



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1172 OF 2000

(CONSOLIDATING HCCC NO. 2910 OF 1996 AND SPMCC NO. 8285 OF 1996)

HCCC NO. 2910 OF 1996

STEPHEN NDUNGU KIMUNGU.....PLAINTIFF

VERSUS

JAMES MUIGU.....DEFENDANT

(CONSOLIDATED WITH)

SPMCC NO. 8285 OF 1996

JAMES MUIGU ALIAS JAMES MUIGU NJOROGE.....PLAINTIFF

VERSUS

NGARA MUCHOKANIRIRIA COMPANY LTD.....1ST DEFENDANT

STEPHEN NDUNGU KIMUNGU.....2ND DEFENDANT

RULING

What is before me is the Notice of Motion application dated 24th February, 2017 brought by the defendant in HCCC No. 2910 of 1996, James Muigu alias James Muigu Njoroge who is also the plaintiff in SPMCC No. 8285 of 1996 (hereinafter referred to as “the applicant”). In the application, the applicant has sought leave for the firm of Maina Makome & Company Advocates to come on record on his behalf in his matter in place of Njiru Boniface & Company Advocates and the setting aside of the judgment that was entered herein on 25th November, 2016 so that the suit may be heard afresh. The application has been brought on the grounds that the hearing of this suit proceeded in the absence of the applicant on 30th May, 2016 and judgment was subsequently entered against him on 25th November, 2016. The applicant has averred that he did not attend court because his advocates then on record, Njiru Boniface & Company Advocates did not notify him of the hearing date. The applicant has contended that he risks being evicted from the suit property if the orders sought are not granted.

The application is opposed by the Plaintiff in HCCC No. 2910 of 1996, Stephen Ndungu Kimungu who is also the 2nd defendant in SPMCC No. 8285 of 1996 (hereinafter referred to as “the respondent”) through Notice of Preliminary Objection dated 28th March, 2017 and replying affidavit sworn on the same date. The respondent has contended that the application is incompetent the same having been filed by the firm of Maina Makome & Company Advocates who are not properly on record for the applicant. The respondent has contended that the hearing date of 30th May, 2016 was taken by consent and that no good reason has been given by the applicant to justify his failure to attend court during the hearing. The respondent has contended that this suit has been pending in court for over 20 years and as such it would be unjust to set aside the judgment that was entered on 25th May, 2016. The respondent has contended that the applicant’s advocates who were on record when the judgment was entered were duly notified of the judgment on 14th December, 2016 and took no action in the matter. The respondent has contended that no explanation has been given for the delay in bringing this application which was filed about three (3) months after the applicant’s advocates had been notified of the judgment against the applicant.

The application was heard by way of written submissions. The applicant filed his submissions on 2nd November, 2017 while the respondent filed his submissions on 29th August, 2017. I have noted that there is a consent on record between the firms of Njiru Boniface & Company

Advocates and Maina Makome & Company Advocates allowing the latter to come on record for the applicant in this matter in place of the former. I would therefore grant leave to the firm of Maina Makome & Company Advocates to come on record as advocates for the applicant. The disposal of that issue paves the way for the determination the main prayer in the application namely, the setting aside of the judgment of 25th November, 2016.

I have considered the application and the response thereto by the respondent. I have also considered the submissions by the advocates for the parties and the authorities that were cited in support of the same. Order 12 Rule 7 of the Civil Procedure Rules gives the court power to set aside judgment that has been entered in the absence of a party. The power is discretionary. The question that I need to answer is whether in the circumstances of this case, I should exercise my discretion in favour of setting aside the judgment that was entered herein on 25th November, 2016. I have considered the reasons given by the applicant for his failure to attend court on 30th May, 2016. I am not satisfied that in the circumstances of this case, the reasons given by the applicant would justify the setting aside of the said judgment. The hearing date of 30th May, 2016 was taken in court in the presence of the applicant's former advocate, Mr. Boniface Njiru. When the matter came up for hearing on 30th May, 2016, neither the defendant nor his advocate attended court and the hearing proceeded in their absence. In the judgment that was delivered on 25th November, 2016, the directed that the applicant's advocates then on record be served with a copy of the decree essentially to notify them that the hearing proceeded in their absence and that judgment had been entered against the applicant. According to the affidavit of service of Philip Ndambuki Munyasia sworn on 23rd February, 2017, attached to the respondent's replying affidavit, a copy of the court decree was served upon Mr. Boniface Njiru Advocate then acting for the applicant personally on 14th December, 2016. The present application was filed by the applicant's advocates now on record on 8th March, 2017 about 3 months after the applicant's former advocates had been notified of the judgment.

The applicant has blamed his former advocates for his (applicant) failure to attend court for the hearing. He has also taken issue with them over their failure to notify him of the judgment. The hard question that must be answered is who should take responsibility for a party's advocate's failure to perform his professional duties? Is it the opposite party or the court? I believe that the answer would depend on the circumstances of each case. There cannot be a general rule. In the circumstances of this case, I am of the view that the advocate concerned should not only bear the blame but should also carry the loss and damage if any arising from the consequences of his neglect of duty. The justice train can no longer be delayed, stopped, derailed or re-routed by the parties or their advocates. Once the train takes off on a scheduled trip, those left behind must bear the consequences of their failure to get on board.

The dispute between the parties herein was brought to court in 1996. As at the time it was heard and judgment delivered, it had been pending in court for 20 years. In the case of E.T. Monks & Co. Ltd. v Evans (1985) KLR 584, it was held that, "public policy demands that the business of the court be conducted with expedition." Section 1A (1) and (2) of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and the court in exercise of its power under the Act shall seek to give effect to the said overriding objectives. I am of the view that if I was to exercise my discretion in favour of the applicant and have the judgment entered herein on 25th November, 2016 set aside, I would not be giving effect to the overriding objectives of the Civil Procedure Act and Rules.

I am alive to the fact that the applicant would be evicted from the disputed property if the orders sought are not granted. I am however of the view that the injustice that would be occasioned by setting aside the judgment that was entered herein and rehearing this suit that has been pending in court now for 22 years a fresh far outweighs any injustice that may be occasioned to the applicant who was given an opportunity to be heard but did not utilise the same. In my view, the applicant has only his former advocates to blame and should look to them for any loss or damage he may suffer as a result of the judgment entered against him herein.

The upshot of the foregoing is that, the Notice of Motion dated 24th February, 2017 has no merit. The same is dismissed with costs to the Respondents.

Delivered and Dated at Nairobi this 21st day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Mr. Nyamweya holding brief for Ngala for the Plaintiff

Mr. Maina for the 1st Defendant

Mr. Kinyua for the 2nd Defendant

Catherine Court Assistant