



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

HCC NO. 93 OF 2011

1. SHELTER ODUOR OKODI.....PLAINTIFFS

2. JOSEPH WANDERA OKODI

VERSUS

1. JOHN KADIMA ORUTUMU

2. ZAKARIA ABWIRE KADIMA.....DEFENDANTS

3. PETER OMONDI KADIMA

4. PETER TENGENEZA KADIMA

R U L I N G

1. Before me is a Notice of Motion dated 20/3/2017 and filed on 27/3/2017. It was filed by the 2nd Defendant - **ZACHARIA ABWIRE KADIMA** - against the two Plaintiffs - **SHELTER ODUOR OKODI** and **JOSEPH WANDERA OKODI** - in whose favour judgement was delivered herein on 10/11/2016. The second Defendant is essentially contesting that judgement.
2. What is in dispute is ownership of land parcel No. BUKHAYO/BUYOFU/221. The plaintiffs are the registered owners but the defendants are also claiming entitlement. The suit was heard without the defendants and that happened because the defence had been served but failed to appear. The 2nd Defendant now says that the 1st Defendant, who is now deceased, was the one in conduct of the matter. The 1st Defendant had instructed a firm of advocates and when he died, there was a breakdown in communication between the rest of the Defendants and that firm of advocates. Then the matter proceeded in absence of the counsel on record and the Defendants. The end result was the judgement on the basis on which the Defendants are now threatened with eviction.
3. The Defendants say the judgement has prejudiced them. They say they have a good defence and want to be heard. The Defendants averred that the hearing notice for the date of 20/6/2016 had been received by the counsel on record under protest.
4. The Plaintiffs filed a response vide a replying affidavit dated 21/4/2017. According to the Plaintiffs, the Defendants were aware of the hearing date but deliberately chose not to come to court. They said that the matter has been pending in court for a long time. The Defendants in the meantime have been encroaching on the land. The application herein is viewed as a delaying tactic meant to deny the Plaintiffs enjoyment of the fruits of their judgement.

5. The application was canvassed by way of written submissions. The Defendants written submissions were filed on 23/5/2017. It was pointed out that the Defendants have explained their predicament well. The decided cases of **PITHON WAWERU MAINA vs THUKU MUGIRA: CIVIL APPEAL No. 27 of 1982** and **SHAH vs MBOGO [1967] EA 116** were cited to explain the conditions necessary for setting aside judgement. What emerges from the two cases is that courts have a wide discretion to set aside such judgements. Such discretion is meant to avoid injustice or hardship that may have been occasioned by accident, inadvertence or excusable mistake or error on the part of the defaulting party.

6. The Defendants also pointed out that they have a defence on record and that defence is good.

7. The Plaintiffs' submission were filed on 13/7/2017. They also sought to rely on the two cases (supra) cited by the Defendants. They differed however in their appreciation of the facts pertaining to this case. According to them, the Defendants never consulted their counsel. And that counsel had been invited severally to take hearing dates without appearing. The Defendants were said to have been served with the hearing date. Their counsel too was notified of the judgement. According to the Defendants there was proper service and the conduct of both the Defendants and their counsel was inexcusable. There was also inordinate delay in filing this application. It was averred further that the Defendants have alternative land and will therefore suffer no prejudice if the judgment is executed. The position of the Plaintiffs is that the discretion of the court should not be exercised to assist a person who has deliberately sought to delay or obstruct the cause of justice.

8. In the application, the Defendants seek to set aside the *exparte* proceedings taken on 20/6/2016 and the ensuing judgement (prayer d). They also seek to be heard (prayer (e)). Also sought is provision for costs of the application (prayer (f)). These are the prayers submitted on by both sides, prayers (a), (b) and (c) having been meant for the *exparte* stage.

9. I have considered the application, the response made, and the rival submissions. Generally, the law regarding setting aside *exparte* judgement is as spelt out in the cases that both sides sought to rely on. But the two sides differ in their appreciation of the facts pertinent to this case.

10. I have gone through the proceedings. Something crucial escaped the court's notice when it allowed hearing to take place on 20/6/2016. And the crucial point is this: the hearing notice for 20/6/2016 had been received by the defence counsel under protest. A handwritten intimation to that effect is clear at the right bottom corner of the hearing notice. This fact alone inclines the court to consider the Defendants averments favourably.

11. But this is not the only consideration. The Defendants have a defence on record. I have looked at the defence. Its merits need to be considered. And this would be in accord with the holding of the court in **WAIBOCI & Another vs PASHITO HOLDINGS LTD and 7 Others: [2004] 2 KLR 415** where the court took the position, *inter alia*, that an entirely regular interlocutory judgment can be set aside where the Defendants happen to have and place before the court a reasonable defence on the merits.

12. It is in the light of the foregoing that I find it necessary to allow the application herein. I therefore hereby allow the application in terms of prayers (d) and (e). Costs of the application, which is prayer (f), will be in the cause. Additionally, I hereby direct that the Defendants' act with all due dispatch to comply with the necessary pre-trial requirements. At any rate, this should not take more than three (3) months, failing which the Plaintiffs will be entitled to proceed with the matter without the Defendants.

Dated, signed and delivered at Busia this 20th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs:

Defendants:

Counsel: