



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 287 OF 2014**

**LAXMICHAND VIRCHAND GUDKA.....PLAINTIFF**

**VERSUS**

**ANDERSON ISINTA MATWETWE.....DEFENDANT**

**R U L I N G**

1. The plaintiff filed the instant suit by way of plaint dated 23<sup>rd</sup> July 2014. The defendant was served with the summons to enter appearance and filed a memorandum of appearance dated 8<sup>th</sup> September 2014 but did not file a defence within the stipulated period. The suit proceeded for hearing by way of formal proof on 28<sup>th</sup> July 2016 and the court delivered its judgment on 2<sup>nd</sup> December 2016. The judgment was in the following terms:-

**1) A declaration be and is hereby issued that the plaintiff is the lawful and legal owner of land parcel known as Majoge/Bokimonge/2163.**

**2) That the defendant his servants and/or agents are ordered to vacate land parcel Majoge/Bokimonge/2163 within 30 days from the date of being served with the decree herein.**

**3) That in the event the defendant does not vacate as under (2) above the plaintiff shall be entitled to an order of eviction on application for the forcible eviction of the defendant.**

**4) The costs of the suit are awarded to the plaintiff.**

2. The defendant vide an application dated 30<sup>th</sup> November 2017 expressed to be brought under Order 9 Rules 7 and 9, Order 22 Rule 25 and Order 12 Rules 2 and 7 and Sections 1, 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeks inter alia the following orders:-

1. ....

2. ....

**3. That there be a temporary stay of execution of the decree pending the hearing and final determination of this application herewith.**

**4. That the honourable court be pleased to set aside the judgment entered herein on 25<sup>th</sup> November 2016 and all the consequential orders made thereof and the suit herein be heard on merit.**

**5. That the draft statement of defence annexed be deemed as duly filed upon payment of the requisite fees.**

**6. That the costs of the application be provided for.**

3. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the defendant/applicant on 30<sup>th</sup> November 2017. The plaintiff/ respondent swore a replying affidavit dated 20<sup>th</sup> March 2018 in opposition to the application. The applicant filed a supplementary affidavit dated 3<sup>rd</sup> May 2018 together with submissions on 4<sup>th</sup> May 2018. The plaintiff/respondent filed his submissions on 13<sup>th</sup> June 2018.

4. The applicant's application seeks to set aside a judgment that is said to have been delivered on 25<sup>th</sup> November 2016. Indeed the typed

copy of the annexed judgment indicates the date of the delivery of the judgment as 25<sup>th</sup> November 2016. The original court record shows that on 26<sup>th</sup> September 2016 the court reserved judgment for delivery on 2<sup>nd</sup> December 2016 in the presence of Ochoki Advocate for the plaintiff. On 2<sup>nd</sup> December 2016 the record shows judgment was delivered as scheduled in the absence of the parties. The original of the typed judgment on the record shows that the date of 25<sup>th</sup> November 2016 indicated on the typed copy of the judgment was duly altered to read 2<sup>nd</sup> December 2016 and the alteration was duly endorsed by the Judge at the time of delivery. Thus the judgment sought to be set aside by the applicant was delivered on 2<sup>nd</sup> December 2016 and not 25<sup>th</sup> November 2016. The error was a typo and was inadvertent and was appropriately corrected at the time of delivery. There must have been an omission to effect the correction on all the copies of the typed judgment.

5. On the merits of the application, the applicant predicates his application on the ground that the advocate whom he had instructed failed him as he never filed any defence precipitating the suit to proceed by way of formal proof ex parte. The applicant avers that the failure to file a defence was not his mistake but negligence by his counsel for which he ought not to be punished. The applicant further avers that the sale by public auction at which the plaintiff purchased the suit property was not properly conducted and no account of the proceeds from the sale have been made to him. Notably the applicant avers that the sum of kshs. 1,430,338/70 being the balance after the redemption of the amount owing to the chargee was not accounted to him. The applicant further avers that the plaintiff/respondent will not suffer any prejudice if the judgment is set aside and the matter heard on merits. The applicant avers that the draft defence and counterclaim raises triable issues to warrant the court to set aside the judgment to enable the matter to be heard on its merits.

6. The plaintiff/respondent in his response avers that the defendant/ applicant's application is devoid of any merit and that the same is merely calculated to frustrate and delay justice to the respondent. The respondent contends he has obtained a regular judgment against the defendant/applicant and there would be no basis to set the same aside. The judgment was delivered on the basis of the evidence that was presented by the respondent and the respondent stands to be greatly prejudiced if the same is set aside on flimsy grounds as adduced by the applicant. The respondent avers that the defendant's application is an afterthought aimed at delaying justice and denying the respondent the right of enjoying the fruits of a valid judgment entered by the court in his favour.

7. The parties argued the application by way of written submissions.

8. The primary issue in the present application is whether the applicant has satisfied the conditions upon which a court may set aside an ex parte judgment to warrant the exercise of the court's discretion in his favour. The court's discretion to set aside an ex parte judgment is unfettered save that the same ought to be exercised judiciously. The following excerpts from judicial decisions illustrate how the courts ought to proceed in considering applications to set aside ex parte judgments:-

In the Court of Appeal case of **Patel -vs- E. A Cargo Handling Service Ltd [1974] EA 75** the court stated thus:-

**“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”**

In the case of **Shah -vs- Mbogo [1967] EA 116** the court stated as follows:-

**“...this discretion to set aside an ex parte judgment is intended 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 cause of justice.”**

In the case of **Stephen Ndichu -vs- Monty's wines and Spirits [2006] eKLR**, Azangalala, J. (as he then was) considered various judicial pronouncements on exercise of judicial discretion and stated thus:-

**“The principles governing the exercise of judicial discretion to set aside ex parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (see Patel -vs- E.A Cargo Handling Services Ltd [1974] E.A 75. The discretion is intended to be 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 cause of justice (see Shah -vs- Mbogo [1967] E.A 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration -vs- Gasyali [1968] E. Way 300). It also goes without saying that the reason for failure to attend should be considered.”**

9. In the instant matter the defendant/applicant admits that the Agricultural Finance Corporation had in 2003 advanced him a sum of kshs.100,000/= against the security of land parcel **LR No. Majoge/Bokimonge/2163** which he charged to them. He further acknowledges he defaulted in the payment of the loan and that the chargee in 2012 set in motion the process of realizing the property offered as security. The applicant further acknowledges the property was advertised for sale by the chargee before it was ultimately sold. The court in the judgment delivered on 2<sup>nd</sup> December 2016 after evaluating the plaintiff's evidence stated thus:-

**“...The evidence tendered has established that the defendant charged his property LR No. Majoge/Bokimonge/2163 to Agricultural Finance Corporation to secure a loan advanced to him and when he defaulted in payment the chargee offered the property for sale by way of public auction in order to recover the debt due to it. The plaintiff's bid of kshs.1,700,000/= was accepted at the public auction sale held on 22<sup>nd</sup> October 2012.”**

10. The defendant was aware that the chargee, Agricultural Finance Corporation had set in motion steps to realize its security as per the newspaper advertisement of 24<sup>th</sup> September 2012 in the Daily Nation and that the sale was scheduled for 22<sup>nd</sup> October 2012 (“AIM-5”). The defendant does not appear to have taken any steps to redeem the property and also does not appear to have engaged the chargee to ascertain what became of the sale. On the basis of the material placed before the court it is abundantly clear that the plaintiff purchased the suit property at the auction and that the sale was not challenged and/or set aside with the result that the transaction was completed and the plaintiff was duly registered as the owner of the suit property. On the evidence on record there is no basis upon which the sale to the plaintiff can be impugned. The sale was completed and in case the defendant was aggrieved by the resultant sale his only remedy would be against the chargee and perhaps the auctioneers who acted as the chargee’s agents for damages.

11. The defendant was aware of the suit brought against him by the plaintiff and he even instructed an advocate who entered appearance on his behalf on 9<sup>th</sup> September 2014. The suit related to the suit property **LR No. Majoge/Bokimonge/2163** which the plaintiff had purchased at the public auction which by the defendant’s own admission was advertised in the Daily Nation Newspaper of 24<sup>th</sup> September 2012. It was the duty of the defendant to see it to that his appointed advocate had acted appropriately to file any necessary defence to the suit. The defendant’s conduct was extremely casual as it would appear that for over 2 years the defendant did not bother to ascertain the status of his case with the advocate whom he had appointed to represent him. The plaintiff was entitled to pursue the conclusion of his case and as per the record he followed due process to get the suit heard and determined. The plaintiff obtained a valid and regular judgment albeit ex parte.

12. The defendant having been aware that his land parcel was advertised for sale by public auction on 22<sup>nd</sup> October 2012 did nothing to stop the sale and even after the date of the scheduled sale he did nothing until he was served with the suit papers in this matter whereupon he instructed the firm of Moses N. Siagi & Company Advocates who entered an appearance for him on 9<sup>th</sup> September 2014. Again, the plaintiff did nothing to ascertain the progress of his case until 30<sup>th</sup> November 2017 (after 3 years) when he filed the instant application. The defendant in my view did not act with diligence and his conduct was too casual and cannot be excusable.

13. While I am conscious that the matter before me calls for exercise of judicial discretion, I am also keenly aware that the exercise of discretion is intended to do justice to the parties before the court having regard to all the attendant circumstances. The court in an application to set aside an ex parte judgment is required to consider among other matters whether the applicant has a reasonable defence to the claim. If no viable defence can be raised, it would be pointless to allow the defendant to defend.

14. In the present matter the sale of the suit property by public auction was completed and the plaintiff is the registered owner of the property presently. That sale was not challenged and has not been set aside. By the admission of the defendant, he had defaulted in the servicing of his loan to Agricultural Finance Corporation (AFC) and therefore the right of the AFC as chargee to realize the security had arisen. The chargee exercised its power of sale conferred under the charge and statute and the plaintiff was the beneficiary of that exercise of the chargee’s power of sale. The transfer of the property by the chargee to the plaintiff was pursuant to the chargee’s power of sale and it was properly exercised.

15. The defendant by the counterclaim raises issues of account of the sale proceeds. The plaintiff’s obligation under the conditions of sale at the public auction was to pay the full purchase prices of kshs. 1.7Million which he paid. The issue of account would only concern the chargee and the auctioneer the chargee employed. In my view therefore, the defendant cannot have a reasonable defence against the plaintiff’s claim. The defendant has a separate and distinct cause of action against the chargee and the auctioneers for account of the sale proceeds from the public auction.

16. In consequence, I find that the defendant’s application dated 30<sup>th</sup> November 2017 lacks any merit and I order the same dismissed with costs to the plaintiff.

**RULING DATED, SIGNED and DELIVERED at KISII this 28<sup>TH</sup> DAY of SEPTEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Muguche for Ochoki for the plaintiff

Mr. Anyona for the defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**