



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 111 OF 2017**

**MUKUNYA MUGO A.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**MUKUNYA MUGO B.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VS**

**ELIZABETH MUGURE MUKUNYA.....DEFENDANT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 18/4/2018 the Applicant sought orders under Order 10 rule 11, Order 51 rule 1, Section 3A of the Civil Procedure Act read together with Article 159 of the Constitution, to set aside the proceedings of the Court held on 12/10/17 and all the consequential orders thereon. Additionally, she sought orders that the Court be pleased to order for the trial de nou (?). The application is premised on the grounds that; the Applicant was represented by the firm of Macharia Gakaria & Associates, which advocates failed to keep her informed of the progress of her case generally and of the hearing that took place on the 12/10/17; That the said advocates were absent during the said hearing which hearing proceeded exparte and in her absence.

2. The Application is supported by the affidavit of the Applicant sworn on the 18/4/18 in which she reiterated the grounds of the application as set out in Para 1. In addition, she stated that she came to know that the hearing took place on the 12/10/17 upon being served with the submissions of the Respondents. That it is then that she perused the Court file and discovered that the case proceeded for hearing exparte in her absence. That the said Advocates had proceeded to file an incompetent application dated the 14/10/2017 without her instructions. That it is for that reason that she withdrew the services of her earlier Advocates and instructed the current one who has filed this application. She averred that there is in existence a pending succession cause in the High Court Nairobi No. 397/2005 involving Loc 1/Kiunyu/172, the suit land. That the Succession Court issued restraining orders against all dealings on the suit land pending the hearing and determination of the succession cause aforesaid. That she has pleaded in her defence that this Honourable Court does not have jurisdiction to hear this matter in view of the pending succession cause.

3. The application is opposed by the Respondents on the following grounds that;

- a. The proceedings cannot be set aside
- b. That the submissions were served on her erstwhile defence counsel receipt of which is acknowledged.
- c. The Applicant has come to Court with unclean hands and not deserving of equitable reliefs
- d. The Applicant is introducing extraneous issues that are irrelevant to the subject application
- e. The Applicant has not given a proposal to meet costs of the Respondents and their counsel.

4. Parties have filed written submissions which I have read and considered.

5. Maintaining that she has a defence with triable issues, the Applicant submitted that the Plaintiffs are seeking to evict her on grounds that she is a trespasser, that she is a potential beneficiary of the suit land and her claim is subject to a succession cause No 397 of 2005 pending in Nairobi.

6. The Learned Counsel for the Applicant submitted that though the Civil Procedure Rules do not provide for setting aside proceedings, he implored the Court to so act under other quoted provisions of the law to make appropriate orders to meet the ends of justice. He relied on the case of **Shah V Mbogo 1967 EA**. He submitted that the Defendant's failure to attend Court on the 12/10/17 was as a result of the fault of the previous Advocates and their mistake should not be visited on the Applicant. The Applicant stated that any inconvenience visited on the Respondents can be remedied by costs, some of which they have already paid.

7. The Respondents submitted that there are no provisions for setting aside proceedings. That Order 10 Rule 11 provides for setting aside a judgment or order and not proceedings. That there is no such thing as trial of the case *de nou*. That the advocates for the Applicant were duly served and the Applicant has no good reason to set aside the proceedings. That the grounds relied on by the Applicant are extraneous matters. That the Applicant is curiously silent on costs despite her present advocate not attending Court on 21/5/2018 when the matter came for mention.

### Determination

8. Order 10 rule 11 provides as follows;

“Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just”.

My reading of the above rule is that it confers upon the Court discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. It is silent on setting aside proceedings.

9. This matter was transferred to my Court from Kerugoya in 2017 and the Applicant has been absent from Court on several occasions to wit; 17/2/17, 6.4.17, 31/5/17, 18/9/17, 12/10/17, 4/12/17, 29/1/18, 19/2/18 and 21/5/17 as shown on the Court record. On most of the dates cited above the Defendant’s counsel has been served with hearing/mention notices. On the day of the hearing, the Applicant and her Advocate were absent.

10. On record is exhibited by the Affidavit of service sworn by the Respondents counsel on 11/10/17 indicating that the Applicant’s advocates were duly served on 4/10/17. There is a stamped acknowledgement by the said firm of Macharia Gakaria Advocates date-stamped 4-1-17 at 8.23 am on the Hearing Notice. The Court being satisfied that the Applicant was served with the hearing notice and on application of the Respondents counsel to proceed with the hearing directed the hearing to proceed *ex parte* under Order 12 rule 2 (a) which provides as follows;

“If on the day fixed for hearing, after the suit has been called on or hearing outside the Court, only the Plaintiff attends, if the Court is attends satisfied — (a) that notice of hearing was duly served, it may proceed *ex parte*”.

11. It is admitted by the Applicant that her advocates on record were duly served and chose to absent themselves from Court. No plausible reason has been tendered before the Court to explain their absence. The said advocates were recognized agents of the Applicant. They were served. If they did not inform or brief the Applicant as they are duty bound, then the Applicant I believe has recourse to them under a separate claim but not in this matter or Court. There is no explanation validly given as to how the agent failed to give notice to the Applicant. The Defendant and her previous advocates did not attend Court on the dates stated in Para 9. Even with the present advocate the Defendant and the advocate failed to attend Court on 21/5/18.

12. If proceedings are to be set aside there will be prejudice in the following manner; the proceedings will be set aside without any procedural error on the part of the Court; it will imply acceptance or anticipation of the conduct of the Court on the proceedings sought to be vacated; the evidence recorded on the Plaintiff’s case will be accessed freely by the Defendant and prepared to counter the evidence other than during the first hearing of the case between the parties; the Plaintiff and or their witnesses will not have the opportunity to depart from the evidence on record for which the Defendant will not have heard substantial time to prepare to counter; The Defendant will have had all the time and opportunity to prepare and counter the evidence of the Plaintiff including repairing gaps that may occur or may have occurred in their evidence.

13. Section 1A of the Civil Procedure Act provides as follows;

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court (emphasis is mine).

The Applicant and his advocates are not exempt from the provisions of section 1A (3). A party who has notice of a case pending in Court should not slumber even when they have an agent in form of advocate on record.

14. The Applicant has attributed the absence in Court at the hearing date to the mistake of counsel for the Applicant and has urged this Court not to visit the mistake on the Applicant. Advocates have a duty to their clients to act in a professional and diligent manner and to the Court to facilitate the due administration of justice, they being officers of the Court. That notwithstanding it does not excuse them from their responsibility to the Court and to the Client. It has been held time and again that a litigant should not suffer due to the transgressions of their Advocates. Litigants also have a duty to be vigilant on their cases in Court to ensure that they follow up what the agents are doing, they being the principals.

15. In view of the facts and the circumstances of this case, the Court is not satisfied that the Applicant is deserving of the exercise of

discretion in her favour.

16. The upshot of this ruling is that the application is dismissed with costs to the Respondents.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> DAY OF JULY 2018.**

**J. G. KEMEI**

**JUDGE**

**Ruling read in open Court in the presence of:**

Mr Wainaina Kinyanjui HB for Mr Mboha for the Plaintiffs.

Defendant – Absent

Ms.Irene and Ms Njeri, Court Assistants.