that the Applicant had no knowledge of the Hearing Notice which was served on 7<sup>th</sup> March, as he was not present in the Office. He contends that the Applicant has a good Defence and it is in the interest of justice that the Applicant is heard without condemnation. Further, that no prejudice will be occasioned to the Respondent if the Order is set aside as the Defendant has all along acted in good faith as well as in the best interest of the client.

The applicant LEONARD NJAU filed a supporting affidavit where he avers that there is a pending suit between the parties on the same subject matter which is Kajiado SPMCC No. 260 of 2016. He explains that the Plaintiff had instructed him to terminate the sale agreement dated the 20<sup>th</sup> September, 2010 for the sale of thirty (30) acres between the Plaintiff and Joseph Nderitu Kibugu. He confirms that he was to demand for the return of the original title deed to the whole of Kajiado/ Olooitkoshi/ Kitengela/ 1879 from Joseph Nderitu Kibugu. Further, he was instructed to negotiate a refund of the sum of KShs. 4.2 million including all interest and costs that had been agreed between the Plaintiff and the third party's lawyers. He contends that the Plaintiff requested him to purchase 10 acres of land to enable them return monies they owed to third parties to whom they had earlier sold their land but later changed their minds. Further, that he paid them a full amount which they acknowledged receipt vide an agreement dated the 16<sup>th</sup> May, 2013. He confirms carrying out the Plaintiff's instructions and duly sent the surveyors to survey the land and transfer the said land as per their instructions. He reiterates that despite the Plaintiff receiving monies from him and third parties they have refused to remove the caution on the land, which denies him his land and fees. He became aware of this suit when he received a copy of the order delivered on 15<sup>th</sup> March, which had been issued by the Court. He denies knowledge of the Hearing Notice served on 7<sup>th</sup> March as he was not present in the office. He reaffirms that he has a good defense and should be given an opportunity to defend himself.

The Plaintiff opposed the application by filing a replying affidavit sworn by KILEU NALOLETUSHA LEMUTU where he deposes that instead of the Applicant releasing the title to him, he has opted to file the instant application. He insists the Applicant is in contempt of the Order of Court and has no right of audience before it. He claims the Applicant is blackmailing the Court by filing the application without releasing his title and by his conduct, he is acting with impunity. Further, that the Applicant has not given any valid excuse why he failed to participate in the proceedings herein as he admits being duly served. He explains that the Applicant received his title from him with clear instructions to sub divide the property and transfer to Joseph Nderitu Kibugu. Further, that the applicant confirmed receipt of the said instructions. He denies instructing the Applicant to cancel the Sale Agreement between himself and Joseph Nderitu Kibugu but contends that he filed this suit so as to complete the said Sale Agreement. He contends that he is the owner of the title and he needs the same to be released to him. He is not aware of any suit pending between him and the Applicant. Further, that the court where the alleged suit was filed did not have jurisdiction to handle it. He claims his title is not safe with the Applicant as his actions are laden with mischief and he is likely to interfere with it. He reiterates that the Applicant has not demonstrated that he has a good case with chances of success.

The Applicant LEONARD NJAU filed a further affidavit where he annexed pleadings in Kajiado CMCC No. 260 of 2016 which is still pending. He insisted that the Plaintiff concealed the existence of the said suit and filed the instant Originating Summons as a shortcut and an abuse of the process of court. He claims that the Plaintiff has been urging him not to release his title to the Advocates as he has not instructed a Counsel to collect the same. He further annexed a copy of the draft replying affidavit which he intends to file in response to the Originating Summons.

Both parties filed their submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 11<sup>th</sup> April, 2018 and amended on 2<sup>nd</sup> July, 2018 including the parties affidavits' as well as submissions, the only issue for determination is whether the Order of the Court issued on the 15<sup>th</sup> March, 2018 should be set aside.

The Applicant in his submissions reiterated his claim above and relied on the cases of **HCCC NO. 209 of 2015 Kenya Broadcasting Corporation V National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA); Nyeri HCCC No. 101 of 2015 Wachira Karani V Bildad Wachira; Nairobi CA No. 329 of 2001 CMC Holdings Ltd V James Mumo Nzioki; Nairobi CA No. 247 of 2010 AK Adulgani V Geoffrey Nzioka Ndambuki and HCCC No. 144 of 2014 James Wanyoike & Others V CMC Motors Group Limited and Others** to buttress his arguments for setting aside the order of court issued on 15<sup>th</sup> March, 2018. The Plaintiff opposed the application and insisted that the Defendant had not met the threshold for setting aside as he has no just cause for withholding his title. He relied on the cases of **Shah V Mbogo (1967) EA 116; Esther Wamaitha Njihia & 2 others V Safaricom Limited (2014) eKLR; Gideon Mose Onchwati V Kenya Oil Co. Ltd and Anor (2017) eKLR; Stephen Ndichu V Montys Wines and Spirits Ltd (2006) eKLR; Patel V EA Cargo Handling Services (1974)** to support his arguments.

Order 12, rule 7 of the Civil Procedure Rules provides that: **'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.'**

In the case of **Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P at page 76** stated:

**"... 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".**

While in the case of **CMC HOLDINGS LTD VS JAMES MUMO NZIOKA (2004) KLR 173** the Court of Appeal held that:

**"[T]he discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."**

In the current scenario, I note the Defendant admitted that the Hearing Notice was served in their office but he failed to attend Court as he was handling another matter. The Defendant annexed pleadings in Kajiado CMCC No. 260 of 2016 which I note is actually similar to this case. The Defendant further annexed the draft replying affidavit to demonstrate he has a good Defence. Insofar as the Plaintiff contends that the Order should not be set aside as he owns the title to the suit land, however on perusal of the draft replying affidavit including the various annexures, I note there existed an advocate client relationship between the Plaintiff and the Defendant. Further, the Defendant undertook certain legal work in respect to the suit land involving a third party. I note there is also a Sale Agreement dated the 16<sup>th</sup> May, 2013 between the Plaintiff and the Defendant in respect to the suit land where the Plaintiff confirms receipt of purchase price. From my analysis, I opine that these are triable issues and I hold that the Defendant indeed has a prima facie defence.

In the circumstance and relying on the above two Court of Appeal decisions cited above as well as the facts as presented, I find that it would be pertinent if all the parties presented their evidence before court and the suit determined on its merits.

It is against the foregoing that I proceed to allow the Defendant's application dated the 11<sup>th</sup> April, 2018 and amended on 2<sup>nd</sup> July, 2018 and set aside the Order issued on 15<sup>th</sup> March, 2018. I further direct the Defendant to file and serve his replying affidavit in respect to the Originating Summons within 14 days from the date hereof.

The Costs of the Application is awarded to the Plaintiff.

**Dated signed and delivered in open court at Kajiado this 2<sup>nd</sup> day of December, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

M/S. Muya holding brief for Kwengu for plaintiff

No appearance for defendant

Court assistant- Mpoye