



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 45 OF 2017

LAWRENCE MUIRURI NJUGUNA.....PLAINTIFF/RESPONDENT

VS

CHARLES MWENGA MULWA.....DEFENDANT/APPLICANT

RULING

1. On the 17/8/18 the Defendant filed a Notice of Motion under Order 51 Rule 1, Order 22 Rule 22, Order 9 Rule 9 of the Civil Procedure Rules 2010, Section 1, 1A, 1B, 3 and 3A and section 63 of the Civil Procedure Act Cap 21 and Article 159 of the Constitution, 2010 and any other enabling provisions of the law. The Defendant sought the orders as follows;

a. Spent

b. That the firm of S Ogeto Ongori & Company Advocates be allowed to come on record for the Defendant in the place of Messrs Nzavi & Co Advocates.

c. That the Court be pleased to stay execution of the decree issued by this Court for the execution on the 6/4/2018 pending the hearing and final determination of this application.

d. That subsequent to the above stay the Court be further pleased to set aside the exparte judgment entered on 8/3/2018 and the matter be set down for hearing afresh.

2. The application is premised on the following grounds; -

a) The Defendant is the registered owner of the suit land LOC 17/IGANJO/2041 which is the subject of the suit.

b) That the Defendant instructed the law firm of Messrs Nzavi & Co Advocates to defend him in this suit who filed the relevant documents but failed to attend Court and or advise the Defendant on the proceedings.

c) That despite service on the said firm of Advocates, the said firm did not inform the Defendant as a result of which the matter proceeded exparte without the participation of the Defendant leading to the delivery of an exparte judgment and the Defendant's land being unfairly taken away by the Plaintiff.

d) That after the exparte judgment the firm of Nzavi Advocates sought and was granted leave to cease acting for the Defendant.

e) That it is on this ground that the Defendant seeks to set aside the exparte judgment and be allowed to defend.

3. The Application aforesaid is supported by the affidavit of Charles Mwenga Mulwa sworn and filed on the 17/8/18. In it, the deponent claims that he engaged the services of Nzavi & Company Advocates to defend him in the suit. The said law firm entered appearance and filed the statement of defence, list of documents and witness statements. That the matter was set for hearing but the said advocates did not inform him of the hearing dates until when he learnt that the judgment had been entered in favour of the Plaintiff exparte without any information and participation of the Defendant. After the judgment was delivered, that the said advocates filed an application on the 17/7/18 seeking to cease acting on the grounds that the Defendant had failed to give him instructions to defend the suit. That this application to cease acting was a mere cover up of his failed representation. That had the advocate informed him of his failure to appear in Court, he would have instructed another counsel or even appear in person. That during the hearing the said Nzavi & Co Advocates did not appear and did not inform him of the hearing schedules as such the hearing went on exparte hence the exparte judgment. That a decree has been extracted following the judgment and the same is about to be executed. He urged the Court to set aside the exparte judgment to allow him to defend the

suit in the interest of justice.

4. The application was opposed by the Plaintiff who filed a replying affidavit and deponed that the Notice of Motion is full of falsehoods and is an abuse of the process of the Court. That the Defendant retained the services of Nzavi & Company advocates who was at all times served with the notices for hearing and judgment. That the Defendant gave evidence in the matter on the 12/7/17 and cannot claim that he did not participate in the hearing of the suit. Further that the Defendant has not satisfied the conditions of granting of an order of stay of execution and as such no security has been offered by the Defendant. Finally, that there is no *ex parte* judgment to be set aside, the Defendant having entered appearance and defense and participated in the hearing and proceedings of the suit. He termed the application mischievous, scandalous and an abuse of the process of the Court, only meant to delay the Plaintiff from enjoying the fruits of his judgment. He urged the Court to dismiss the application for lacking in merit.

5. On the 20/9/18 by consent of the parties, prayer No b was allowed consequently the law firm of S Ogeto Ongori & Co. Advocates came on record for the Defendant after the law firm of Nzavi & Company Advocates ceased acting for him on the 17/7/18. Similarly, on even date, on application by the Defendant, the Court granted a temporary stay of execution pending the hearing and determination of the application.

6. Parties elected to prosecute the application by way of filing written submissions which I have read and considered.

7. In regard to the setting aside of the *ex parte* judgement, the Defendant submitted that the hearing proceeded in the absence of the Defendant because his advocate on record then did not inform him of the mention and hearing dates. That from the record of the Court, the said advocate absented himself from Court on 18/6/15, 3/5/16, 8/2/17 and 22/2/17. That neither he nor his advocates participated in the hearing of the suit. That after the delivery of judgment, the said advocates ceased acting citing frustration and non-cooperation on the part of the Defendant. The non-attendance is evidence that the Defendant's defense was not properly conducted owing to the absence of the Defendant and his advocate. That the said advocate did not inform the Defendant of the hearing dates as well. That his non-attendance is attributed to the mistake of his advocates on record. He submitted that the Defendant had a defence and documents which showed that the Plaintiff tried to purchase part of the property and the agreement was in Kikuyu language but no English translation was produced. He Placed reliance on the case of **Weld-Con Limited Vs China National Aero Technology International Engineering Corporation & Anor (2017) EKLR**.

8. The Plaintiffs cited the case of **Kiminisi Ole Ngenda Vs Mataiya Kantai & Anor (2017) EKLR** where the Court had this to say;

“in the instant application the Applicants seek to have the *ex parte* judgment entered against them set aside. The power of the Court to set aside is discretionary. The Court has unfettered unlimited and unrestricted jurisdiction to set aside *ex parte* judgements”.

9. The Plaintiff further cited other case law *inter alia* **James Wanyoike & 2 Others Vs CMC Motors Group Limited & 4 others (2015) EKLR; Shah Vs Mbogo (1967) EA 166, Patel Vs EA Cargo Handling Limited (1974) EA 75** and submitted that no *ex parte* judgment was entered and there is none to be set aside.

10. The starting point in determining this application is to set out the record of the proceedings. The suit was filed on 14/11/14 in Kerugoya and at the establishment of the Environment and Land Court in Murang'a in 2017, the file was transferred to Murang'a Environment and Land Court on 17/1/17. After pretrial, the matter was set down for hearing for the 30/5/17. The firm of Nzavi & Company advocates who represented the Defendant was duly served with the hearing notice on 20/3/17 and an acknowledgement is on record. Come the 30/5/17 (date of hearing), Messrs. Omagwa Advocate held the brief of Mr Nzavi in Court and confirmed service but sought an adjournment on the ground that Mr Nzavi was engaged in a traffic case at Makueni law Courts. The Court declined to grant the adjournment and allocated time for the hearing of the suit at 12.15pm the same day. At the start of the hearing the Defendant's advocate and or Messrs Omagwa Advocate who had held his brief earlier were absent and the hearing proceeded *ex parte*. The Plaintiff and his witness testified and the Plaintiff closed his case whereupon the suit was adjourned for the defense hearing on 12/7/17.

11. According to the record, on the 12/7/17, Mr Nzavi learned counsel for the Defendant was present as well as the Defendant and his witness. The Plaintiff and his counsel were also present. Mr Nzavi informed the Court that he was ready to proceed with the hearing and that he had his client, the Defendant and one witness in Court. He sought leave of the Court to recall the Plaintiff for cross examination because he was absent when the Plaintiff testified. The learned Counsel for the Plaintiff, Mrs. Kimani had no objection and the Court granted the leave to reopen the hearing of the plaintiff's suit by recalling the Plaintiff for purposes of cross examination. According to the record the Plaintiff was cross examined at length and re-examined after which the Plaintiff finally closed his case. The Defendant commenced the hearing of his case where he testified along with his one witness. The Defendant closed his case and the parties elected to file written submissions which they did. Judgment was rendered on the 7/12/17.

12. Having considered the application, the rival affidavits, the submissions there are two issues for determination; whether the judgment delivered on the 12/7/17 is *ex parte*? If yes whether it can be set aside? Whether stay of execution should be granted.

13. Black's Law Dictionary, 9th Edition defines *ex parte* as something done or made at the instance and benefit of one party only, and without notice to or argument by any person adversely interested; of or relating to Court action taken by one party without notice of the other, example is an *ex parte* proceedings or judgment.

14. Order 12 rule 2 provides as follows;

“If on the day fixed for hearing, after the suit has been called on or hearing outside the Court, only the Plaintiff attends, if the Court is attends 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.

15. In the instant case the Defendant was duly served and was represented by counsel who held the brief of his advocate. When the said advocates did not show up at the allocated time of the hearing, the Court proceeded with the hearing *ex parte* in accordance with the provisions of Order 12 rule 2 (a) of the Civil Procedure Rules. It must be noted that, notwithstanding the Plaintiff's case having been closed, the Defendant with leave of the Court was allowed to cross examine the Plaintiff and he proceeded to have his case fully heard including offering testimony in person and his other witness. From the above factual record of the Court it is manifestly clear that the Defendant fully participated in the hearing and proceedings of the case and the claim that the case was heard in his absence and that of his lawyers is untrue.

16. The current Advocate of the Defendant claims to have perused the record of the Court and if indeed he did, he ought to have given a factual reflection of the same as an officer of the Honorable Court. Given the above factual summary of the record it is clear that said Advocate is misleading the Court.

17. In the circumstance thereof, I hold that there were no *ex parte* proceedings in this suit. I further hold that there was no *ex parte* judgment issued by the Court in this suit. The judgment delivered on the 12/7/17 was a product of the full involvement and participation of all the parties, the Defendant and his then counsel included.

18. That notwithstanding, the power to set aside judgment is a discretionary one. Under Order 12 rule 7 the Court on application may set aside or vary judgment or order upon such terms as may be just. In the case of **Pithon Waweru Maina Vs Thuka Mugiria (1982-88) 1 KAR 171** Bosire J as he then was set out the principles applicable to the above orders as follows; the power to set aside judgment is discretionary; the discretion is unlimited provided it is properly exercised; it being judicial discretion must be exercised on the basis of evidence and sound legal principles; the Court has powers under this order to set aside on terms as are just; the Court is obliged to look at the defence the Applicant /Defendant may be having to the claim; if a party establishes a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined towards setting aside.

19. In ordinary circumstances, a judgment obtained irregularly is bound to be set aside as of course or right. In a regular judgment the Court must *inter alia* look at the defence and satisfy itself that the Defendant has triable issues.

20. In the instant case none of the above principles applies. There is no justifiable cause to make me exercise my discretion and set aside this judgment. If the Defendant is aggrieved by the conduct of his previous advocates, his agents, then his remedy lies elsewhere and if he is aggrieved by the judgment of this Court, he has the liberty to file an appeal. I decline to exercise my discretion as in so doing it will amount to imprudence and at best indiscretion.

21. The Defendant has not addressed the Court on the issue of stay of execution although the same was prayed for under prayer 3 of the application. Neither party has addressed the Court on the issue of stay of execution in their submissions. The Court takes it that since the stay was for the period pending the hearing and determination of the application, it is taken that the same is now spent. I need not delve into it.

22. The upshot is that the application is devoid of merit. It is dismissed with costs to the Plaintiff.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 6TH DAY OF DECEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi HB for Kimani for the Plaintiff/Respondent

Defendant/Applicant – Absent

Irene and Njeri, Court Assistants