



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE NO. 55 OF 2017
(FORMERLY KISII ELCC NO. 210 OF 2009)

OKAL ONGARO.....PLAINTIFF/RESPONDENT

VERSUS

JAMES OWIYO ODIPO.....DEFENDANT/APPLICANT

RULING

1. This is an application by way of Notice of Motion dated **1st February 2017**, brought under certificate of urgency by the Defendant/Applicant, **JAMES OWIYO ODIPO** against the Plaintiff/Respondent, **OKAL ONGARO**. He is seeking orders, inter alia:-

- a)(spent).
- b) Pending the Hearing and determination of the instant application, the Honourable court be pleased to grant an interim order of stay of proceedings, more particularly, the hearing of the Notice of Motion Application dated 6th December 2016 and which is currently scheduled for hearing on the 9th day of February 2017.
- c) Pending the Hearing and determination of the instant Application, the Honourable court be pleased to grant an interim stay of Execution, Enforcement and/or implementation of the judgment and the resultant Decree issued by this Honourable court on the 5th day of June 2015, together with all consequential orders thereto.
- d)(spent)
- e)(spent)
- f) The Honourable court be pleased to Vary, rescind and/or set aside the judgment and the Decree issued by Consequent to prayer (4) herein above being granted, the annexed Notice of change of Advocates be deemed duly filed and served upon payment of requisite court fees this Honourable court on the 5th day of June 2015, together with all consequential orders.
- g) Consequent to prayer (6) herein above being granted, the Honourable court be pleased to reinstate and/or restore the instant suit for hearing and disposal on merits.
- h) Cost of this Application to abide the cause and/or be at the Discretion of the Honourable.

i) Such further and/or other orders be made as the court may deem fit and expedient.

2) The application is based on twenty five (25) grounds on the face of it. These grounds include;

a) The instant suit touches and/or concern claim to and/or interest over and in respect of LR. NO. KAMAGAMBO/KANYAJUOK/1331, currently registered in the name of the Plaintiff/Respondent (hereinafter referred to as the suit property).

b) Be that as it may, the instructed Advocate duly entered Appearance and Statement of Defence, but failed to mount a Counter-Claim.

c) On the other hand, despite entering Appearance filling a statement of Defence, the Defendant/Applicant's previous counsel on record, failed and /or neglected to attend court on the scheduled hearing date.

d) The implementation of the Eviction orders, shall render the Defendant/Applicant homeless.

e) Besides, the Defendant/Applicant shall be denied and/or deprive of an opportunity to ventilate his claim over and in respect of the suit property.

f) Be that as it may, the Defendant/Applicant herein ought not to suffer as a result of the mistake and/or inadvertence of the previous counsel.

g) Beside, the Honourable court does not exist to mete out punishment to litigants, on account of mistake and/or technical lapses, of whatsoever, nature.

h) At any rate, the Ex-parte Judgment and Decree shall work and/or occasion injustice.

i) On the other hand, the Defendant/Applicant has been condemned unheard.

3. In support of the application is an affidavit sworn on 1st February 2017 by the Defendant/Applicant represented by Oguttu Mboya Advocate. He annexed to the application the documents as follows:-

a) Judgment Delivered on 5/6/2015 marked JOO1

b) Notice of Motion ex-parte marked JOO2

4. Initially S.M. Sagwe Advocate represented the Plaintiff/Applicant. On 14/2/201, Sam Onyango Advocate filed Notice of Motion application for change of advocate. He duly served the notice on S.M. Sagwe Advocate as shown on an affidavit sworn on 6/3/2016. There was no appearance for S.M. Sagwe Advocate. The court allowed the Notice of change accordingly.

5. The Plaintiff/Respondent filed a replying Affidavit of 28 paragraphs dated 17/2/2017. He claimed that there was undue delay in filing the present application, the Defendant/Applicant is guilty of indolence, the application has no merit and that it should be dismissed in the interest of justice.

6. The Defendant/Applicant filed a list of authorities dated 22/2/2017. He cited the following authorities :-

a) Housing Finance Company of Kenya – Vs- Richard Ndere Johnson & 3 others Court of Appeal Civil Appeal No. 52 of 2003 (Unreported).

b) Sebei District Administration – Vs- Gasyali & Others (1968) E.A, page 300-302.

c) Julius Leperes Ngilas – Vs- Johnathan Nkaro Muneryia, Kisii HCC ELC Case No. 166 of

2009 (Unreported).

d) Chemwolo & Another – Vs- Kubende (1986) KLR, Page 492-502.

e) The Civil Procedure Act, Chapter 21 Laws of Kenya and Civil Procedure Rules, 2010.

7. On 3rd February, 2017, Mutungi, J, certified the Notice of Motion application as urgent and fixed inter partes hearing for 23rd February, 2017. In the meantime, on 8th February, 2017, he transferred the case to this court for hearing and determination..

8. On 15/3/2017, I heard submissions by Ms. Mireri counsel instructed by Oguttu Mboya counsel for the Defendant/Applicant. The counsel submitted that the Defendant/Applicant lays his claims on adverse possession in respect of the suit land and that he has not been heard by the court.

9. The counsel further submitted that the Defendant/Applicant had instructed an unqualified counsel, who filed memorandum of Appearance and defence, but failed to file a counter-claim. That the unqualified counsel failed to attend court hence it was not the mistake of Defendant/Applicant who was not aware even of judgment date. Additionally counsel relied on the list of authorities. She urged court to exercise its discretion and grant orders sought as the application is merited.

10. I also heard submissions by Sam Onyango counsel for the Plaintiff/ Respondent that the court has discretion over the regular judgment, proceedings are valid, the Defendant/Applicant delayed in bringing the application and that there are notriable issues in the suit. He further submitted that there is no pending application to amend defence. The counsel also referred to the list of authorities including **Chemwolo case (supra)**. He termed the application unmerited and sought for its dismissal with costs.

11. I have studied the entire application and submissions by both counsel in this application. Therefore, is the Defendant/Respondent entitled to the prayers sought in the application?

12. The Defendant/Respondent is seeking orders, among others, stay of proceedings, more particularly the hearing of the Notice of Motion application dated 6/12/2016. He stated that the application is pending hearing and determination by the court. In **Republic-vs- Kenya Anti-Corruption Commission and 2-others (2009) KLR 31**, it was observed that there is no order of stay of proceedings where the proceedings are non-existent. In the instant scenario, it is a civil matter. The application sought to be stayed is still pending hearing and determination. However, judgment has already been delivered in the suit.

13. The authors of **Blacks Law Dictionary, sixth Edition, at page 1413** explains the term “stay” as hereunder;

‘A “stay” does not reverse , annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of the orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.’ (Emphasis added)

14. In the case of **PKA-vs-MSA (2009) KLR 745**, it was noted that an order of stay was intended to maintain the position as it was before the order against which the stay was intended was made or in other words to maintain the status quo as it existed then.

15. Under **Order 42 rule 6 (2) Civil Procedure Rules,2010** in respect of stay execution of judgment, the Applicant has to satisfy conditions set thereunder for the court to exercise the discretion vested on it in the Applicant’s favour. The conditions are;

a) The Applicant ought to demonstrate to the satisfaction of the court that if no stay was granted, the Applicant would suffer substantial loss; see New Stanley Hotel Ltd-vs-Arcade Tobacconist Ltd (1980) KLR 757

b) The application for stay of execution must be brought without unreasonable delay and

c) The applicant must furnish security for due performance of such decree or order as might have been ultimately binding on the Applicant. Costs at the discretion of the court.

16. I note that the hearing of the suit proceeded on 26th January, 2015 at 12.45 pm. The judgment delivered by Okongo, J. (see J001 paragraph 3 above) at paragraph 2 page 3 reads:

“After satisfying myself from the affidavit of service of Isaiah Miruka sworn on 3/12/2014 that the defendant’s advocates, J.N Owetch and Co. Advocates were duly served with a hearing notice, I allowed the hearing +of the case to proceed the absence of the defendant and his advocates notwithstanding.”

17. The court at paragraph 5 further noted:

“.....the Defendant filed a statement of defence but failed to turn up for hearing of the case.”(points emphasized)

18. **Article 159 (1) (a) and (b) (d) of the Constitution of Kenya, 2010**, provides that justice shall be done to all irrespective of status, it shall not be delayed and it shall be administered without undue regard to procedural technicalities respectively. Moreover, **Article 50 (1) of the same Constitution** provides for the right to fair hearing.

19. In **Shah-vs- Mbogo(1967) EA 116 at 123**, it was held that setting aside judgment is in exercise of the court’s inherent discretion. The court observed, inter alia:

“This discretion is intended so 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 course of justice”

The application was dismissed accordingly.

20. The likelihood of occasioning injustice in a case, delaying the course of justice or reasons for the delay and merits of defence case are some of the factors that may determine the setting aside of an ex parte judgment. I take into account authorities, including the following;

- **Chemwolo case**(supra) where it was held that a party is not to suffer penalty due to mistake of counsel and his/her case has to be determined on its merit.
- **Sebei case** (supra) that defence to be heard on merits and it is the court’s discretion to set aside ex parte judgment. That denying the subject a hearing should be the last resort.
- **Michael Kamau Gakundi -vs- Daima Bank and Another (2012) eKLR** on the principles governing the exercise of judicial discretion to set aside an ex parte judgment obtained in the absence of appearance or defence.
- **Abdulshakoor Sheikh-vs=Kenya Ports Authority (2006) eKLR** regarding exercise of discretion on the basis of genuine mistake of counsel.

21. I apply the principles applicable to the facts in this case. The Defendant deliberately sought to evade and or delay the course of justice by his failure to turn up for hearing despite the fact that he was duly served for hearing. The judgment dated 5th June, 2016 is perfectly regular. Whereas I consider the arguments advanced by the Defendant/Applicant’s counsel, I am constrained to uphold able submissions by counsel for the Plaintiff/Respondent. There is no sufficient case to set aside the judgment.

22. A fortiori, I find the application unmerited. I dismiss it accordingly.

23. On Costs, the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21)**, clearly gives this court

discretion to award for the ends of justice to be met and they follow the event. **In Rai-vs-Rai, Petition No.2 of 2012 (2014) eKLR**, it was judicially recognized that the basic principle on attribution of costs that costs follow the event was a well recognized-principle but could not be used to penalize the losing party rather it was for compensating the successful party for trouble taken in prosecuting or defending the suit. Furthermore, in **Samwel Kamau Macharia and Another-vs-Kenya Commercial Bank and 2 Others, Supreme Court Application No. 2 of 2011 (2012) eKLR**, the court ordered that each party bear their own costs. Each party is represented by counsel and has incurred costs. In the circumstances, I am of the opinion that each party bear own costs to ensure the ends of justice. Each party to bear own costs.

Right of Appeal explained to the parties.

G. M. A. ONGONDO

JUDGE

DELIVERED, SIGNED and DATED in open court at MIGORI this_5th day of April_2017.

G. M. A. ONGONDO

JUDGE

In the presence of;

Ms. Mireri counsel instructed by Oguttu-Mboya counsel for the Defendant/Applicant

Mr. Sam Onyango counsel for the Plaintiff/Respondent

Mr. Tom Otieno-Court assistant

G. M. A. ONGONDO

JUDGE