



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 255 OF 2017**

**ESTHER WANJIRU MAINA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ZIPPORAH NDUTA KARANJA.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant in her notice of motion dated 15<sup>th</sup> May 2018 has moved this Court under the provisions of Order 12, rule 7 of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:

i. Spent.

ii. Pending the hearing and determination of this application, or further orders of the Court, there be stay of execution of the judgment delivered on the 25<sup>th</sup> April 2018.

iii. That this honorable court be pleased to set aside the proceedings of the 2<sup>nd</sup> and October 2017 and the Judgments delivered on the 25<sup>th</sup> April 2018.

iv. The ex-parte judgment entered against the Defendant on 14<sup>th</sup> July 2017 be set aside.

v. That the Costs of this Application be provided for.

2. The application is based on the grounds set out in the body the motion and application is supported by the Applicant's affidavit sworn on 15<sup>th</sup> May 2018 and filed in court on 24<sup>th</sup> May 2018 and the annexures thereto.

3. In response to the Defendant/Applicant's notice of motion, the Plaintiff/Respondent filed her replying affidavit sworn on 20<sup>th</sup> June 2018 on the 21<sup>st</sup> June 2018.

4. The application was disposed by way of written submission wherein it was the Applicant's case that she did not attend to the hearing of the case because she had not been aware of the hearing date as she was not served with the same on time.

5. She submitted that at the time she had been acting in person wherein sometime in mid-September 2017, she had received a hearing notice dated the 20<sup>th</sup> July 2017 that had erroneously indicated that the matter was coming up for hearing on the 21<sup>st</sup> October 2017 which dated fell on a weekend. That later in the month of October 2017, she had received another notice that indicated that indeed the matter was coming up for hearing on the 2<sup>nd</sup> October 2017 by which time the matter had already proceeded for hearing.

6. The Applicant's contention is that she had been using her friend's postal address in Miharati as is evidenced from her postal address. That as it is normal in the village, people do not often check for their mail. That her friend took time to check on her mail box, then passed a message to her to collect her letter which also took time before the Applicant could collect her letter.

7. That in the circumstance, the Applicant did not receive her mail on time.

8. That since there was no service, and ex-parte judgment should be set aside as a matter of right. In so submitting, the Applicant relied on the decided case of **James Kanyita Nderitu & Another vs Morios Philotas Ghikas & Another [2016] eKLR**

9. The application was opposed by the Plaintiff/Respondent who filed both a replying affidavit and her submission and gave a chronology of the suit since its inception at the Nakuru High Court as Civil Suit No. 220 of 2016 to the subsequent transfer to this court.

10. The Respondent's submission is that the Applicant's Application lacks merit to the effect that whereas she claimed not to have been properly served with the hearing notice on time, yet, in her replying affidavit dated the 20<sup>th</sup> June 2018, she had stated that the notice was served by registered post on the 20<sup>th</sup> September 2017 and an affidavit of service as is required under Order 5 Rule 15 of the Civil Procedure Rules annexed as EWM4. The Respondent had therefore fulfilled all the required obligations contrary to the Applicant's allegations.

11. The Applicant, having known that a matter had been filed against her, was not diligent and vigilant enough. That although she had sufficient time to attend court and make an inquiry on the position of the matter from time to time, she failed to do so but waited until the matter had been concluded and judgment entered so that she could file the present application. It was the Respondent's submission that equity aids the vigilant and not those who slumber on their rights.

12. That all along, the Applicant had made no appearance in court on the various times that matter had been set down for mention. Her present application was therefore an afterthought in the circumstance.

13. The Respondent also submitted that there will be no prejudice occasioned to the Applicant if the prayers in their Application are not granted. That on the contrary it would be the Respondent who would suffer if the judgment was set aside because she was the proprietor of the suit land and her right to exclusive possession would be denied.

14. The Respondent submitted that the application be dismissed with costs.

15. I have perused the pleadings proffered by the parties in support of their assertions. I note that the Defendant/Respondent does not deny knowledge of the hearing date. What she is saying is that she had received it after the hearing dated. However she does not say why she did not apply to set the said proceedings aside but had to wait until the judgment had been delivered to file the present application.

16. Order 12, Rule 2 of the Civil Procedure Rules provides as follows:

*If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—*

*(a) that notice of hearing was duly served, it may proceed ex parte;*

*(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or*

*(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.*

17. The court having satisfied itself that the Applicant had been served vide the address she had given, and that the provisions of Order 5 Rule 15 of the Civil Procedure Rules were complied with, it proceeded to receive the Plaintiff'/Respondents evidence ex-parte pursuant to the provisions of Order 12 Rule 2(a)of the Civil Procedure Rules.

18. It is true that under order 12 rule 7, where a judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. Order 12 Rule 7 does not say that on application the court should or must set aside or vary the opposite judgment.

19. The factors to be considered in setting aside ex-parte Judgment were laid down in the case of **Shanzu Investment Ltd vs the Commissioner of Lands, Civil Appeal No. 100 of 1993** where it was held that tests for setting aside Judgments are:-

i. Defence on the merits

ii. Prejudice

iii. Explanation for the delay.

20. Ordinarily, a Court will not interfere with a regular Judgment unless it is satisfied that there is a Defence on merits which discloses triable issues. I have considered the defendant's statement of defence filed on the 13<sup>th</sup> July 2016. The 1<sup>st</sup> Defendant alleges that she is a wife of the late Eliud Wambugu Maina. The Plaintiff denied that allegation and produced a marriage certificate between her and the deceased Mr. Eliud Gikandi as Exhibit 1 proving that they got married on 3<sup>rd</sup> October 1976.

21. It is also clear that, Plaintiff/Respondent obtained the registration of the suit land through a succession cause. Which evidence was not has challenged and the Court decided on that issue.

22. In this case, I have considered the Applicant's previous conduct wherein she had never appeared in court despite service which is not denied. I have also considered the reasons submitted herein and find that the Defendant/Applicant's explanation for not coming to court on the day fixed for hearing despite knowledge of the hearing date which is not denied, is not merited. I do not agree that reasons given are a good ground for staying the execution or setting aside the judgment herein.

23. For the above reasons, the Court dismisses the Applicant/Defendant's Notice of Motion dated 15<sup>th</sup> May, 2018 with costs to the Plaintiff/Respondent.

**Dated and delivered at Nyahururu this 12<sup>th</sup> day of November 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**