REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.NO.305 OF 2017

ELIZABETH WAMBUI KIRAGU….PLAINTIFF/RESPONDENT

-VERSUS-

NDIRANGU MACHARIA…….....DEFENDANT/APPLICANT

RULING

The matter for determination is the ***Notice of Motion*** dated ***18th July 2016***, brought by the Defendant herein under Order 51, Order 10 Rule 11 of the Civil Procedure Rules, 2010, Sections 1A,1B and 3A of the Civil Procedure Act.

The Applicant has sought for the following orders:-

1) That the Court be pleased to set aside, review and/or vary its orders made on 21st June, 2016.

2) Costs of the application be provided for.

This application is supported by the grounds stated on the face of the application and also on ***the Supporting Affidavit*** of ***Wakahu Mbugua Advocates.*** It was alleged that the Applicant's advocate was unwell on the hearing date and hence could not attend the scheduled hearing in Court. Further that the advocate that was to hold his brief was not in Court on time and that if orders sought herein are not granted, the Defendant will suffer irreparably as his evidence will be closed out.

In his Supporting Affidavit ***Wakahu Mbugua Advocate,*** who is in conduct of this matter alleged that he had prepared for hearing of the matter on ***21st June 2016*** by sending out witness summons to Land Registrar to appear in Court. He attached the said Summons as annexture ***JWM1***. He further alleged that on ***20th June 2016***, he got knee injury on his left knee joint. He went to Kenyatta University Health Unit where he was treated and given two days off to restrict the movement of his knee. The letter recommending the two days off was attached as annexture JWM2. It was his further allegation that he called an advocate by the name of ***Mwangi Ben***, who was appearing with him in ***ELC.1464/2013***, to hold his brief. However, the said Advocate was not in Court on time and the Court proceeded to issue the orders therein. He contended that his absence in Court was not intentional and he therefore urged the Court to allow his application by vacating the orders issued on ***21st June 2016***.

The application is contested and the Plaintiff/Respondent, ***Elizabeth Wambui Kiragu*** swore her ***Replying Affidavit*** and averred that the Defendant and his Advocate had failed to attend Court on various other occasions like on ***20th July 2015***, even after having been served with a hearing Notice. Further that this matter was adjourned again on ***8th October 2015***, and ***12th October 2015*** at the instance of the

Defendant. It was her contention that the Defendant was aware of the hearing date of ***21st June 2016***, but failed to turn up in Court together with his advocate. She further contended that the Defendant's failure to attend Court on ***21st June 2016***, was not the first time to fail to do so and therefore the Defendant's instant application is meant to delay the conclusion of this matter. The Plaintiff/Respondent further alleged that she stands to suffer prejudice if the Defendant is granted the orders sought since she has already filed her Written Submissions. Therefore, the Plaintiff/Respondent urged the Court to dismiss the instant application.

This application was canvassed by way of Written Submissions. The ***Law Firm of Wakahu Mbugua & Co. Advocates*** filed their submissions on ***12th January 2017***, and urged the Court to allow the said application. They relied on various decided cases among them the case of ***Tana & Athi River Development Authority…Vs…Jeremiah Kimogho Mwakio & 3 Others, Civil appeal No.41 of 2014***, where the Court held that:-

> ***"Mistake of a Counsel should not be visited upon an innocent litigant."***

Further in the case of ***Belinda Murai & 9 Others…Vs…Amos Wainana (1979) eKLR,*** the Court also held that:-

> ***"The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better."***

On the part of the Plaintiff/Respondent the ***Law Firm of Kangethe Waitere & Co. Advocates*** filed Written Submissions on ***5th December 2016***, and urged the Court to dismiss the instant application. They relied on various decided cases among them the case of ***Aberdare Cheese Factory Ltd & Another…Vs… Oriental Commercial Bank No.258 f 2004, KLR***, where the Court held that:-

> ***"In considering whether a party is entitled to the prayer for setting aside, the Court should bear in mind whether the party has deliberately sought to obstruct or to delay the cause of justice and if the answer is in the negative, the Court should set aside the exparte Judgement to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. Additionally, the Court should consider whether there is a reasonable defence which raises triable issues"***

Further, in the case of ***Cosmas Safari Chula & 134 Others…Vs…Bryan Daniel Mc Cleary & Another HCCC No.97 of 2010 KLR***. The Court held that:-

> ***"setting aside is a discretion of the Court which can only be exercised where reasonable cause is shown……No ground has been shown and therefore I find no reason to set aside those orders."***

The Plaintiff/Respondent further relied on the case of ***CMC Holdings…Vs…Nzioki, Civil Appeal No.173 of 2004 1 KLR***, where the Court held that:-

> ***"In an application for setting aside exparte Judgement, the Court must consider not only the reason why the defence was not filed or why the Appellant failed to turn up for the hearing but also whether the Applicant has reasonable Defence."***

The Plaintiff/Respondent urged the Court to dismiss the entire application with costs.

The Court has now considered the instant application in its entirety and the Written Submissions. The Court has also considered the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The Applicant has relied on Order 10 Rule 11 which provides that:-

> ***"Where Judgement has been entered under this order, the Court may set aside or vary such***

Judgement and any consequential decree or order upon such terms as are just."

However, this provision of law is applicable in instance of Non-Appearance of the Defendant and Default of Defence. However, in the instant case, the Defendant did appear and even filed his Defence, but failed to turn up on the date of the defence hearing. The Court granted the Plaintiff leave to file her Written Submissions as there was no explanation on the Defendant's non attendance of the Court on 21st June 2016.

The correct provision of law would have been Order 12 rule 7 which provides that:-

"Where under this order Judgement has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgement or order upon such terms as may be just".

It is evident that the matter was set for Defence hearing on ***21st June 2016***, wherein the Defendant herein and his advocate failed to attend Court. There was no explanation given for their absence and given that the matter had been adjourned twice at the instance of the Defendant, the Court proceeded to grant leave to the Plaintiff to file her Written Submissions so that the matter could be reserved for Judgement. The Court had proceeded on the premises of the provisions of Order 12 Rule 2(a) which provides that:-

"If on the day fixed for hearing after the suit has been called on for hearing outside the Court only the Plaintiff attends, if the Court is satisfied:-

a) That Notice of hearing was duly served, it may proceed exparte."

On 21st June 2016, the Court was satisfied that the Defendant was duly served with the hearing Notice. However, he failed to attend Court and so was his advocate. The matter proceeded exparte.

The advocate for the Defendant has alleged that he was ready to proceed with the matter on ***21st June 2016***, and had even taken out Summons for the Land Registrar. The said Summons were attached as annexture ***JWM1***. However, he got a knee injury on ***20th June 2016,*** and upon treatment was given two days off to restrict knee movement. A letter to that effect was attached as ***JWM2***. Though this Could would really not wish to dispute the explanation given by the Advocate, it is evident that the Defendant was not present in Court on the material day. There was no evidence that even the said witness, Land Registrar was present in Court.

From the history of this case and the Court records, it is evident that the Defendant had occasioned adjournments of this matter on several occasions. The Court can correctly hold that the Defendant herein has no interest of expediting the matter. Be that as it may, Order 12 Rule 7, gives the Court discretion to set aside or vary the Judgement or order upon such terms as may be just. It is therefore trite that Court has discretion to set aside orders issued upon non-attendance of the Defendant. However, the said discretion must be exercised judicially and upon such terms as may be just.

The Court has considered the whole matter in its entirety and noted that the Defendant herein has filed his Defence. At the core of the dispute is ownership of land parcel known as ***Ruiru Kiu Block 2/2820***, upon which the Plaintiff and Defendant are claiming ownership. In the Interlocutory Ruling delivered on ***7th March 2013***, the Court had observed that:-

"In the circumstances of this case, the Court cannot appropriately make a determination at the interlocutory stage as each of the parties claims to be the registered owner of the suit property and each of the parties has exhibited document to support their claim of ownership. In the Court's view this is a matter that require to be fully interrogated and investigated at the full hearing of the suit where evidence will be taken and witnesses cross-examined with a view of establishing which of the two persons is legally entitled to the ownership of the suit property."

At the moment, we only have the evidence of the Plaintiff. Failure of the Defendant to turn up in court on

21st June 2016, meant that his evidence was shut out as the Court directed the Plaintiff to file her Written Submissions and thereafter reserve the matter for Judgement. With the said orders of ***21st June 2016***, it then means that what the Court had envisaged in its ruling of ***7th March 2013***, has not been achieved. Without the evidence of the Defendant and interrogation of the same, it would be difficult for this Court to determine which of the two competing title is genuine.

The application is also anchored under Order 51. Order 51 rule 15 provides that:-

> ***"The Court may set aside an order made exparte."***

The order of ***21st June 2016***, was made exparte in the absence of the Defendant. The Court therefore has discretion to set them aside.

Further this application is brought under Sections 1A&1B of the Civil Procedure Act which deals with the overriding objective of the Act, which is to promote ***just, expeditious*** and ***proportionate*** resolution of disputes and that the Court has a ***duty*** to further the above stated overriding objective.

As the Court balances the ***just resolution*** of disputes, it has to ensure that such disputes are resolved ***expeditiously*** and that all parties in a dispute should ensure that the spirit of Sections 1A&1B is promoted. Therefore both the Plaintiff and Defendant herein have a duty of ensuring that this matter does not drag in Court for years. Further Section 3A of the Civil Procedure Act also donates to this Court the inherent power to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the Court.

Having now analysed the above stated provisions of law, the available evidence and the reasons given for the absence of the Defendant's advocate on ***21st June 2016***, the Court finds the said explanation satisfactory. However, the Court notes that the Defendant was absent and the matter has been adjourned severally at the instance of the Defendant. The Court will allow the Defendant's Notice of Motion dated ***18th July 2015***, on the following conditions:-

> ***i. The Defendant to pay all the adjournment fees and costs to the Plaintiff as earlier directed by the Court on 20th July 2015 and 12th November 2015.***
>
> ***ii. The Defendant to pay costs of this application to the Plaintiff.***
>
> ***iii. The Plaintiff is entitled to throw away costs of Kshs.10,000/=.***
>
> ***iv. The Defendant to avail his evidence within the next 30 days. There will be no adjournment whatsoever on the instant of the Defendant. Failure to adhere to the above stated conditions, the orders of 21st June 2016 will prevail.***

Accordingly, the Court finds that the Defendant's/Applicant's

Notice of Motion dated ***18th June 2016*** is ***merited and is allowed entirely*** as per the above stated conditions.

It is so ordered.

Dated, Signed and Delivered this 29th day of September 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Mbiyu holding brief for M/S Waitere for Plaintiff/Respondent

No appearance for Defendant/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

29/9/2017

Court – Ruling read in open Court in the presence of Mr. Mbiyu holding brief for Ms waitere for Plaintiff and absence of Mr. Wakahu for the Defendant/Applicant. Entry of today's Ruling to be communicated to the Defendant's advocate by the Plaintiff's Advocate because of the issue of the time lines and payment of adjournment fees and costs.

L. GACHERU

JUDGE

29/9/2017