



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 148 OF 2014

ABDIRIZAK ABDULLAHI ALIN.....PLAINTIFF

VERSUS

SIMON CHOPER.....1ST DEFENDANT

ESTHER ALEPER.....2ND DEFENDANT

R U L I N G

1. By an application dated **31/1/2017** made under certificate of urgency the defendants sought a number of orders. When the application was first brought to court it was certified urgent. Prayer **No. 2** and **3** were also granted. These are the prayers that sought leave to be granted so that the firm of M/s. Mwathi Chege Murimi & Associates Advocates do come on record and act for the defendants in place of M/s. Samba & Co. Advocates and that the notice of change of advocates filed before court on 30/1/2017 by that incoming firm be deemed as properly filed.

2. Other prayers in the application are as follows:-

“4. THAT this Honourable Court be pleased to set aside the interlocutory judgement entered on the 13th November, 2014 and final judgement delivered on 9th May, 2016 pending the hearing and determination of this application.

5. THAT this Honourable Court be pleased to order a stay of execution of the judgement, decree and/or any other consequential orders herein pending the hearing and determination of this application.

6. THAT the matter herein be heard de-novo in the presence of all parties.

7. THAT costs of the application be provided for.

8. THAT any other order/or directions that his Honourable Court deems fit to grant”.

3. The application is based on grounds set out at the foot of the application and is supported by the affidavit of **Simon Choper**, the 1st defendant/applicant.

4. In his affidavit in support of the application Mr. Choper avers that service of plaint and summons was effected upon both defendants whereupon they engaged the firm of Samba & Co. Advocates, whose Mr. Samba entered appearance on 16/10/2016 on their behalf. He avers that shortly thereafter he was arrested by the police at Lodwar and charged with the offence of forcible detainer at the **Lodwar Law Courts in**

Criminal Case No. 544/2014, consequent to which he was convicted and sentenced to 2 years imprisonment on 2/12/2014. He states that while in prison he could not follow up on the progress of this suit and that his co-defendant is a very elderly woman who is completely illiterate and who therefore had no means of tracking the progress of the suit.

5. In his affidavit Mr. Simon Choper makes various allegations regarding the conduct of Mr. Samba in this suit as follows:

Mr. Samba filed the defence late and after judgement in default of defence had been entered; he never updated the defendants on the progress of the matter and they learnt of the judgement when they were served with the decree sometime in **October, 2016**; That after the 1st defendant was released from prison he enquired from Mr. Samba who informed him that the suit had stalled as there was no judge in Kitale to hear and determine it; that it is by virtue of Mr. Samba's conduct that the defendants were condemned unheard in the matter and that they now risk losing their family home; He avers that the defendants have a good defence to the suit and that it is only proper and just that they be allowed to ventilate their defence.

6. The supplementary supporting affidavit of Simon Choper sworn on 7/2/2017 and the annexure thereto demonstrate that the 1st defendant/applicant's sentence was reduced on 21/3/2016 to the time he had already served in prison and the High Court ordered his immediate release. The further supplementary affidavit of the 1st defendant/applicant sworn on 9/2/2017 reiterates some matters in the first two affidavits mentioned herein, but adds that on the morning of 6th February, 2017 the local police in Lodwar town at the behest of the plaintiff/respondent invaded the suit premises and forcefully evicted the defendants/applicants therefrom.

7. The applicants filed a list and a supplementary list of authorities.

8. The plaintiff/respondent filed a replying affidavit sworn by one **Jeremiah Ongeri Samba** on 7/2/2017 and a further affidavit sworn by the plaintiff/respondent on the 10th February, 2017.

9. In the replying affidavit, the deponent, Mr. Jeremiah Ongeri Samba states that his legal firm was instructed by the applicants as stated herein before, that a Memorandum of Appearance was filed and served, that the pretrial was conducted before the suit was set down for hearing, and that there was no default judgement. Mr. Samba further states that after the close of pleadings, he lost communication with the applicants and he did not have either a phone contact or postal address to which he could address correspondence to the defendants/applicants. He avers that the defendants were only in his office once when they instructed him to file a memorandum of appearance and defence and that he did not have sufficient instructions to proceed with the applicant's case due to breakdown of communication which he attributes to the imprisonment of Mr. Simon Choper the 1st defendant/applicant. He denies allegation of dishonesty in Simon Choper's affidavit and avers that he recalls that the 1st defendant/respondent came to his chambers sometime in December, 2016 when he informed him of the ex-parte judgement.

10. In his affidavit in opposition to the motion the plaintiff corroborates the applicant's averments of arraignment and imprisonment for forcible detainer, contrary to Section 91 of the Penal Code. He states that the criminal charge related to the suit land and that since the 1st defendant was found guilty as charged, he has no claim or defence. He further states that the defendants/applicants have delayed in bringing this application and that the eviction, whose date he states to be sometime in November, 2016 was conducted in accordance with the law.

11. While urging this application before court Mr. Mandela for the applicants submitted that the defendants have a good defence that raises triable issues, that the non-filing of a late defence was due to mistake of counsel who abdicated duty and let the defendants down. The said counsel, he submitted did not even set aside the interlocutory judgement entered against the applicants. In urging that mistakes of counsel should not be visited upon the parties he cited the case of **John Peter Kiria and Another versus Pauline Kagwiria 2009 (EKLR)** and the case of **Philip Keiptoo Chemwolo and Mumias Sugar Company Limited -vs- Augustine Kubende (Eklr)**.

12. Mr. Mandela further urged that this is a civil dispute and while the criminal case alluded to relates to events at the time of commission of forcible detainer, in the present case the defendants desire the court to adjudicate over the matter and state who was the rightful owner since the **1980s**. He urged that in the case of Philip Keiptoo previously cited, the High Court set aside interlocutory judgement despite the fact that the appellant had been convicted for careless driving.

13. On his part, Mr. Khisa for the respondent submitted that there was no interlocutory judgement and that the court allowed the defendants' defence and ordered compliance with *Order 11 of the Civil Procedure Rules*. He stated that subsequently the suit was set down for hearing on 27/5/2015, when Mr. Samba was said to be away and another counsel held his brief and asked for an adjournment. On 5/10/2015, he said, another counsel holding brief for Mr. Samba applied for another adjournment, and that on 3/3/2016 Mr. Samba failed to appear and upon application for adjournment by a different counsel made on Mr. Samba's behalf, the court declined it and ordered the hearing to proceed. On that basis, he stated, the matter proceeded with the knowledge of the defendant's advocate who never challenged the decision of the court.

14. Mr. Khisa urged that in such circumstances a client has a remedy as against an advocate. He urged that the judgement was entered 2 months after the 1st defendant was released and since the date of the decision the defendants only came to court to set aside the judgement vide the current application on 31/1/2017.

15. It is common ground that on several occasions Mr. Samba who was supposed to represent the respondents never attended court. Mr. Mandela submits that for the better part of that time during which counsel never attended court, the 1st applicant was in prison. He urges that when the 1st defendant was released, he followed up the matter and that when court process was served upon them in October, 2016 they instructed their current advocates and in the light of the fact that the advocates are based in Nairobi and the applicants are indigent, the process was arduous and therefore there is no inordinate delay in bringing the application.

16. I have carefully considered this matter. The plaintiff/respondent filed a plaint on 2/10/2014, claiming ownership of all that land known as **Plot No.11** situate at Lodwar in Turkana County on the basis of having purchased the same from one **John Kisaka Mukakula** vide a sale agreement dated 28/2/2014. He pleaded that the defendants had without his knowledge or consent and without right encroached onto the said premises.

17. In their defence filed in court on 17/11/2014 the defendants averred that John Mukakula had never owned the premises, and that they were owned by one **Lominit Namdang** (deceased) who was a brother to the 2nd defendant. They stated they had been in possession of the plot since **1980/81** and they had always collected rent from their tenants to the exclusion of anyone else.

18. The issue that arises herein is whether the applicants have satisfied the court that the judgement said to have been entered against them should be set aside. However the first priority is given to an examination of the kind of judgement or judgements entered against the applicants.

19. From the record it is apparent that a memorandum of appearance dated 14/10/2014 was filed on 16/10/2014 and noted by the Deputy Registrar on 17/11/2014. A request for judgement was filed by the plaintiff on 3/11/2014 seeking judgement in default of defence only. However a statement of defence was filed on 17/11/2014. The defendant's list of witnesses and their statements were filed on 6/2/2015. A pretrial questionnaire was filed on 3/3/2015 alongside a plaintiff's list of issues and a reply to defence. Even though there is indication that the matter was fixed for formal proof on 4/2/2015, this must have been by mistake because no actual entry of interlocutory judgement is reflected in the court record. Besides most of the record reflects that parties and the court approached the matter as one in which interlocutory judgement had not been entered and in which the parties could call witnesses. I find that there was no interlocutory judgement and that what we are dealing with is the final judgement dated 9/5/2016. To further support this view, when the matter came up for hearing on 4/2/2015 the court had this to say:

“This case is not ready for hearing. Issues have not been agreed. Let parties comply with the rules before a date for hearing can be given. The same is stood over generally”.

20. Upon that order, Mr. Kidiavai applied for leave to respond to the defence and Mr. Samba stated that he had no objection at all. It is proper to conclude that this suit was fixed for inter-partes hearing at all subsequent dates.

21. Have the applicants satisfied the court that there is good ground for setting aside the final judgement dated 9/5/2016?

22. It is now common ground that the defendants filed a defence, list of witnesses and witness statements. It is also not disputed that soon after the filing of this case on 2/10/2014 the 1st defendant was arrested charged and on 2/12/2014 he was convicted and sentenced to two years imprisonment which period of imprisonment was shortened upon his release vide an order of the High Court made on 21/3/2016. During this period the only person who could have pursued the suit on behalf of both defendants was the 2nd defendant who is said to be about 80 years old.

23. The advocate appointed to handle the matter stated in his sworn affidavit that after the first appearance in his office during which he was instructed to file appearance and defence, the defendants never again came to his office till sometime in December, 2016 when the 1st defendant visited the office and was informed of the judgement.

24. I find that on a balance of probabilities that the imprisonment of the 1st defendant on 2/12/2014, shortly after this suit commenced, incommoded the two defendants’ process of following upon the suit. Their counsel has denied any wrong doing and stated that he did not have any instructions since communication between him and the defendants had broken down. However a scrutiny of the record reveals that no application to cease from acting for the defendants was ever filed by the firm of Samba & Co. Advocates on the ground that they lacked instructions in the matter. I find that this placed the defendants in a precarious position where the court would not be in a position to determine if that firm still had instructions to act for the defendants. Therefore on the 3/3/2016 when the suit proceeded to hearing in the absence of the defendants and their counsel (a Mr. Wafula had earlier unsuccessfully sought an adjournment in the morning on behalf of Mr. Samba) there was an impression that Mr. Samba was still properly instructed in the matter.

25. Be that as it may it is necessary to note that according to the record there is no evidence of any attempts made to secure attendance of the 1st defendant through any formal mechanisms that would have ensured that despite being a prisoner, he would testify in his own defence. I find that this is not a fault attributable to the defendants themselves as they may not have received appropriate counsel or service towards that end.

26. In the case of *Patel -vs- E A Cargo Handling Service Ltd [1974] EA 75 at 76C and E*, the court stated as follows:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does so on such terms as are 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 to it by the rules. Secondly as *Harris J said in Shah -vs- Mbogo, 1967 EA 116 at 123B*, “This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. That judgement was approved by the Court of Appeal in *Mbogo -vs- Shah [1986] EA 93*. And in *Shabir Din -vs- Ram Parkash Anand [1955] 22 EACA 48 Briggs JA* said at 51:-

“I consider that under Order IX Rule 20 the discretion of the court is perfectly free,

and the only question is whether upon the facts of a particular case it should be exercised. In particular mistake or misunderstanding of the appellants legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

27. In the case of *Joseph Mweteri Igweta -vs- Mukira M’Ethare & Attorney General 2002 [Eklr]* where the applicant was said to have committed a “litany of blunders” the court stated as follows:-

“True Mr. M’Inoti has pointed out that so far the applicant has committed a “litany of blunders”. For that reason he submitted I ought not exercise my discretion in favour of the applicant. He further urged that enough is enough and the applicant must bear the burden of his advocates’ many blunders. Here I must bear in mind the fact that the applicant is not the architect of the “litany of blunders’. Do I punish him by dismissing the application?.....”.

28. The court further said:-

“If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice in our courts. Whilst I do not condone errors on the part of counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeals take. He has no other forum to go to if he is shut out here”.

29. Later on in the judgement the court stated:-

“Whilst I accept that the first respondent does not know where he stands he would not suffer further prejudice if the applicant is allowed his final say in this court. I appreciate that the process of adjudication as regards the suit land is held up. It has been held up for 30 years. A few more months would not make a difference. At least, let the applicant feel that he has had a hearing from this court”.

30. Natural justice lies at the heart of a fair trial. It is important to hear a person who is likely to be adversely affected by a decision before the decision is made. When a decision has been made without the substantive participation of a party who is likely to be affected by it, and the rule of natural justice has been violated, it matters not that that the same decision could have been arrived at if that violation had not occurred. The court may set aside the judgement. In the case of *JMK -vs- MWM and MFC Civil Appeal No. 2015 of 2015 [Eklr]* the court allowed an application to set aside the final judgement of the Industrial Court on the basis that the appellant therein had not been accorded a hearing despite not having been a party to the original suit. It ordered that the 1st respondent’s claim should be heard de novo with the appellant being afforded an opportunity to be heard.

31. I have carefully given consideration to the circumstances of this case. The defence filed raises several issues, including whether the suit land was owned by one **Lominit Namdang** (now deceased) and whether the documents that the plaintiff relied on are genuine. Further the defendants aver that they have been in possession of, and have collected rent from, the suit land since the 1980s. They deny the plaintiffs’ claim.

32. The imprisonment of the 1st defendant, the breakdown of communication that hindered the applicant’s counsel from proceeding with the case in the manner that the applicants would have desired, and the advanced age of the 2nd defendant are factors that contributed to this suit being heard in the absence of the applicants.

For the reasons forestated I find that the application dated 31/1/2017 has merit and make the following orders:-

(1) The final judgement of the court delivered on 9th May, 2016 is hereby set aside.

(2) The hearing of this suit do commence de novo.

(3) Costs of this application to be in the cause.

Dated, signed and delivered at Kitale on this **23rd** day of **February, 2017.**

MWANGI NJOROGE

JUDGE

Mr. Katama holding brief for Mr. Chege for Applicant present

Mr. Bisonga for the Respondent present

Court Assistant – Isabellah.

MWANGI NJOROGE

JUDGE