



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 346 OF 2015

BENJAMIN KIPKULEI.....PLAINTIFF

VERSUS

SHADRACK KAMAAMIA.....1ST DEFENDANT

ALFRED KAMAAMIA.....2ND DEFENDANT

SIMON KILELE.....3RD DEFENDANT

MORINGASO KAMOIRO.....4TH DEFENDANT

SANAET KAMOIRO.....5TH DEFENDANT

JOSEPH NAIMODO.....6TH DEFENDANT

NGAPOE LETURA.....7TH DEFENDANT

PAPIYO PAREIYIO.....8TH DEFENDANT

RULING

(Application for setting aside proceedings and consequential orders and for orders that the District Land Surveyor complies with orders previously made; application dismissed)

1. This ruling is in respect of defendants' Notice of Motion dated 24th July 2017. The application is brought under Articles 159 and 50 of the Constitution, sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, section 18 of the Land Registration Act and Order 51 of the Civil Procedure Rules 2010. The orders sought in the application are:

1. Spent.

2. That the honourable court be pleased to set aside of (sic) proceedings of 13th June 2017 and all other proceedings and consequential orders thereto and recall the plaintiff for cross-examination.

3. That this honourable court be pleased to order the District Land Surveyor to comply with the orders issued by this honourable court on 19th January 2016 and 11th May 2016 and determine the boundaries of parcels no. L.R. 20591/79 and L.R. No. 20591/119 and L.R. No. 79256.

4. *That this honourable court issues such orders or directions as it deems fit to grant for the ends of justice to be met in this application.*

5. *That costs of this application be borne by the plaintiff/respondent.*

2. The application is supported by the affidavit of Shadrack Metekai Kamaamia, the first defendant who deposes that this court on 19th January 2016 and again on 11th May 2016 ordered the District Land Surveyor Nakuru County to carry out a survey of the disputed parcels of land. That the defendants are in occupation of parcels no. L.R. 20591/79 and L.R. No. 20591/119 and not L.R. No. 79256. Further that on 13th June 2017 when the matter came up for hearing the defendants' advocate was engaged in other matters during the judiciary service week at the Narok Magistrate's Court.

3. The application is opposed by the plaintiff through replying affidavit filed on 17th August 2017. He deposes that the on 9th November 2016 the defendants were given 30 days within which to file defence and other compliance documents but the defendants have so far failed to comply. That the defendants advocates were given notice of hearing and opportunity to participate in the proceedings and that the explanation that the advocate was held up in subordinate court matters was rightly rejected.

4. The application was argued by way of written submissions. In that regard, the applicants through their counsel filed their submissions on 24th August 2017 while the respondent filed his submissions on 30th August 2017. In their submissions, the applicants submitted that the dispute before the court is one of boundary and it is therefore imperative that as ordered on 19th January 2016 and again on 11th May 2016, the District Land Surveyor Nakuru County carries out a survey of the disputed parcels of land. That this approach is the proper one since the applicants have denied trespassing on the respondent's land and that this court lacks jurisdiction to determine boundary disputes in view of the provisions of section 18 of the Land Registration Act. The applicants also referred the court to some authorities to the effect that mistakes should not deprive a party of their right to a hearing.

5. In his submissions, counsel for the respondent pointed out that the applicants' submissions do not address the pertinent issue before the court which is setting aside of the orders of 13th June 2017 and further that the applicants were represented in court when the hearing of 13th June 2017 took place and when the orders of that day were made.

6. I have considered the submissions. Though the applicants have included prayers 3 and 4 in the application, what is before the court is principally an application for setting aside. I say so because unless the orders of 13th June 2017 are set aside, the other prayers in the application will be moot. In an application for setting aside of ex parte orders, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v.*

Nzioki [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

7. In **PATEL V EA. CARGO HANDLING SERVICES LTD [1974] EA 75** at P. 75 Duffus stated:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance. He relied on various English authorities and on our decision in MBOGO V SHAH [1968] E.A. 93. In his judgment NEWBOLD, P. adopted the principles set out by HARRIS, J. in KIMANI V. McCONNEL, [1966] E.A. 547 when he said:-

“..... In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

8. The broad principles are thus clear. In a situation where orders were made after due service the court will take into account such factors as the reason for the failure of the applicant to attend court; the length of time that has elapsed since the order sought to be set aside was made; whether the applicant has triable issues to raise upon the setting aside; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the orders.

9. So as to put matters in better perspective, it is necessary to give a background of the matter herein, as borne out by the recorded proceedings. The record shows that on 19th January 2016 Hon. Justice Munyao Sila ordered the District Surveyor, Nakuru to proceed to the ground and carry out a survey to determine whether land L.R No. 79256 is comprised within or forms part of or is independent of LR No. 20591 or LR No. 410/1, 410/2, 7265 and 7281. The survey exercise was to be completed within thirty (30) days.

10. When the matter next come up on 9th March 2016, the survey had not been done. The Surveyor was given a further 45 days. Yet again on 11th May 2016, the court gave a further 45 days to enable the survey to be done. The matter came up again on 9th November 2016 and the survey had not been done. The surveyor was given more time and the defendant were given 30 days to file their defence.

11. The matter next came up on 8th March 2017, a date which was given on 9th November 2016 in the

presence of counsel for the defendants. Counsel for defendants did not appear on 8th March 2017. The court noted that the defendants had been given 30 days from 9th November 2016 to file their defence but had not yet done so. The court therefore ordered that the main suit be heard on 11th May 2017.

12. Come 11th May 2017 counsel for the defendants did not attend court. The 1st defendant was however present and sought an adjournment on the ground that the defendants and their advocate were not aware of the hearing date. The application was opposed by counsel for the plaintiff who pointed out that the defendants had not yet complied with Order 11 of the Civil Procedure Rules. In its ruling the court stated in part as follows:

I note from the affidavit of service that the defendants' advocate was served with a hearing notice on 6th April 2017. I also note that Munyao J. gave today's date having taken into account the defendants' failure to file a defence despite being given a limited period to do so. In the circumstances, I order that the hearing proceeds today.

13. The file was accordingly placed aside for hearing. The hearing commenced later that day at 12.15pm. PW1 gave his evidence in chief and at the conclusion thereof, Mr. Musembi informed the court that he was now present in court and holding brief for Mr. Kamwaro for the defendants. He applied for an adjournment on the ground that Mr. Kamwaro had called him at noon and informed him that Mr. Kamwaro had wrongly diarized the date. He sought an adjournment for purposes of cross examining PW1 and for further hearing. Though counsel for the plaintiff opposed the application, the court while noting the inconsistencies in the reasons advanced for adjournment, granted an adjournment in the interest of justice. The matter was then adjourned to 13th June 2017, a date that was mutually convenient to parties, for cross examination of PW1 and further hearing.

14. On 13th June 2017, Ms. Moenga holding brief for Mr. Kamwaro for the defendants, sought an adjournment on the ground that Mr. Kamwaro was not ready to proceed since he had matters at the Children's Court in Narok during the then ongoing service week at the said court. The application was opposed among others on the grounds that the service week was in the subordinate court and in any case Mr. Kamwaro had not stated which particular matter he was handling in the service week. Upon considering the matter, the court saw no merit in the application for adjournment and dismissed it. Hearing was ordered to proceed. Upon delivery of the ruling on the application for adjournment, Ms. Moenga left the court such that there was no one present to cross examine PW1. The plaintiff not calling any further witness, the plaintiff's case was closed. Upon application by plaintiff's counsel, the defence case was also closed and parties were ordered to file and exchange written submissions. The matter was then set for mention on 19th September 2017 to take date of judgment. Subsequently, the application currently before court was placed before the court under certificate of urgency on 26th July 2017.

15. I have set out the above detailed background because it is important in an application such as this. The applicants do not dispute knowledge of the date of 13th June 2017. They cannot do so because they were in fact represented in court up and until the moment the application for adjournment was dismissed. In such circumstances, the court has full discretion on the issue of whether or not the application should be allowed. Such discretion should of course be exercised judiciously and with a view to doing justice between the parties. In that regard, it is important to note that the defendants were granted an adjournment on 11th May 2017. The justice of the case must be seen from both angles – on one hand that of the plaintiff who has dutifully put his case before the court for determination and has availed himself at the scheduled hearing dates and on the other hand that of defendants who wish to be indulged all over after being granted an adjournment on 11th May 2017. I am not persuaded that the defendants will suffer prejudice if the orders sought are not granted. They were given ample opportunity to cross examine the plaintiff and to prosecute their case.

16. The other issue to be considered is whether or not the applicants have any triable issues to raise upon the setting aside being granted. The applicants have not filed any defence or even complied with Order 11 of the Civil Procedure Rules. They have not sought any setting aside of the orders of 9th March 2017

which required them to file defence within 30 days. Equally, there is no application for extension of time for filing defence. There is absolutely no suggestion by the applicants that they intend to file a defence to the suit. Will the setting aside of the orders and proceedings 13th June 2017 serve any useful purpose? In the absence of a defence, setting aside will be of no purpose. Even though the applicants submitted that the dispute before the court is a boundary dispute, I do not see how such a dispute can be said to exist in the absence of a defence pleading such a case. For the same reasons, the issue of a surveyor's report is not central to the matters at hand. I must emphasize however that merits or otherwise of the plaintiff's case and defence case will only be determined upon a full hearing of the suit.

17. Finally, I have also considered the reasons advanced as to why Mr. Kamwaro was not in court. It is not acceptable that he chose to attend to matters in the subordinate court and not this court where he had obtained a hearing date by consent after being granted an adjournment. In any case, there is in fact no specific evidence that he was engaged in any particular matter before the Narok Children's Court. There is also no explanation offered as to why counsel who held Mr. Kamwaro's brief abandoned the brief and walked out before the proceedings of the day were over. Whenever counsel holds brief, he is as fully responsible to the court as the counsel formally on record. The practice of holding briefs with 'limited instructions' flies in the face of counsel's duty to assist the court to further the overriding objective under section 1A of the Civil Procedure Act.

18. An application for adjournment having been made by counsel appearing for the defendants on 13th June 2017 and the same having been heard and determined on the merits, the issue of whether or not the proceedings and orders of that day were proper is one that ought not be brought back to this court by way of an application for setting aside. The court is *functus officio*. Any party aggrieved by those orders ought to apply for review if valid grounds exist or should appeal.

19. In view of the foregoing and in the totality of the application before the court, I am not persuaded that the applicants have made a case to warrant granting the orders sought. Notice of Motion dated 24th July 2017 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 12th day of October 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/respondent

Mr. Kamau holding brief for Mr. Kamwaro for the defendants/applicants

Court Assistant: Gichaba