REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 107 OF 2016

PURITY KABARI KARURI ……...........1ST PLAINTIFF/RESPONDENT

JUSTIN MUGO NDWIGA……….....…..2ND PLAINTIFF/RESPONDENT

JACKSON GACHOKI NDWIGA…....…3RD PLAINTIFF/RESPONDENT

BEATRICE WANJIRU NDWIGA….....…4TH PLAINTIFF/RESPONDENT

JENET WANJIRA KATHURI……….…5TH PLAINTIFF/RESPONDENT

SELINA WATHITHA NDWIGA……..…6TH PLAINTIFF/RESPONDENT

MARY WANJIKU KARIITHI…….….…7TH PLAINTIFF/RESPONDENT

VERSUS

NANCY KARIUKO NDWIGA ....DEFENDANT/APPLICANT

RULING

This is in respect to the defendant's Notice of Motion dated 5th December 2016 seeking the following orders:

> ***1. That this Honourable Court be pleased to set aside the interlocutory judgment and grant the defendant leave to enter appearance and file defence out of time.***
>
> ***2. That the filed memorandum of appearance, defence and counter claim herein be deemed as duly filed.***
>
> ***3. That costs be provided for.***

The application is based on the grounds set out therein and is also supported by the affidavit of **NANCY KARIUKO NDWIGA** the defendant herein.

Briefly, the defendant's case is that having been sued in this matter, she duly instructed the firm of **IGATI MWAI & CO. ADVOCATES** to defend the suit. However, that firm took no action with the result that on 12th August 2016, interlocutory judgment was entered against her. She only discovered this on 24th August 2016 and withdrew instructions from that firm and entered appearance. Annexed to the memorandum of appearance drawn by herself is the defence and counter claim which she says raises

triable issues. The record also show that on 8th November 2016, the firm of **WANGECHI MUNENE ADVOCATES** entered appearance on her behalf.

The application is opposed and in her replying affidavit, **PURITY KABARI KARURI**, the first plaintiff has, on behalf of the other plaintiffs, deponed that the defendant was duly served with the pleadings and summons to enter appearance on 22nd July 2016 but did not file any defence nor enter any appearance and therefore interlocutory judgment was entered against her on 12th August 2016 and the case was set down for formal proof. That this application has been brought too late in the day after the entry of interlocutory judgment and does not meet the conditions for the orders sought and ought to be dismissed with costs.

The application was canvassed by way of written submissions which have been filed by **MR. MWAURA** advocate instructed by **KELI & MWAURA ASSOCIATES ADVOCATES** for the plaintiffs and **MS WANGECHI MUNENE & CO. ADVOCATES** for the defendant.

I have considered the application, the rival affidavits and the submissions by counsel.

It is not in dispute that the defendant was duly served with the plaint and summons to enter appearance on 22nd July 2016. It is also not in dispute that on 12th August 2016, interlocutory judgment was entered against the defendant who had failed to enter appearance or file a defence to the claim. According to the plaint filed herein on 14th July 2016, the plaintiffs had sought judgment against the defendant in the following terms:

> ***"a. A declaration that the late NDWIGA NJERU was registered to hold land parcel number BARAGWE/THUMAITA/944 in trust for his entire family which includes the plaintiffs and the defendant herein and that the insertion of the defendant's name into the register of the said land to the exclusion of the plaintiffs was fraudulent hence null and void.***
>
> ***b. An order directing the registration of the land parcel number BARAGWE/THUMAITA/944 in the names of the plaintiffs and the defendant herein to hold the same in equal shares since their father NDWIGA NJERU is already deceased.***
>
> ***c. Costs of this suit with interest".***

It is clear from the plaint that the plaintiffs' suit against the defendant is based on a claim of land held by the defendant in trust. It is therefore not a claim for pecuniary damages or for detention of goods for which interlocutory judgment could be entered against the defendant as provided under ***Order 10 Rule 76 of the Civil Procedure Rules*** which reads as follows:

> ***"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the Court shall, on request in form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be".***

This is therefore not the type of claim for which interlocutory judgment could be entered against the defendant as happened on 12th August 2016. Instead, the plaintiffs ought to have proceeded as provided under ***Order 10 Rule 9 of the Civil Procedure Rules*** and set down the suit for hearing. That provision provides as follows:

> ***"Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear, the plaintiff may set down the suit for hearing".***

Order 10 Rule 4 of the Civil Procedure Rules on the other hand provides that where a plaint makes a liquidated demand only and the defendant fails to appear, a judgment shall be entered against the defendant for the liquidated demand. The interlocutory judgment entered against the defendant on 12th

August 2016 was really of no consequences and has no legal force. Both litigants and the Courts are to blame for this common practice and the Deputy Registrar must be vigilant and ensure that interlocutory judgments are only entered in appropriate cases as set out under ***Order 10 of the Civil Procedure Rules***. Having said so, this Court has unfettered discretion in setting aside any ex-parte judgment. The principle is that where there is no proper service, the Court will set aside the ex-parte judgment as a matter of law – ex debito justitiae. But even if service upon the defendant was proper, the Court has unfettered discretion to set aside such judgment provided that in doing so, no injustice is occasioned to the opposite party. It is said that such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes or error but is not designed to assist a party that has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice – ***SHAH VS MBOGO 1967 E.A 116***. In exercising its discretion in this regard, the Court will also consider any draft defence annexed to the application and also the reasons put forward as to why no appearance nor defence were filed in time. In this case, the defendant has annexed to her application a defence in which she denies that land parcel No. BARAGWE/THUMAITA/944 was registered in the names of the late **NDWIGA NJERU** in trust for the plaintiffs adding that he was registered as the absolute owner thereof. The defendant also raises a counter claim in which she seeks a permanent injunction to restrain the plaintiffs from interfering with the land in dispute or picking tea thereon. Those are issues that ought to go to trial – ***PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75***. I am also guided by **Article 50 (1) of the Constitution** to the effect that:

> ***"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body".***

In his submissions, counsel for the plaintiffs has referred me to my own decision in the case of ***PETER NJUGUNA GITAU VS AGNES MUTHONI NYAGA & OTHERS KERUGOYA ELC CASE No. 114 of 2014 (2016 e K.L.R)*** and urged me to find that the plaintiffs' application is flimsy, unsubstantiated and dismiss it. I have perused my ruling in the ***PETER NJUGUNA GITAU*** case (supra) and it is clearly distinguishable from this case for the main reason that the hearing date in that case had been taken with the consent of the parties and their advocates but neither the defendant nor his advocate appeared. In dismissing the defendant's application to set aside the subsequent judgment, I addressed myself as follows:

> ***"This Court can only conclude that there was an attempt by the applicants to obstruct or delay this case and that would not entitle them to the exercise of this Court's discretion in their favour. Where a party is not candid, as is now clear from the circumstances of this case, such conduct deprives him of any equitable relief from this Court"***

The hearing date in the ***PETER NJUGUNA GITAU*** case (supra) had been taken by consent and yet in their application to set aside the judgment, the defendants alleged, falsely, that neither they nor their advocate were served with the hearing notice. Clearly the defendants in that case had not come to Court with clean hands and were therefore undeserving of the Court's discretion in setting aside the judgment that followed.

Secondly, in the case of ***PETER NJUGUNA GITAU*** (supra) the dispute had been litigated upto the Court of Appeal and so there was really no defence worth consideration by the Court. That case does not therefore aid the plaintiffs in this case.

In the circumstances, I find that the defendant's Notice of Motion dated 5th December 2016 is well merited and I accordingly allow it in the following terms:

> ***1. The interlocutory judgment dated 12th August 2016 is of no legal consequences and is therefore set aside ex debito justitiae.***
>
> ***2. The defendant has 15 days from the date of this ruling to file and serve her defence and counter claim.***

3. Each party to meet their own costs of this application.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017

Ruling delivered, signed and dated in open Court this 29th day of September 2017

Ms Kiragu for Ms Wangechi for the Applicant present

Ms Waweru for Mr. Mwaura for the Respondents present.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017