



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CAUSE NO. 874 OF 2012

PATRICK MUCHIRI.....PLAINTIFF

VERSUS

AGNES MUMBI NG'ANG'A.....DEFENDANT

RULING

This ruling is in respect of an application dated 25th May 2018 brought by way of notice of motion by the defendant /applicant seeking for orders:

- a) That pending the hearing inter partes and determination hereof, the firm of Maurice Oduor & Company Advocates be placed on record for the defendant/applicant in the place of Adalo Bitok & Company Advocates.
- c) That pending the inter partes hearing and determination of this application there be stay of execution of the judgment delivered herein on 19th December 2017 and all consequential proceedings.
- d) That the judgment delivered on 19th December 2017 together with proceedings leading to the said judgment and proceedings thereafter be reviewed and set and the suit be listed for hearing de novo.

Mr. Oduor Counsel for the defendant/applicant argued the application and relied on the grounds on the face of the application and the supporting affidavit of the applicant. It was his submission that when this matter proceeded neither the applicant nor his Counsel were present. Counsel submitted that the defendant was not aware of the hearing date as the advocate never informed her of the date.

It was Counsel's further submission that the advocate would call the applicant and she would avail herself for the hearing. He stated that there were some upheavals in the firm of Sirma & Co Advocates and a notice of change of Advocates was filed by Adalo Bitok & Co. Advocates. The defendant deponed that she did not know that the character of the law firm had changed. It was the defendant's submission that this matter has been in court for a long time and that she has been living on the suit land since 1974 and that if it turns out that the decision is against the defendant then the same should be made when she has ventilated her grievance as per the Constitution.

Counsel alluded to the principles of setting aside judgments and cited several authorities in respect of the fact that mistake of Counsel should not be visited upon a party. Counsel submitted that the plaintiff will not suffer any prejudice other than waiting for the matter to be resolved and that if there is any prejudice then the same can be compensated by way of damages. Mr. Oduor therefore urged the court to exercise its discretion and allow the application as prayed.

The application was opposed by the respondent's Counsel who relied on the grounds on the face of record and the replying affidavit filed herein. Counsel stated that there are no grounds for review as no new evidence which was not within the knowledge of the defendant or an error on the face of the record.

Miss Adhiambo submitted that what is before the court is about negligence and sloppiness by Counsel. It was Counsel's submission that the defendant cannot deny that she was not properly represented and further that there is no affidavit from Adalo Bitok & Co Advocates to explain what transpired. Miss Adhiambo also submitted that for one to prove that there was an error by counsel then the said Counsel should file an affidavit to state the same which is not the case in this matter.

Miss Adhiambo Counsel for the plaintiff submitted that 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. She stated that the provisions of order 12 are clear as there was due notice hence no sufficient grounds have been advanced to set aside the judgment.

It was Counsel's submission that Article 159 of the Constitution should not be used to cause injustice by avoiding procedural imperatives. She further submitted that the upheavals in the law firm were raised during the pendency of the suit and that the court called out the matter

and gave it time allocation for hearing. It was Miss Adhiambo's final submission that the plaintiff will suffer prejudice if the judgment is set aside. She therefore urged the court to dismiss the application with costs to the plaintiff.

Mr Oduor in response submitted that the application is not based on discovery of new evidence but on the exercise of discretion on reasonability and application of article 159 of the Constitution on substantive justice.

Analysis and Determination

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)”.

The above authority cited by Counsel for the defendant summarizes the issue of exercise of discretion to set aside a judgment. This case is an old one which has been in the court corridors for some time. It should also be noted that when it came up for hearing on 16th May 2017 the plaintiff's Counsel applied for an adjournment on the grounds that Counsel was indisposed even though Counsel for the defendant had indicated that they were ready to proceed with the hearing. The matter was adjourned to 14th June 2017 when the plaintiff's Counsel applied for adjournment again on the ground that she was in conduct of another case which was proceeding and the defendant's Counsel indulged her but the court ordered that the plaintiff pays court adjournment fees plus costs to the defendant. The matter was rescheduled for hearing on 27th September 2017 by consent of the parties.

This is to emphasize the fact that the defendant was all along represented in this matter by Counsel and that the hearing date was taken by consent. By the time the matter was proceeding the issue of representation had already been sorted out and that is why Adalo Bitok Advocates were on record for the defendant. Further when the matter came up for mention to confirm that submissions had been filed, the defendant's Counsel requested for 7 days to be allowed to file his submissions which he never did though the court had granted an order allowing him to do so. I therefore find that the issue of representation and upheaval as Counsel put it does not arise.

The other issue on service is also clear that the date was taken by consent and whether the defendant was aware of the date or not is an issue which the advocate who was previously acting for her should have filed an affidavit to explain the reason for nonattendance. This was not done.

The defendant herself should have been in court when the matter was coming up for hearing on the date that it was adjourned and another date given. Parties should take their matters seriously and follow up their cases not missing court then use the excuse that mistake of Counsel should not be visited upon innocent parties. When applying Article 159 of the Constitution 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.

It should also be noted that there is laxity on the part of some Counsel who abandon their clients at the hour of need. If Counsel feel that they do not have sufficient instruction to proceed with a matter, then the procedure requires that they file an application to cease acting to allow the parties to proceed on their own or engage the services of other Counsel. This trend of non-attendance of parties and their Counsel is occasioning injustice and double work for the court.

In exercise of judicial discretion, the court must do it judiciously. I have considered the application, supporting affidavits together with submission by Counsel and the relevant authorities. This is the type of case which I would not ordinarily exercise my discretion in favour of the applicant but in the interest of justice I do so and order that the defendant be allowed to cross examine the plaintiff on the evidence on record and tender her evidence during the hearing.

I also order that the defendant do pay the plaintiff thrown away costs of Kenya Shillings twenty thousand (Kshs. 20,000/) within the next 21

days failure of which the order lapses.

Dated and delivered at Eldoret this 10th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Oduor for the defendant/Applicant and in the absence of the Plaintiff/Respondent. The application is allowed.

Mr. Koech ; Court Assistant.