



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KITALE**

**ELC CASE NUMBER 44 OF 2015**

**GEORGE KITIWO KAMARY .....PLAINTIFF**

**VERSUS**

**STEPHEN KOWASIKOU MWOI.....DEFENDANT**

**R U L I N G**

1. The applicant brought an application dated 25<sup>th</sup> January 2017 seeking the following orders:

*a. spent*

*b. spent*

*c. That the Honourable court be pleased to set aside the judgement dated 7-11-2016 and list this matter for hearing de novo.*

*d. That the costs of this application be in the cause.*

2. The background is that the plaintiff in this suit filed a plaint dated 30<sup>th</sup> March 2015 on 31<sup>st</sup> March 2015. In that plaint he sought orders:-

*a. A declaration that the agreement of 16<sup>th</sup> January 2012 became null and void for failure on the part of the defendant to pay the balance of the agreed consideration and for failure to seek and obtain the consent of the land control board*

*b. A declaration that the defendant is a trespasser in the plaintiff's 20 acres comprised in Title No West Pokot /Katikomor/1 and who should be ordered to vacate therefrom and failing which he be forcefully evicted.*

*c. Costs*

*d. Interest*

*e. Any other relief that this honourable court may deem fit to grant.*

3. The plaintiff applied for interlocutory judgement but before it could be entered the parties consented that the application be marked as withdrawn and that the defence be filed. Defence was filed on 9<sup>th</sup> July

2015. By consent of the parties it was agreed that the plaint be amended and an amended plaint was filed on 2<sup>nd</sup> September 2015. R.E Nyamu & Co Advocates applied to cease acting for the defendant on 9<sup>th</sup>, March 2016 citing insufficient instructions.

4. The suit proceeded to hearing on the 28<sup>th</sup> September 2016. Only the plaintiff testified. Judgement was delivered on the 7<sup>th</sup> November 2016. It is that judgement that is sought to be set aside. The grounds are that the matter proceeded *ex parte*; the defendant failed to attend court on the 28<sup>th</sup> September 2016 on medical grounds; the applicant did not have a representative on the hearing date as the advocate who had been representing him had ceased to act for him by the hearing date; the applicant ought to have been given a fair hearing; by this matter proceeding *inter partes*, that the application has been brought in good faith, that the defendant will suffer great loss if the orders sought are not granted, and that it is in the interests of justice to set aside the judgement and that the plaintiff would suffer no prejudice if that was done.

5. The court has no discretion where there appears to have been no proper service. It is noted that the defendant is not stating that he was not served with the hearing notice in this matter for the hearing scheduled for 28<sup>th</sup> September 2016. Indeed in its judgement the court noted that the defendant had been duly served.

6. It is the correct position in law that the court has an unfettered discretion to set aside judgement. The principles governing the exercise of judicial discretion as to the setting aside of an *ex parte* judgement obtained in default which were clearly set out in the judgement of the Court of Appeal in the case of **Maina versus Mugiria (1983) KLR 78** are as follows:-

**a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**

**b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.**

7. In the light of the cited judgement the issue in this application is whether there are facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgement not been *ex parte* and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed.

8. In this matter the plaintiff claimed that the defendant failed to pay the balance of the purchase price and therefore the plaintiff rescinded the agreement and sought to refund the deposit paid. The defendant in his defence and counterclaim pleads that the plaintiff refused to accept the balance of the purchase price despite the fact that the defendant was ready to fulfill his part of the agreement within time. He further pleads that the plaintiff is not the registered owner of the land and that the plaintiff was therefore not capable of transferring the same to the defendant.

9. The defendant does not answer to the plaintiff's claim that the agreement was void for want of grant of the Land Control Board consent within six months of the agreement. However the court considered this point and stated at **paragraph 9** of the judgement as follows:-

***"The plaintiff never took the defendant to the Land Control Board to obtain consent. The transaction between him and the plaintiff (sic) became null and void the expiry of six months from 16/6/2012. The defendant therefore became a trespasser on the 20 acres after the agreement became null and void for want of the consent of the Land Control Board."***

10. The court took the earlier date of the beginning of the agreement that is 16<sup>th</sup> June 2012. Would the consideration of the latter date that is 23<sup>rd</sup> February 2013, have any impact on the decision of the court?

11. As the suit was filed on 31<sup>st</sup> March 2015 and the defendant's case is that the agreement was to be concluded by 23<sup>rd</sup> February 2013 by the payment of the balance of the purchase price, and the defendant does not controvert the allegation by the plaintiff that there was no Land Control Board consent issued during the duration the defendant had been granted to pay the balance, or within the six month period following the due date that is 23/2/2013, then there is no triable issue arising as far as the Land Control Board Consent is concerned.

12. Whatever triable issue could have arisen from the defendant's claim that the plaintiff breached the agreement is overshadowed by the want of the land control board consent for which there is no other remedy but the refund of the moneys paid for the transaction.

13. The defendants' claim in the counterclaim is only for a refund of the Ksh 300,000/=, costs and interest. The plaintiff had not pleaded any issue regarding the refund of the purchase price paid and therefore it is a new issue raised in the defence. It has not been replied to by way of a reply to defence.

14. The plaintiff's answer to this was not by way of pleading. At the hearing the plaintiff said that he had deposited the sum of Ksh 300,000/= which the defendant had paid as deposit for the land with the plaintiff's advocates for collection by the defendant as a refund in respect of the transaction.

15. The receipt from the advocates acknowledging the sum is dated 17<sup>th</sup> October 2015. However, there is no reason given by the defendant as to why the deposit sum was not collected from the plaintiff's advocate's office despite notification. Even his statement filed in the suit and dated 9<sup>th</sup> July 2015, long after the plaintiff's documents were lodged, does not address the issue and it lacks substance. It may be properly said that the plaintiff invited this suit against himself by not collecting the deposit money and by remaining on the land in question.

16. I have considered two of the cases cited by the defendant which I found relevant to the issue at hand. However, I note that in the case of **WACHIRA KARANI VS BILDAD WACHIRA NYERI HCCC NO 101 OF 2011**, service was a contested issue, contrary to the circumstances of this case. In the case of **LAWRENCE MWATA CHORE VS DICKSON TEYIE MUTOKA 2012 ECLR**, the revocation of the title by the Ministry of Lands was considered a force majeure event which in my view was sufficient to raise a triable issue at the hearing upon the setting aside.

17. In the light of the foregoing this court finds that it is would not be in the interests of justice to set aside the judgement dated 7<sup>th</sup> November 2016 as there is no sufficient cause for doing so.

18. The application dated 13th February 2017 is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of **April, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**In presence of:**

**Mr. Kiarie for the Defendant**

**Mr. Khisa holding brief for Mr. Komen for the Applicant**

**Court Assistant - Isabellah**

**MWANGI NJOROGI**

**JUDGE**

**3/4/2017**