



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 62 OF 2010**

**ANNUNCIATA MWONGELA.....1ST PLAINTIFF**

**ROBBERT KYALLO.....2ND PLAINTIFF**

**MARY CONCEPTA NDUKU MUTIE.....3RD PLAINTIFF**

(Suing as Administrators of the estate of the late Henry Mutie Mwangela)

**=Versus=**

**WILLIAM ABUKA.....1ST DEFENDANT**

**WANSHINGTON OMONDI.....2ND DEFENDANT**

**DORCAS TABITHA ADHIOMBA .....3RD DEFENDANT**

**RULING**

1. The plaintiffs are administrators and beneficiaries of the estate of the late Henry Mutie Mwangela, the registered proprietor of Land Reference Number 209/12320 comprised in Grant No IR 82498. The plaintiffs brought this suit contending that the defendants were trespassers on the suit property. They sought an order directing the defendant to vacate the suit property. On 12/6/2017, judgment was entered in their favour. Subsequently, on 4/8/2017, the defendants brought a Notice of Motion dated 4/8/2017 seeking to set aside the judgment. They also sought an order staying execution of the decree herein. That application is the subject of this ruling.
2. The applicants' case is that they did not attend court at the hearing of the case because their advocate did not inform them about the hearing. They contend that due to an administrative mix-up, their advocate did not diarize the hearing date.
3. The plaintiffs oppose the application through a replying affidavit sworn on 31/8/2017 by Annuciata Nthambi Mwangela. They contend that the defendants have not explained what "administrative mix-up" happened. They add that the defendants and their advocates did not attend court on previous occasions when the matter was scheduled for hearing on 13/4/2016, 19/7/2017, 8/12/2016 and 2/2/2017 despite being served. They add that the defendants are trespassers who, with impunity, are forcibly and illegally holding onto the property they do not own. They urge the court to dismiss the application.
4. I have considered the application together with the rival affidavits and written submissions. I have also considered the relevant law and applicable jurisprudential principles. The single issue to be determined in the application is whether the applicants have satisfied the criteria for setting aside a valid *exparte* judgment entered after hearing of a case.
5. The key principles governing the exercise of the judicial discretion to set aside an *exparte* judgment obtained in default of either party to attend the hearing were spelt out by the Court of Appeal in **Maina v Mugiria (1983) KLR 78**. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, the discretion is intended to be so 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 course of justice. Thirdly, the court has no discretion where it appears there has been no proper service. Fourthly, when exercising this power, the court is required to consider prior and subsequent facts and circumstances and respective merits of the parties' respective cases which informed the passing of the judgment and consider whether or not it would be just and reasonable to set aside or vary the judgment. Fifthly, the court is required to consider the nature of the action and the defence put forth by the defendant.
6. In the present suit, non-attendance is attributed to an "administrative mix-up" on part of the defendants' advocate. The nature of the mix-up has not been disclosed. The concerned advocate has not sworn an affidavit to explain the mix-up in order for the court to be able to properly exercise its discretion.

7. Secondly, it is noted from the court record that this suit came up for hearing on two previous occasions, 13/4/2016 and 19/7/2016. On both occasions, the defendants had been served through their advocates but elected not to attend court. Similarly, they elected not to attend pre-trial sessions. They similarly did not file witness statements and bundle of documents during pre-trial. To date none has been filed.

8. Thirdly, the suit property is registered in the name of the late Henry Mutie Mwangela. The plaintiffs are administrators of his estate and contend that the defendants are trespassers on the suit property. The 2nd defendant did not file any defence. The 1st and 3rd defendants filed a joint defence in which they denied all averments made in the plaint including the contention that they were in occupation of the suit property. On their own, they did not lay any claim of title to the suit property but alluded to some undisclosed third parties who may be on the suit property pursuant to a claim of adverse possession.

9. I have taken all the above circumstances into account. More importantly, I have considered the fact that on their own, the defendants deny occupying the suit property and do not lay any claim to the suit property. Further, it is noted that the deceased's title has not been challenged in any way.

10. Taking all the foregoing factors in account, the court is not satisfied that there is a proper basis for the court to set aside the judgment entered herein in favour of the plaintiffs. The court therefore declines to exercise its discretion in favour of the applicants. The net result is that the Notice of Motion dated 4/8/2017 seeking the setting aside of the judgment entered herein is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JULY 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kiragu holding brief for Ms Koki Mbulu Advocate for the plaintiff

Mr Kihara holding brief for Mr Wanga Advocate for the defendant

Ms Halima Abdi - Court Clerk