REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 79 OF 2017

EVANS NAKHABALA WEKESA - PLAINTIFF/RESPONDENT

VS

KENYA AFRICAN NATIONAL UNION - DEFENDANT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion on 4/4/16 against the Respondent seeking the following orders;-

a) Spent

b) That the Honourable Court be pleased to stay execution of the judgement/decree of this Court delivered on 16/3/ 2016 pending the hearing of this application.

c That the Honourable Court be pleased to set aside its judgement delivered on 16/3/2016 or any orders made either before or after this judgment.

d) That the Honourable Court in the interest of justice be pleased to allow the hearing of this suit afresh on its own merits.

e) That costs of this application be in the cause.

2. The application premised on the following grounds; -

a) This suit was heard exparte on 29/10/2015 because the Applicant's Advocates did not turn up for hearing and did not give the Applicant proper advice on what they could do in his absence.

b) That even after changing the Advocates the new Advocates did not attend Court to prosecute the application they had filed.

c) That this case was heard and the claim dismissed through no fault of the Applicant.

d) That the Applicant now stands to suffer substantial and irreparable loss if the judgment is not set aside.

e) That the Respondent does not stand to suffer any damage if the judgement is set aside and the suit is heard and determined on its own merits.

3. The Application aforesaid is supported by the affidavit of Pharis Solomon Chege sworn and filed on

4/4/16. In it, the deponent claims that the Applicant attributes its non-representation at the hearing of this suit on their Advocates failure to attend Court on the trial date where the hearing proceeded and a judgement was later delivered on 16/3/2016. In that judgement the Honourable Court dismissed the Applicant's Counterclaim for want of prosecution. That the Applicant has been in occupation of the suit property for over 40 years, carried out developments and stands to lose if the judgment in favour of the Respondent is not set aside. Further that the mistakes of its Advocates on record should not be visited on them. That if the judgement is set aside the Respondent will not suffer any prejudice. That the execution of the decree of this Court should be stayed pending the hearing of the application filed on 4/4/16. That the suit should be heard on merit and the applicant given a chance to ventilate its case on ownership to the suit land.

4. In its submissions the Applicant has urged the Court to set aside the judgement to allow the Applicant to defend its case and prosecute its Counterclaim. That the Applicant should not be condemned unheard. That its counterclaim was not heard/case undefended due to non-attendance of the Advocate in Court. That the transgressions of Counsel should not be visited upon them. That the Court ought to have exercised its discretion by adjourning the case and condemning the Applicant to costs and not proceed to hear the matter exparte. That the Applicant was treated unfairly by the Court as well as the Respondent.

5. The application has been opposed by the Respondent and in his Replying Affidavit filed on 20/4/16, Evans Nakhabala Wekesa deponed that the application should be dismissed as it is a delaying tactic by the Respondent to deny him the enjoyment of the fruits of his judgement for no good or reasonable reason. That the Applicant never complied with Order 11 of the Civil Procedure Rules as expected or attended Court through Advocate and no plausible reasons were given to the Court despite being aware of the hearing date through service of hearing notice/dates given in open Court in the presence of its lawyers.

6. Further that no security has been provided by the Applicant requisite for stay of execution orders being sought. That in any event the defence and Counterclaim were a sham and adduced no evidence to sustain the Applicant's claim in the Counterclaim or offer any defence. That the application has no merit, incompetent and an abuse of the process of the Court and should be dismissed.

7. In his submissions the Respondent stated that the Applicant had showed reluctance in prosecuting its case even when the Court indulged them before the determination of the suit. That on the day of hearing none of the Advocates, Witnesses or Clients were present in Court. That the Applicant has not appealed the decision of the Court. Further it has not established a prima facie case to warrant the setting aside of the judgement.

8. The brief facts of the case are set out as below;

The Plaintiff (Respondent in this application) filed suit against the Defendant (applicant) on 24/7/2013 claiming ownership of property LR NO. MURANG'A MUNICIPALITY BLOCK 3/12 and alleged that the Defendant had forcefully taken possession and refused to give vacant possession to the Plaintiff. The Plaintiff's claim was premised on the fact that he held a legal and registered title to the suit premises. The Defendant entered appearance and filed a defence and Counterclaim through the law firm of Kivuti Advocates & Co. In its Counterclaim it sought for declaratory orders that the plot was registered in the names of the Plaintiff fraudulently and the same should be cancelled and the title rectified to read KANU Murang'a branch. The Plaintiff filed a reply to defence and defence to the Counterclaim denying the Defendants claims. On the 13/7/2015 when the matter came up for pretrial, Mr. Kinuthia for the Plaintiff confirmed that the Plaintiff had complied with order 11 of Civil Procedure Rules while Mr. Mwangi holding brief for Mr. Mungai for the Defendant informed the Court that they had not complied with Order 11 and that he needed two weeks to do so. It is then that by consent the hearing date for the main suit was fixed for 29/10/15 within which time the Defendant was expected to have complied with the provisions of the said Order 11. Come the 29/10/15 the Defendants Advocates did not attend Court and on application by Mr. Kinuthia for the Plaintiff, the hearing proceeded to conclusion and the Plaintiff's Advocates on record sought upto 4/12/15 to file written submissions. The matter was then listed for mention on 4/12/15. However, on 1/12/15 the Defendants Advocates Mr. Suyianka Lempaa filed an application under

certificate of urgency seeking to set aside the proceedings. The Advocate was advised by the Court to appear on the 4/12/15 when the matter would be coming up for mention to confirm filing of written submissions and argue his application. On 4/12/15 the Advocate for the Plaintiff confirmed filing written submissions but informed the Court that Mr. Mungai, the earlier Advocate of the Defendant had refused service on the grounds that he had fallen out with the Defendant. As it would happen, Mr. Suyianka Lempaa Advocate, too, did not appear in Court on this day to argue the defendant's application to set aside the proceedings. The Court was left with no option but to proceed with the business of the day and gave directions on the delivery of Judgement. The date was fixed on 16/3/16. It is this judgement that the Applicant has applied to be set aside and hence the subject of this application.

9. The Civil Procedure Rules donate the power to the Court to set aside judgments. It has unfettered discretion to do so but under certain principles. Order 12 Rule 7 of the Civil Procedure Rules states that where judgement has been entered or the suit has been dismissed, the Court, may set aside or vary the judgement or order upon such terms as may be just. In the case of P**hilip Kiptoo Chemwolo and Mumias Sugar Co. Ltd – v- Augustine Kubende (1982-1988)1 KAR 1036** the Court of Appeal dealing with an appeal in which interlocutory judgment had been entered in default of appearance considered whether judgment had rightly exercised his discretion in refusing to set aside the judgment under Order 9A Rule 5 held as follows: -

> "The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.
>
> Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue ……".

In this instant case, it a regular judgement being set aside and therefore the Court is invited to enquire on whether the applicant has a valid defence.

10. The Court of Appeal in the above-mentioned appeal on page 1039 of their judgment further stated:-

> "The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

11. In the case of **Shah – v- Mbogo & Anor (1967) E.A 470** Court of Appeal for Eastern African held:-

> "applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused".

The discretion therefore is not designed to assist a party guilty of deliberately conduct intended to obstruct or delay the cause of justice and where the Court is persuaded of the intentions of such a party to so obstruct or delay justice, it should not hesitate to disallow such an application.

12. The Constitution of Kenya, 2010 provides that every person's right to have any dispute determined be decided fairly. This means every person be afforded an opportunity to be heard and the case be decided on merits. Article 50(1) of the Constitution of Kenya, 2010 provides:-

> "50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
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> Article 159 (2) (a) and (b) of the Constitution of Kenya, 2010 on the other hand obliges court to do justice to all without undue regard to technicalities. Article 159(2(a) and (d) provides:
>
> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) Justice shall be done to all, irrespective of status;
>
> (b) ……..
>
> (c)…….
>
> (d) to a public trial before a court established under this Constitution".

Further the Civil Procedure Act under Section 1A and 1B of the Civil Procedure Act obliges this Court to do substantive justice and not to dwell on technicalities. The Court of Appeal observed in **Richard Ncharpi – Vs – IEBC & 2 Others [2013] EKLR** as follows;

> "Nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."

13. Applying the above principles to his case; the reason for non-attendance of the Applicant to the trial has been attributed to the failure of Advocate to attend Court for the hearing of its case. The Applicant's official has stated that the Advocate was called that the hearing was ongoing but he refused to come refuting that the case was not listed for hearing on that very day. The date had been taken by consent of the Advocates of both parties, the applicant included. From the record it is apparent that there is no plausible reason why the said Advocate failed to attend Court. Immediately thereafter, the Applicant sought the services of another Advocate Mr Suyianka Lempaa who came on record and filed an application to set aside the exparte proceedings but on the day that the application was scheduled to be heard, he too did not show up, forcing the Court to give directions on the delivery of the judgement and the judgment date. The applicant has not given a good reason for this state of affairs other than to say that the mistakes or errors of its Advocates should not be visited on them. In **Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd – v- Augustine Kubende (1982-1988)1 KAR 1036** aforesaid, Yet in the same judgment APALOO J. A, as he then was on page 104 stated:-

> > "Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline….." .

14. It has been held that a litigant should not suffer due to the transgressions of their Advocates. However, litigants are also duty bound to ensure that their Agents/Advocates attend court and prosecute the cases as they should. It is not in dispute that the Applicant sought to replace the advocate immediately it fell out with Messrs Mungai Advocates (as stated on record), appointed Mr Suiyanka Lempaa who made a brief one time appearance before leaving the applicant without representation. The conduct of these counsels firstly as officers of the Court and secondly as legal professionals is unacceptable. It is a total waste of the

Court's time as well as the other party who is keen to prosecute their matters diligently. The prudent manner to deal with the matter would be to place an application before the Court to cease acting at the earliest opportunity to enable a party to either elect to represent itself or seek another counsel. There is no evidence that they did so.

15. That notwithstanding I am convinced that the applicant has not demonstrated that its actions are intended to delay or obstruct the cause of justice. Upon the delivery of the judgment the applicant filed a notice of motion which it would appear was not followed by an appeal. There is nothing to suggest that the same was served on the respondent but suffice to state that it filed this application to set aside some 18 days after the delivery of judgment which must be stated to be fairly expediently.

16. Does the Applicant's defence raise triable issues? **Patel – Vs – Cargo Handling Services** where the Court of Appeal considered the meaning of defence held that;

> "In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue'.

The defence and the Counterclaim filed by the Applicant seeks to challenge the Plaintiff's title on account that it was irregularly obtained and ought to be cancelled. That the suit property had been allotted to the Salvation Army for a period of 33 years from 1964. That in 1972/73, the Salvation Army wrote to the Commissioner of Lands expressing their intention to surrender the lease to the Government. That in early 1973 the applicant occupied the suit property and there are correspondences from the Municipal Council of Muranga informing the Commissioner of Lands that the applicant is in occupation of the suit property and that it should be transferred to it/allotted to enable them pay rents to the Local authority then. There are also minutes of the said Council to suggest that the lease of Salvation Army was not approved in 1997 when the lease expired by affluxion of time. However, it is not clear from the documents on record when the Salvation Army regained the ownership of the land to be possessed with the capacity to enter into an exchange agreement with the plaintiff on the 9th March 2012. Notwithstanding the said exchange, there is a letter of allotment in the name of the plaintiff on record where the plaintiff was allocated the suit property by the Commissioner of Lands. It is not clear how the allocation was made to the plaintiff for land that was in the ownership of the Salvation Army. It is also on record that the applicant has been in occupation since 1973 or thereabouts. It is not clear from the pleadings when the alleged trespass of the plaintiff's land by the applicant begun. In view of these issues which are not clear surrounding the ownership of the land, I am persuaded that there are triable issues in this case which warrant trial on merit.

17. Before I conclude, I wish to comment on the events that took place immediately the application was filed. It is on record that a decree was extracted on the 16/3/16. It is also on record that this application was filed on the 4/4/16 seeking a stay of execution of the decree as well as setting aside the judgment issued by the Court on 16/3/16. In response the responded filed a replying affidavit on the 20 /4/16. There is no evidence that a stay of execution of the judgment was granted by the court albeit it being one of the applicant's prayers in the notice of motion. The respondent in his written submissions filed on the 20/4/17 submitted that he sold the suit property to a third party on the 22/4/16. I would like to leave this matter to the parties to consider their appropriate causes of action subject to my final orders in this application. The revelation though weighty has not been pleaded in the application.

18. I find the applicant has a valid defence and in the interest of justice it should not be shut out from ventilating its case. I see no way that the respondent will be prejudiced as he will be accorded the opportunity to be heard and proof his case on a balance of probability. In this case the Court has not heard the matter on merit and the justice of this case demands that the application to set aside judgment issued on the 16/3/16 has merit and should be granted.

19. The final orders are; -

> a). The application dated 2/4/16 is allowed and the judgement issued on the 16/3/16 be and is hereby set aside.

b). That the parties to set the matter for pretrial and hearing at the earliest instance.

c). Costs be in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF OCTOBER 2017

J.G. KEMEI

JUDGE