REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 85 OF 2017

SIMON NDICHU NJOROGE **PLAINITFF/RESPONDENT**

VS

RAHAB WANJIRU MBOGO **DEFENDANT/APPLICANT**

RULING

1. On 25th August 2016, the Respondent herein filed a suit by way of a plaint dated the 25th August 2016 seeking *inter-alia* the following orders against the Applicant; -

a) A declaration that the defendant's deceased husband Mbogo Njoroge alias Samuel Mbogo held land parcel Number Loc16/Mbugiti/1008 in trust for himself and the plaintiff and his other siblings.

b) The costs of this suit be borne by the defendant.

c) Any other relief that the Honourable Court may deem just to offer.

2. The Respondent's case is that the defendants husband one, Mbogo Njoroge alias Samuel Mbogo was registered as proprietor of Land Parcel Number Loc 16/Mbugiti/117 in trust for himself, his siblings and his Uncle Boboti Muhoro. That in 1979, the High Court in Nairobi through HCCC No 990 of 1978 ordered the subdivision of parcel 117 into two parcels; 1007 and 1008 respectively. In compliance of the said order, parcel No 1007 was transferred and registered in the names of the children of Boboti Muhoro, being Muhoro Boboti and Samuel Muigai. This was the share of Boboti Muhoro, the Respondent's Uncle. Parcel No. 1008 was registered in the name of Mbogo Njoroge, the defendants husband allegedly to hold in trust for himself and that of his siblings. Upon the demise of Mbogo Njoroge, both the Applicant and the Respondent jointly and separately filed succession causes to wit; Thika Succession cause No. 99 of 1988 and Muranga Succession Cause No. 72 of 1994. The latter one distributed the estate of the late Mbogo Njoroge to the Applicant and her children allegedly to the exclusion of Mbogo Njoroge's siblings, one of whom is the Respondent. The Muranga succession cause was later revoked vide the High Court Succession Cause 1023 of 1996 at the instance of the Respondent. The learned Judge Honourable Lady Justice Rawal ordered as follows; -

"a). **that the certificate of confirmation dated the 13th June 1995 issued in succession cause Number 72 of 1994 before Resident, Magistrate Court at Muranga be and is hereby revoked.**

b). That a fresh grant be issued herein in the name of Rahab Wanjiru Mbogo and Simon Ndichu Njoroge.

c). That the issue of the deceased holding Loc 16/Mbugiti/1008 in trust for the objector and

his siblings be determined prior to the confirmation of the fresh grant.

d). That all the siblings of the objector be served with this order with notice of citation. Similarly, all the beneficiaries that is the children of the deceased herein be served with the order and be notified by way citation".

It is the Respondent's averments that he filed the present suit in compliance with the above order. I shall return to this order at a later point in this ruling.

3. On the 26th August 2016, the service of summons to enter appearance together with the plaint and the supplementary documents were served on the Applicant as attested in the affidavit of service sworn on the 30th September 2016 by the process server. Memorandum of appearance by Kariuki Kagunda & Company Advocates dated the 13th September 2016 was filed on the same date on behalf of the Applicant. Having been duly served and entered appearance, the Respondent on the 30th September 2016 filed a request for judgement, which interlocutory judgement was entered against the Applicant by the Honorable Court on the 24th October 2016.

4. The granting of interlocutory judgement against the Applicant caused pandemonium and panic on the side of the Applicant and in reaction the Applicant filed a Preliminary Objection on the 26th October 2016 and two days later followed with a Notice of Motion seeking the following orders;

a). Spent

b). That pending and determination of this application, this Honourable Court be pleased to set aside the interlocutory *exparte* judgement herein delivered on the 24th October 2016 against the Defendant/Applicant and all the consequential orders therefrom.

c). Spent

d). That the costs of this application be provided for.

5. On the 16th March 2017, the Applicant withdrew the preliminary objection and dispensed with prayer number 3 in the Notice of Motion without assigning any reasons thereto, leaving the Notice of Motion dated 28th October 2016, the subject of this ruling.

6. The application is supported by the grounds stated therein as well as the supporting affidavit of the Applicant sworn on the 28th October 2016. She deponed that the reasons for the delay in filing defense were; missing court file in the registry, existence of a pending case in Muranga lower Court awaiting the issuance of letters of administration jointly in the names of the Applicant and the Respondent before the issue of determination of the trust, if any, in the suit property, ill health prevented her from instructing the advocates on time, that the Respondent stands to suffer no prejudice if the application to set aside interlocutory judgement is granted and that in the interest of justice and fairness, the court should give her the opportunity to be heard.

7. The Respondent, in opposition to the Applicant's application filed a replying affidavit which he stated that applicants application should be dismissed for being unmeritorious on the following grounds; that the application is frivolous, vexatious and misconceived; that the application is a delaying tactic to deny the Respondent the fruits of the interlocutory judgement in his favour and that no evidence of ill health has been adduced on the part of the Applicant. He urged the Court to dismiss the application with costs.

8. To further support her application, the Applicant filed a supplementary affidavit dated the 1st February 2017 and filed on the 28th February 2017 to prove to the Court that she has a triable defense. A draft statement of defence dated the 29th October 2016 is attached to the affidavit.

9. All the parties have filed their written submissions which I have perused. The Respondent did not make any reference to any precedent in support of his position.

10. The Learned Counsel for the Applicant in his written submissions argued that Order 10 rule 11 of the CPR empowers this Court to set aside or vary any judgement and any consequential decree or order upon such terms as are just. That the cardinal principles of setting aside judgment has been variously decided in leading cases as firstly whether there is a triable and meritorious defence, secondly whether there is an explanation for the delay and thirdly whether any prejudice will be occasioned on the plaintiff. He cited many decided cases to support his client's position. Finally he implored the Court on a balance of convenience to allow the application so that the Applicant is given the opportunity to be heard so that the dispute at hand is heard and determined on its merits.

11. The Respondent on the other hand argued that the failure of the Applicant to file defence within the stipulated time in law has not been sufficiently explained. That the delay is inordinate and this application was filed as an afterthought on realization that interlocutory judgement had been entered against her. That this application serves no purpose other than as a delaying tactic to hinder the Respondent from enjoying the fruits of the interlocutory judgment obtained lawfully from the Honourable Court. And that the same deserves dismissal to pave way for formal proof of his claim and execution to ensue thereafter.

12. The issues for determination by this Court are;

a). Whether the Applicant was duly served with the summons to enter appearance and the suit papers?

b). Whether there is a sufficient explanation for the delay in filing the defence?

c). Whether there is a meritorious defence?

d). Whether the Respondent will be prejudiced by the setting aside of the interlocutory judgement.

Whether the Applicant was duly served with the summons to enter appearance and the suit papers?

13. If there is no proper service or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one which the Court must set aside *ex debito justitiae* i.e as a matter of right. This may be done *sui motto* by the Court or on application of the defendant and such a judgement is set aside as a matter of judicial duty to uphold the integrity of the judicial process itself. That was the dicta by Ringera J (as he then was) in the case of **Gandhi Brothers Vs H K Njage t/a HK Enterprises, Milimani, HCCC No. 1330 of 2001.**

14. In the default judgement one, (where service was effected) the Court has an unfettered discretion to set aside judgement and any consequential decree or order upon such terms as are just as ordained in Order 10 Rule 11 of the CPR. The instant case falls under the latter category. The summons to enter appearance together with the suit papers to wit the plaint, verifying affidavit, plaintiff statement, witness statements, list of documents and witnesses were served on the Applicant on the 26th August 2016 as evidenced by the affidavit of service sworn by the process server on the 30th September 2016. The service was effected personally on Rahab Wanjiru Mbogo, the Applicant herein in accordance with Order 5 Rule 8(1) which states that service shall be made on the defendant in person or to his agent. Upon service of summons to enter appearance, the Applicant indeed entered appearance through her advocates on record on the 13th September 2016. The fact of service is not in dispute and the Court holds that proper service was indeed effected on the Applicant.

Whether there is a sufficient explanation for the delay in defence?

15. The summons to enter appearance provided for 15 days for the Applicant to enter appearance. Given that the plaintiff entered appearance on the 13th September 2016, latest time she should have filed her

defence should have been on or the 28th September 2016. The Respondent moved the Court on the 30th September 2016 and applied for Request for judgement against the Applicant for failure to file a defence within the stipulated time. He proceeded to ask that the matter be fixed for formal proof. The Deputy Registrar entered judgement in default on the 24th October 2016, approximately 41 days after the Applicant entered appearance in Court.

16. The Applicant in her affidavit dated the 28th October 2016 advanced various reasons for the delay. The first one being that the Court file was missing in the registry. There is no evidence on record that has been adduced by the Applicant to support this assertion. There are no requests to the Registry to avail the file or at any rate to enable the Applicant to file pleadings noting that the stipulated time is fixed and there are penal consequences for failure to file defence on time or at all. This is especially grave because at this point the Applicant has engaged a legal Counsel on board, who should have known better, given that he is a legal practitioner.

17. When the certificate of urgency dated the 28th October 2016 was received at the Registry on the same day at 1 p.m, the Deputy Registrar made hand written notes in the file to the effect that " **it is also noted that the file was not missing in the Registry and so Applicant is advised to serve the respondent"**. This has not been controverted by the Applicant save to make a mere statement that the file could not be traced. In any event a factor of the court file missing in the registry cannot be relied by a party because the party or any other of the parties have no obligation to keep a court file and documents are not required to be filed in the court file but in the registry of the court. The physical act of it then is for a party to present its pleadings to the registry and the registry which is the custodian of the court file is obliged to receive and stamp the documents presented by a party as evidence of filing. This is not dependent on the physical availability of the court file. In the case of the applicant, she has not stated or alleged that the registry refused or declined to accept his pleadings in the absence of the court file if her allegations in that respect were acceptable.

18. Secondly, the Applicant explained that the existence of a mutual agreement between the parties that the Respondent would invite the Applicant to fix a hearing date and would not invariably take an adverse action in the circumstances to the detriment of the Applicant. No evidence on record was adduced to back up this averment. Indeed, there is evidence that the Respondent on the 10th October 2016 invited the Applicant in person to fix a hearing date in the matter. No evidence that this elicited a response from the applicant. Be that as it may, a party must take full ownership and responsibility for the conduct of their case and cannot, in the absence of evidence, like in this case, delegate to the other party, especially in an adversarial system like ours.

19. Thirdly, that the Applicant has been ailing and therefore prevented from giving proper instructions to the Advocates on record to prosecute the matter. No evidence has been presented before this Court to support this statement and the same has been expressly controverted by the Respondent in his replying affidavit.

20. Fourthly, that the existence of a succession cause No 1023 of 1996 (formerly heard in Nairobi) in Muranga which is awaiting the issuance of fresh grant to the parties jointly before a suit to determine the issue of trust could be filed. It is not clear how this case hindered or caused the delay in filing the defense in question at all or in time.

21. Fifthly, though she states that she stands to suffer untold prejudice unless the interlocutory judgement is set aside, she has not explained the nature of prejudice to this Court.

22. In the case of **CMC Holdings Limited Vs James Mumo Nzioki, CA No. 329 of 2004 1 KLR 173**, in law, the discretion which the Court has in deciding whether or not to set aside *ex parte* judgement is meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error and it would not be proper use of such discretion if the Court were to turn its back to a litigant who has demonstrated such an excusable mistake inadvertence accident or error. Given the material presented by the Applicant before this Court, the Court finds the reasons adduced for the

delay vague, unsupported and unconvincing.

Whether there is a meritorious defence?

23. In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998**, the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an *ex parte* judgement. It is on record that the Applicant has annexed a draft statement of defence . In it the Applicant is challenging the ownership of parcel No. 1008 and especially that there was an alleged trust for the benefit of the siblings of her late husband, the Respondent included. She asserts that Parcel 1008 was for the benefit of herself and that of her children. She avers that she resides on Parcel No 1008, the suit property herein which from the record has had a chequered history of dispute in the family, and that she depends on it for her livelihood. She besieged the Court in her defence that it is in the interest of justice and fairness that she be given the opportunity to be heard in the dispute so that her side of the story can also be tested by way of evidence. Establishing ownership by trust is a question of fact. Evidence must be adduced viva voce on the existence or otherwise of trust in land ownership.

24. This Court has taken into account the Order of the Honorouble Lady Justice Rawal, earlier cited in Paragraph 2 above and in specie the following;

> "b). That a fresh grant be issued herein in the name of Rahab Wanjiru Mbogo and Simon Ndichu Njoroge.
>
> c). That the issue of the deceased holding Loc 16/Mbugiti/1008 in trust for the objector and his siblings be determined prior to the confirmation of the fresh grant

It is clear that the issue of ownership of the land in trust was a triable issue then in 2006 and it still is a triable issue and one that this Court is not prepared to turn its back on as the rights of the parties or otherwise hinges on the same.

This Court finds that the Applicant has mounted a defence which raises triable issues and the same is found to be meritorious.

Whether the Respondent will be prejudiced by the setting aside of the interlocutory judgement.

25. The Respondent in his written submissions and the replying affidavit is silent on how the setting aside of the *ex parte* judgement will prejudice him. It must be noted that directions to set down the matter for hearing of the formal proof had not been granted, although at this stage it is a natural consequence of events in the matter. If there is any prejudice to the Respondent, which this Court has not found, it will be in form of time lost which can be compensated by costs in the case. See the dicta in the case of **Sebei District Administration Vs Gasyali (1968) EA 300** where the Court held that an aggrieved party can be reasonably compensated by costs for the delay occasioned by setting aside the interlocutory judgement. That to deny a party a hearing should be the last resort of a Court. Taking into account the circumstances of this case, and the balance of convenience, the Court finds no prejudice on the Respondent that cannot be remedied with the compensation in costs. Further it will be noted that the Respondent does not have locus standi to bring this suit nor to lay a claim under it in view of the orders of Hon Lady Justice Rawal.

26. Before I conclude, I would like to return to the order of the Honourable Lady Justice Rawal cited in Paragraph 2 above. The Court ordered that a fresh grant be issued in the joint names of the Applicant and the Respondent. That confirmation of the said grant be only made after the controversy of ownership in trust of Land Ref Loc 16/Mbugiti/1008 has been determined. There is no evidence that this Order has been challenged on appeal and for all purposes and intents is still in force as confirmed variously by both parties to this application. This Court is however perturbed in the manner in which the Respondent is disobeying the Court order at will by filing this suit before the grants of administration are issued by the Succession Court as ordered by the Honourable learned Judge. Court orders must be obeyed however unpalatable a party may find them. This suit is being brought prematurely and in total

disregard/disobedience to an existing Court order aforesaid. It is the duty of this Court to stop the Respondent in his tracks from taking such an expedition in filing a suit whilst in disobedience of an order of a Competent Court. No evidence has been advanced by either of the parties herein as to the reason for the delay in obtaining the fresh grants, over 11 years since the order was issued. In the circumstances and based on the wording of the said order, it then follows that both the applicant and the respondent have no legal capacity to sue or claim under this property until the Honourable Court issues fresh letters of grant of administration as ordered by the learned Honourable Justice Rawal.

27. In the circumstances of this case, the material presented before me and in the interest of justice, this Court makes the following orders; -

(a) That the interlocutory judgement entered on the 24th October 2016 be and is hereby set aside.

(b) That draft statement of defence dated the 29th October 2016, subject to payment of the requisite Court filing fees, be and is hereby deemed to have been filed and served.

(c) That in view of the order issued in HCCC Succession Cause No 1023 of 1996 by the Honourable Lady Justice Rawal (as she then was) on the 31st October 2006, the parties are hereby ordered to fully comply with the said order, before this case is listed for hearing.

(d) That the effect of Order c) above stays the prosecution of this case pending the compliance of order c) above.

(e) Parties be at liberty to list the matter for hearing once order c above is complied.

(g) Each party to bear their own costs on this application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH JULY 2017.

J. G. KEMEI

JUDGE