



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**E.L.C. CASE NO. 272 OF 2009**

**BEATRICE MUTHIO NZIOKA.....PLAINTIFF**

**VERSUS**

**CHARLES AKELO ONG'WEN.....DEFENDANT**

**RULING**

Through the application dated 16/3/2013, the Defendant seeks stay of execution of the judgement delivered by Lady Justice Nyamweya and any consequential orders issued by the court. He also seeks stay of execution of the Plaintiff's bill of costs and an order to set aside the orders issued by the court on 9/6/2014 allowing the hearing of the suit to proceed *ex parte*.

The Defendant claims that he was shocked to learn on 19/12/2014 that the court had issued a decree which required him to vacate the suit premises within 60 days. He blamed it on the mistake of his former advocate for failing to notify him to attend court when this matter came up for hearing. He seeks an opportunity to present his evidence in court as he stands to be evicted from the house where he has been staying with his family. He avers that he will suffer grave injustice if he were to lose the property in which he has invested a lot of money and on which he resides with his family. He swore the affidavit in support of the application in which he maintains that his defence raises weighty, legal and factual issues that entitle him to defend the case. In his affidavit he also indicates that he seeks leave to amend his defence once a fresh trial is ordered to align his defence with the circumstances of the case.

The Plaintiff opposed the application through the affidavit filed in court on 27/3/2017. She set out the factual position on the hearing of this suit. She stated that the matter was partly heard on 16/2/2011 by Muchelule J. when she testified and was partly cross-examined by the Defendant's advocate. The matter proceeded afresh before Nyamweya J. on 11/11/2013 and was adjourned at the instance of the Defendant's counsel to 10/3/2014 and then to 9/6/2014. The Defendant was ordered to pay costs of Kshs. 10,000/= on 10/3/2014 which he failed to pay. Neither the Defendant nor his advocate attended court on 9/6/2014. The hearing was concluded on 9/6/2014. The Defendant's advocate filed submissions which the Plaintiff believes the court considered in arriving at its judgment of 8/12/2014. The Defendant was served with a decree on 8/12/2014 giving him 60 days to vacate the suit premises being L.R. No. Nairobi/Block 140/40/70.

The Defendant filed the present application on 16/3/2015. The Plaintiff maintains that the Defendant was afforded an opportunity to attend court and give evidence but he chose not to do so. He also argued that the Defendant ought to have lodged an appeal against the decision of the court which he failed to do. Further, that the trial court allowed the Defendant's counterclaim for a set off. The Plaintiff avers that the decree has partly been performed.

Parties filed submissions. The issue for determination is whether the court ought to exercise its discretion in favour of the Defendant and grant the orders he seeks. The Defendant contends that his evidence was not taken into consideration by the judge in arriving at her determination since he was not called by his former advocate to attend court and testify. He pleads that the mistake of his former advocate of failing to inform him of the hearing dates should not be visited on him. He relies on various decisions on the courts discretion to set aside an *ex parte* judgement. The intention would be to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes. The Defendant also argued that Justice Nyamweya of the High Court did not have jurisdiction to hear and determine the matter and hence any judgment, decree or order she made was a nullity *ab initio*. He relied on the case of **Republic v Karisa Chengo and 2 others [2017] eKLR**. He argued that the Plaintiff will not suffer any prejudice if the *ex parte* judgement is set aside and he is allowed to present his evidence.

The Defendant relied on the case of **Pravinchandra Jamnadas Kakad v Lukas Oluoch Mumia [2015] eKLR** on the issue that where fraud is alleged the party alleging it must be given an opportunity to prove since it raises a triable issue entitling the Defendant to leave to defend the suit. The court notes that in that case no defence had been filed unlike the instant case where there was a defence and counterclaim. The Defendant relied on the case of Joyce **Kichoro Kurwa v Peterson Mbauni Kinyutho [2017] eKLR** where orders were made where there was nonattendance of the Applicant or his advocates. The court notes that in this case the Defendant's advocate attended court during the hearing of the case and even filed submissions. The same position obtained in **Richard N. Leiyagu v Independent Electoral and Boundaries Commissions & 2 others [2013] eKLR** where the court looked at the issue of mistake. The court notes that in those proceedings both the advocate and his client failed to attend court.

The court cited the case of **Centre for Rights Education and Awareness and another v John Harun Mwau & 6 others [2012] eKLR** on the issue that one of the important principles applied in the construction of the Constitution is the presumption against absurdity in that a court should avoid a construction that produces a bad result which is unworkable and impracticable. The Court should find against a construction that creates an anomaly or produces illogical results. In the court's view making a finding that Nyamweya J. did not have jurisdiction at the time she heard and determined the suit would produce an illogical result and an absurdity. The Court takes judicial notice of the fact that before the Environment and Land Court (ELC) judges were appointed to hear disputes relating to the environment and land following the promulgation of the new Constitution, land and environment cases used to be heard by the High Court Judges. Some of the cases currently being heard by the ELC judges were previously handled by High Court judges but were not concluded. Many land disputes were heard and determined by the High Court judges. It would produce a bad result which is unworkable and impracticable to find that all the High Court Judges who heard and determined land and environment cases before the ELC judges were appointed had no jurisdiction to deal with those cases. Would this mean that all the cases heard and the judgements delivered by High Court judges on land and environmental matters prior to 2010 and before the ELC judges were appointed are a nullity? The court is of the view that this cannot have been the intention of the 2010 Constitution which created specialised courts under Article 162.

The court has looked at the proceedings and the judgement of Nyamweya J. and notes that the Defendant was represented when the matter came up on 17/6/2013 and 11/1/2013. An adjournment was sought for the Defendant on the grounds that his advocate was not feeling well. The court directed that the hearing would proceed and the Plaintiff testified. The Defendant's advocate filed submissions. Pages 9 to 13 of the Judgement of Nyamweya J. show that the court analysed the Defendant's case and counterclaim. The court took into consideration the Defendant's contentions in the analysis of the issues and allowed the Set-off against the purchase price. The court found that the Defendant purported rescission of the sale agreement dated 23/1/2008 was unlawful and void.

The court has considered the rival arguments of parties and finds no merit in the Defendant's application. The Defendant was given an opportunity to defend the claim and present his case on the counterclaim but failed to do so. The application is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 14<sup>th</sup> day of November 2018.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Maweu for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant