



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 1177 OF 2016**

**(FORMERLY HCC NO. 45 OF 2010)**

**PETER BOGONKO ONCHONYA.....PLAINTIFF**

**VERSUS**

**JANET NYANCHAMA NYANGAU.....DEFENDANT**

**RULING**

1. The Environment and Land Court during the period 20<sup>th</sup> March 2017 to 31<sup>st</sup> March 2017 organized a service week for several courts within the country with the objective of clearing case backlog. During the period specific court stations which had high case load of pending cases were identified and Kisii Environment and Land Court was one such station. During the service week the court *suo moto* listed for hearing matters that were deemed ready for hearing and issued hearing notices to the parties. In the present case, the suit was fixed for hearing on 24<sup>th</sup> March 2017.

2. On the date scheduled for hearing, the matter was listed for hearing before Honourable **Lady Justice J. M. Onyango** when only the plaintiff and his advocate appeared. The hearing proceeded *ex parte* and the plaintiff testified and closed his case. The advocate for the plaintiff filed written submission and on 30<sup>th</sup> March 2017 the Judge reserved judgment for delivery on 18<sup>th</sup> May 2017. The court delivered judgment in favour of the plaintiff on 24<sup>th</sup> May 2017 in the presence of both counsel for the plaintiff and the defendant. The defendant's counsel applied orally for a stay of execution of the judgment to enable the defendant to apply to set aside the judgment and for the suit to be heard on merits. The court granted stay of execution for a period of 30 days.

3. On 20<sup>th</sup> June 2017, the defendant filed the Notice of Motion dated the same date expressed to be made under Orders 12 Rule 7, 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking inter alia the following orders:-

**1. That the Honourable court be pleased to grant a temporary stay of execution of the judgment delivered on 24<sup>th</sup> May 2017 directing the eviction of the applicant/defendant from land parcel Central Kitutu/Daraja Mbili/3093 pending the hearing and determination of the application herein.**

**2. That the honourable court be pleased to set aside the *ex parte* judgment delivered on 24<sup>th</sup> May 2017 upon such terms as may be just and have the matter determined on merit.**

**3. That the costs of the application be borne by the respondent in any event.**

4. The application is supported on the grounds set out on the face of the application and the affidavit by the defendant/applicant sworn in support of the application on 21<sup>st</sup> June 2017. The main grounds on which the application is grounded are that the defendant avers that neither her or her advocate was served with the hearing notice for the case and thus the defendant was not aware of the date scheduled for the hearing of the case. The defendant further claims she has a good defence and counterclaim which raises triable issues and it would be in the interest of justice for the case to be tried and heard on its merits having regard to the defendant's defence. The defendant states she has been in occupation and has resided in the suit property for over 20 years and she stands to be prejudiced if she is evicted as decreed in the judgment without being afforded the opportunity of being heard. The defendant further avers that the plaintiff will not suffer any prejudice or injustice if the judgment is set aside and the defendant allowed to be heard on her defence and counterclaim.

5. The defendant has in her supporting affidavit deposed that she had no notice of the date of hearing and that her advocate had informed her that he also never had any notice of the hearing date explaining why he was absent in court during the hearing.

6. The plaintiff swore a replying affidavit dated 4<sup>th</sup> July 2017 in opposition to the defendant's application. The plaintiff avers that the defendant is misleading the court that she was not served as the Deputy Registrar duly served the parties with hearing notices and additionally the plaintiff's advocates caused the defendant's advocates to be served with hearing notices both through a process server and

through the post. The plaintiff denies that the defendant's defence and counterclaim raise any triable issue to warrant the court to grant the defendant leave to defend and prosecute the counterclaim. It is the plaintiff's contention that the defendant is merely intent on frustrating the plaintiff from enjoying the fruits of his judgment which was regularly obtained.

7. The defendant/applicant swore a supplementary affidavit dated 27<sup>th</sup> July 2017 in response to the plaintiff's replying affidavit where she avers that her advocate could not have received the registered letter as his advocate's postal box had been closed for nonpayment of annual dues. She further refuted the affidavit of service by the process server stating that there was no security officer within the building housing his advocate's office known by the name Njoroge. She further deposed that her advocate's office was operational and was never closed as averred in the affidavit of service.

8. The application before me is principally one under the provisions of Order 12 Rule 7 of the Civil Procedure Rules which invites the court to exercise discretion in considering whether or not to set aside a judgment that is obtained ex parte. Order 12 Rule 7 provides thus:-

**"7. 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."**

It has long been held that a judge's discretion in considering an application to set aside an ex parte judgment is wide and unfettered except that such discretion has to be exercised judiciously and ought not to be exercised whimsically or capriciously.

9. In the case of **Patel –vs- E. A Cargo Handling Services Ltd [1974] E. A 75 Duffus, P** stated:-

**"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the courts 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."**

In the case of **Shah –vs- Mbogo [1967] E. A 116 Harris, J.** stated:-

**"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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."**

In the case of **Shabir Din –vs- Ram Parkash Anand [1955] 22 EACA 48 Briggs JA** stated at pg 51:-

**"I consider that under Order IX rule 20, the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case it, should be exercised. In particular, mistake or misunderstanding of the appellant's legal adviser's, even though negligent, may be accepted as proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."**

10. The above authorities that I have referred to illustrate how a court ought to exercise discretion and in my view the main consideration ought to be for the court to do justice and to obviate an injustice being done to a party who is before the court through application of stringent technical procedures. In the instant case the contestation is whether or not the defendant was served with the notice of hearing of the case on 24<sup>th</sup> March 2017. Although there is evidence that the Deputy Registrar issued a notice of hearing for service on the parties advocates, there is no evidence that the same was received by the firm of the defendant's advocates.

11. The plaintiff has vehemently argued that the defendant's advocate was served by a process server and additionally a notice was sent to the said firm by registered post. The defendant has refuted these notices were received by or served on her advocates. The receipt for payment by postal corporation marked "E" shows the parcel was destined to GPO - 00100 whereas the defendant's advocates postal box is shown to be 5926 - 00200 and this raises the issue whether the parcel was correctly addressed as the postal code 00200 is for City Square while 00100 is for GPO. The defendant has further deposed that her advocate had not made payment for his postal box which, if true he could not have received the notices sent by post. Taking regard of the totality of the averments, I entertain a doubt whether or not the defendant's advocate received the notice of the hearing of the suit and in the circumstances of this case, I would resolve the doubt in favour of the defendant/applicant.

12. I have perused the defence and counterclaim filed by the defendant and the reply to the defence and defence to the counterclaim filed by the plaintiff and I am not persuaded the defence and the counterclaim is hopeless and raises no triable issue. The plaintiff has filed a reply to defence and a defence to the counterclaim and did not apply to have the same struck out. The defence and counterclaim clearly raises triable issues principally whether the plaintiff obtained transfer of the suit land fraudulently to justify the rectification of the land register. The defendant in the interest of fairness and justice deserves her day in court to ventilate her case.

13. In the final result, I exercise my discretion in favour of the defendant and I hereby order to be set aside judgment delivered in favour of the plaintiff on 24<sup>th</sup> May 2017 and the suit to be heard afresh on its merits. I have anxiously considered the aspect of costs and I have observed from the record that the defendant's conduct has been rather casual. For instance on 23<sup>rd</sup> February 2015 when the suit was fixed for hearing the defendant's advocate prayed for more time to comply with Order 11 of the Civil Procedure Rules. **Okong'o, J.** on the day granted the defendant 30 days within which to file the defendant's witness statements and bundle of documents. The record does not show that the defendant complied with this direction which puts to question the defendant's commitment to having this suit heard and finalized.

14. In the circumstances, I will award the plaintiff thrown away costs of kshs. 15,000/= to be paid by the defendant within the next 30 days

from the date of this ruling failing which the judgment entered in favour of the plaintiff on 24<sup>th</sup> March 2017 will stand reinstated and the defendant's defence and counterclaim will stand dismissed as ordered by the Judge in the judgment.

**RULING DATED, SIGNED and DELIVERED at KISII this 9<sup>TH</sup> DAY of MARCH, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Omwega for Gichana for the plaintiff

Mr. Morigori for the defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**