



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 539 OF 2012

AGNETA AGISA MUDUKIZA.....PLAINTIFF

VERSUS

TERESA NOEL.....1ST DEFENDANT

KAITANO ANDUKU.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 2nd March 2018 brought by way of notice of motion by the defendant /applicant seeking for orders:

- 1) Spent.
- 2) That this honourable court be pleased to set aside the ex parte judgment entered herein together with all consequential orders.
- 3) That this Honourable court be pleased to issue orders for stay of execution of the court's judgment delivered on 23rd May 2017 pending the hearing and determination of this application and all consequential orders.
- 4) That pending inter partes hearing prayer No.2 be granted in the interim.
- 5) That costs be provided for.

This matter was brought under certificate of urgency whereby the orders of stay of execution were granted pending the hearing and determination of the application. The applicant was directed to serve the application within 3 days which was done.

Mr. Murgor argued the application on behalf of the applicant and relied on the grounds on the face of the record and the supporting affidavit. He submitted that the plaintiff will suffer no prejudice if the application is allowed. He therefore prayed that the application be allowed as prayed.

Mr. Chepkwony opposed the application and relied on the replying affidavit and the annexures. He submitted that the defendants are not entitled to the orders sought as they are guilty of laches. He stated that the judgment was delivered on 23rd May 2017 and the defendant has come to court more than a year after the delivery of the judgment. It was Counsel's submission that the defendant's Counsel has always been served with the hearing notices and mentions but has never attended court. He further submitted that the defendant's Counsel was served with a notice of taxation dated 21st June 2017 for 15th August 2017 of which she acknowledged receipt but did not attend the court for taxation

Mr. Chepkwony submitted that equity aids the vigilant and not the indolent. Further that Counsel has always been served with notices but at no time has she ever attended court. He urged the court to take judicial notice of the fact that this is a 2009 matter.

Counsel submitted that what is deponed in paragraph 5 of the applicant's affidavit is hearsay as it is not within her knowledge. He further stated that the record bears witness that at no time have the defendants attended court. He urged the court to dismiss the application.

Analysis and determination

This is an application for setting aside ex parte judgment and all the consequential orders. The principles governing the exercise of judicial discretion in setting aside ex parte judgment are as was set out in the Court of Appeal case of **PITHON WAWERU MAINA V THUKA MUGIRIA [1983] eKLR** which held as follows:

“2The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:

- a) 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.
- b) Secondly, 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. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.
- c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93.
- d) The court has no discretion where it appears there has been no proper service (*Kanji Naran v Velji Ramji* (1954) 21 EACA 20).
- e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton* [1972] SC 30)” or might not have been present had the judgment not been exparte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (*Jesse Kimani v McConnel* [1966] EA 547, 555F)”.

This case has a checkered history of the defendants and their counsel not appearing in court even though served with notices. It should be noted from the court record that the defendants and their Counsel have delayed the hearing and determination of this matter by failure to attend court.

The issue for determination is as to whether the defendants deserve the orders sought for setting aside judgment. The judgment in this matter was delivered on 23rd May 2017 and a decree extracted by the plaintiff. The defendant’ counsel was served with a notice of taxation of which she never attended court. The defendants filed an application for setting aside judgment on 2nd March 2018 which is more than 11 months after the delivery of judgment. This shows a lack of interest in the case and the undue delay in filing the application has not been explained. The defendants finally woke up from the slumber when they realized that costs of the suit had been taxed.

The court has unfettered discretion to set aside a judgment but the same should not be used to assist a party to obstruct the course of justice. The provision of order 12 are clear as there was due notice hence no sufficient grounds have been advanced to set aside the judgment.

The court is enjoined under Article 159 of the Constitution to do substantive justice but applying this article, it should be appreciated that the substantive justice applies to both parties and not only the applicant who feels that an injustice will be occasioned in case the orders are not granted. The respondent might also suffer injustice if the orders sought are allowed. This is an old matter where the defendants have always been given an opportunity to present their side of the case but squandered the chance. Allowing the application to set aside judgment would cause prejudice to the plaintiff.

In the circumstances I find that the application has no merit and is therefore dismissed with costs to the plaintiff.

Dated at Eldoret this 18th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Chepkwony for Plaintiff/Respondent and Mr. Cheruiyot holding brief for M/s Arunga for Defendants/Respondents.