



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

**AT KERICHO**

**ELC CASE NO. 6 OF 2015**

**KIPRONO ARAP KOSKE.....PLAINTIFF**

**VERSUS**

**JOHN CHERUIYOT KOSKEI.....DEFENDANT**

**RULING**

By an application dated 24<sup>th</sup> November, 2016 the Defendant /Applicant seeks the following orders:

- a. That the application be certified as urgent.*
- b. That the firm of Orina and Company Advocates be granted leave to come on record on behalf of the defendant/applicant in place of the firm of Weldon Ngetich and Company Advocate.*
- c. That there be a stay of execution of the judgment dated 30<sup>th</sup> September 2016 pending interpartes hearing of this application.*
- d. That pending the hearing and determination of the present application, this honourable court be pleased to set aside and/or review the judgment delivered on 30<sup>th</sup> September 2016 together with all consequential orders and the matter be set down for hearing on the merits.*

The application is based on the grounds set out in the Notice of Motion and the Supporting Affidavit sworn by John Cheruiyot Koskei, the defendant herein on 14<sup>th</sup> March, 2016.

A brief summary of the case is that the Plaintiff/ Respondent filed suit against the Defendant/ Applicant on 2<sup>nd</sup> February, 2015 seeking prayers for sub-division of land parcel number **KERICHO/SILIBWET/944** into two equal shares on the ground that he is entitled to half of the suit land. The defendant entered appearance and filed his defence on 19<sup>th</sup> February, 2015 objecting to the sub-division of the suit land.

When the suit came up for hearing on 30<sup>th</sup> June 2016, the defendant failed to attend and the suit proceeded as an undefended suit. Judgment was consequently entered in his favour and the court ordered for the sub-division of the suit land.

The plaintiff subsequently extracted the decree on 5<sup>th</sup> October, 2016 and applied for execution.

On learning that the Plaintiff intended to proceed with execution of the decree the defendant filed the present application for stay of execution and sought to set aside the judgment.

In his supporting affidavit the defendant states that he instructed the firm of Wheldon Ngetich to represent him in the matter but his advocate did not inform him of the hearing date. I must at this juncture point out that I have not seen any Notice of Appointment of Advocate by the said firm of Weldon.

He explains that his failure to attend court was occasioned by the fact that his wife was critically ill at the time the suit was set down for hearing and she subsequently passed away. He has attached medical records and a death certificate in support of his averments. He further maintains that his defence raises triable issues and the judgment should be set aside so that he can be allowed to defend the suit.

In their written submissions, both counsels have cited to me several authorities that should guide the court in applications for setting aside. In **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing 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 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. **Shah V Mbogo 1967 EA 116 at 123B.***
- c. Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***
- d. The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***
- e. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30.***

All in all the court is required to look into the circumstances leading to the failure to attend court and consider whether it would be just and reasonable to set aside the judgment. It must also consider if the party seeking to set aside the judgment has a defence that raises triable issues.

Having considered the pleadings herein, the submissions by both counsels and the authorities cited to me and the circumstances of the case I am persuaded that the defendant has made out a strong case for setting aside the ex-parte judgment. He has demonstrated by way of documentary evidence that his wife was critically ill at the time the case came up for Hearing and it would not be reasonable to expect that he was in position to attend court. I have also had a look at the defendant's defence and I am of the view that it raises triable issues. Consequently, I allow the application and direct that the parties comply with **Order 11** within the next 30 days to pave way for an expeditious disposal of the case.

The costs of this application shall be in cause.

**DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JUNE, 2017.**

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**J. M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Koech for the Respondent
2. N/A for the Applicant
3. Court assistant- Rotich