REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 729 OF 2012

CHRISTINE JEBOR JOHN ………………….................. PETITIONER

VERSUS

JACKSON NAIBEI ……………………...…….... 1ST DEFENDANT

DORCAS EKOHA …………………….......….......2ND DEFENDANT

JUDGMENT

Before court is the Notice of Motion amended on 11/3/2015 pursuant to the leave granted by the Honourable Court on the 4/3/2015. The 2nd defendant prays for the setting aside of the judgment delivered in this suit together with all consequential orders and that the 2nd Defendant be granted leave to file defence and counterclaim. The application is based on grounds that the hearing notices and other documents were not duly effected by the plaintiff and due to the plaintiff's failure to serve the aforesaid documents upon the applicant, the applicant never had knowledge of the proceedings of this case against her. The 2nd defendant claim that he has a defence and a counterclaim that is merited. The Amended Notice of Motion is based on the affidavit of service Ekoha sworn on 1/12/2014 and filed on 3/12/2014 where she states that the Judgment was given without her knowledge as she was never served with necessary court documents, such as summons to enter appearance to filed and accompanying documents. Moreover, that the defendant shall not suffer any prejudice if the application is allowed.

The plaintiff filed a replying affidavit stating that the 2nd defendant was duly served with all necessary papers. That the applicant was again served with the Chamber Summons dated 3/6/2011 on the 2/7/2011 and filed their replying affidavit dated 9/12/14 on 13/12/2011 and therefore it is not true on the part of the 2nd defendant/applicant to allege that the defendants were not aware of the existence of the suit herein. The suit came up severally for hearing and the 2nd defendant was served but failed to attend. That the property belongs to the plaintiff and that the Judgment was delivered after due procedure. In the second application dated 11/12/2014, the plaintiff prays for an order of Eviction of the defendant from the suit land. The application is based on ground that there is a valid judgment on record where the defendants were ordered to vacate. The same is supported by affidavit of Christine Jebor John, the Decree-Holder. The 2nd defendant filed a replying affidavit on 11/3/2015 sworn on 11/3/2015 stating that same was not duly effected as the same was not done at her address of service specified in the Memorandum of Appearance as required by Order 6 rule 6 of the CPR 2010.

I will begin with the Amended Notice of Motion dated 11/3/2015 and having considered the submission of both parties, I do find that this court is required to exercise its discretion judiciously which discretion is unlimited and that the concern of the court is to do substantive justice.

In this matter, I do find that the 2nd defendant filed a memorandum of Appearance on 4/7/2011 and indicated her address of service for purposes of this suit as ***C/O National Legal Aid and (awareness) Programme, 8th Floor, Kiptagich Building, Uganda Road, P.O. Box 7427, Eldoret.*** It appears that the alleged service was carried out at Mokoinet Village, contrary to the physical address supplied by the 2nd Defendant and therefore service was not affected according to procedure. The Plaintiff was obligated to serve upon the physical the address supplied by the defendant or could send it by registered post and do agree with the 2nd Plaintiff that the service was irregular and therefore the Judgment was also irregularly obtained. The courts discretion in setting aside ought to be exercised without prejudice to the respondent. in the case of **PHILIP KEIPTO CHEMWOLO AND MUMIAS SUGAR CO. LTD – V- AUGUSTINE KUBENDE (1982-1988)1 KAR 1036** Court of Appeal dealing with an appeal in which interlocutory judgment had been entered in default of appearance considered whether judgment had rightly exercised his discretion in refusing to set aside the judgment under Order 9A Rule 5 as it then was, held as follows: -

> ***1. The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties (Kimani v Mconnell (1966) EA 547).***
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> ***2. Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue.***
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> ***3. In this case there was a triable issue on contributory negligence which would affect the quantum of damages.***

The court of appeal in the above-mentioned appeal on page 1039 of their judgment stated: - ***"The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously, the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

Yet in the same judgment APALOO J. A, as he then was on page 104 on line 18 stated: -

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits."***
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> ***I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the respondent will not agree. I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were permitted a hearing, the quantum of the liability to pay damages may be much less.***

In the case of **SHAH – V- MBOGO & ANO (1967) E.A 470** Court of Appeal for Eastern African held: - ***IV. applying the principle that the court's 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 not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused

Further in the case **of KENYA COMMERCIAL BANK LTD – V- NYANTANGE & ANOTHER (1990)** KLR 443 Bosire J, as he then was held: - ***1. Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.***

> ***2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.***

Under Article 50 (1) of the Constitution of Kenya, 2010 it is provided that every person's right to have any dispute determined are decided fairly. This means every person be afforded an opportunity to be heard and case be decided on merits. Article 50(1) of the Constitution of Kenya, 2010 provides: - ***50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*** Article 159 (2) (a) and (b) of the Constitution of Kenya, 2010 on the other hand obliges court to do justice to all without undue regard to technicalities. Article 159(2(a) and (d) provides:

> ***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***
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> ***(a) Justice shall be done to all, irrespective of status;***
>
> ***(b) ………………………………………………..***
>
> ***(c)…………………………………………………….***
>
> ***(d) to a public trial before a court established under this Constitution***

Our own Civil Procedure Act under Section 1A and 1B of the Civil Procedure Act obliges court to do substantive justice and not to dwell on technicalities. On the ground that service was irregular, I do find that the amended Notice of Motion amended on 11/3/2013 is merited. The right to be heard is cardinal and should not just be wished away. The 2nd Defendant is entitled to fair hearing in view of the provision of Article of 5o (1) of the Constitution of Kenya 2010 and therefore, the application is allowed. Costs in the cause. Application dated 11/12/2014 is deemed as having been overtaken by the decision herein. Ultimately, the matter to begin de-novo.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2017.

A. OMBWAYO

JUDGE