



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 174 OF 2015

STEPHEN KIBOWEN..... PLAINTIFF

VERSUS

RAYMOND RUTO.....1ST DEFENDANT

KIPKORIR RUTO.....2ND DEFENDANT

KIPROP RUTO.....3RD DEFENDANT

KIPCHUMBA RUTO.....4TH DEFENDANT

CHEPCHIRCHIR RUTO.....5TH DEFENDANT

CHEPKOECH RUTO.....6TH DEFENDANT

RULING

(Application for setting aside of orders made ex parte; application allowed)

1. This ruling is in respect of plaintiff’s Notice of Motion dated 4th April 2017. The application is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules 2010. The orders sought in the application are:

1. Spent.

2. Spent.

3. That the orders of this honourable court made on 4th April 2017 transferring this suit to this honourable court sitting at Eldoret for hearing and final determination and for consolidation with Eldoret Environment and Court Case No. 119 of 2017: Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany vs Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen be reviewed and set aside.

4. That costs occasioned by this application be borne by the respondent.

2. The application is supported by the affidavit of the plaintiff in which he deposes that on 22nd March 2017, the defendants’ advocates served his advocates with Notice of Motion dated 21st March 2017 and that it was indicated on the face of the said application that the application was scheduled for inter parte

hearing on 14th April 2017. That though his advocates realized that 14th April 2017 would be a public holiday, they nevertheless reluctantly recorded the date in their diary. That contrary to the notified date, the application was placed before the court on 4th April 2017 and orders issued in his advocates' absence transferring this matter to the Environment and Land Court sitting at Eldoret and consolidating it with Eldoret Environment and Court Case No. 119 of 2017: Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany vs Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen. The plaintiff therefore prays that the orders of 4th April 2017 be set aside. The plaintiff also made several other statements in the affidavit which though relevant to the application for transfer of suit as well as consolidation, are not central to the application for setting aside.

3. The defendants have opposed the application through the replying affidavit of Raymond Ruto (the 1st defendant) and that of Steve Odhiambo Opar, advocate for the defendants. Mr. Opar deposed that he personally endorsed the inter parte hearing date of 4th April 2017 on the face of the application that was served upon the plaintiff's advocates. He further deposed that the applicant altered the date from 4th April 2017 to 14th April 2017.

4. In his replying affidavit, Raymond Ruto deposed on matters that are largely address merits the application for transfer of suit and consolidation as opposed to the application for setting aside.

5. Parties agreed to argue the application by way of written submissions. In that regard, the applicant filed his submissions on 2nd May 2017 while the respondents filed their submissions on 8th June 2017. I have considered the submissions and authorities cited.

6. Though the applicant cited sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules 2010, what is before the court is essentially an application for setting aside of orders made ex parte. In such an application, 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 Kanyiiita 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 the application presently before the court, the applicant had stated on oath that the application that was served upon his advocates bore a different date from the actual date that was given by the court with the result that he could not be and was not represented at the hearing. I have looked at the copy of the application which was annexed by the applicant and on the face of it, it shows the hearing date as 14th April 2017 which of course is different from the date that was given by the court. I am alive to the fact that the respondents have accused the applicant's advocates of altering the date on the application that was served on them to read 14th April 2017 and have even suggested that the matter be referred to a document examiner to ascertain the alteration. That is a serious allegation that would call for criminal investigations, an approach that is certainly beyond the scope of the issues presently before this court.

8. Having weighed the opposing contentions, I have no reason to doubt the applicant. I am fortified in this conclusion by the fact that a perusal of the affidavit of service that was filed by the respondents and which formed the basis of the ex parte proceedings of 4th April 2017 shows that only a copy of the certificate of urgency dated 21st March 2017 was annexed to it. No copy of the Notice of Motion was annexed. It is therefore impossible to verify Mr. Opar's subsequent claims that the copy of the application that was served was endorsed with an inter parte hearing date of 4th April 2017 against the actual contents of the affidavit of service. Having found that there was no valid service, the applicant is entitled to setting aside *ex debito justitiae*.

9. Besides the issue of validity of service, the applicant had also raised important issues as to whether this suit should be transferred to Eldoret and whether it is desirable to consolidate this suit with Eldoret Environment and Court Case No. 119 of 2017: Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany vs Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen. Even if it was to be held that service was proper, the court will still have discretion to give the applicant a chance to be heard on all these are issues so that a determination is made on the merits.

10. From the foregoing discourse, it is manifest that plaintiff's Notice of Motion dated 4th April 2017 ought to succeed. The orders of this honourable court made on 4th April 2017 transferring this suit to this honourable court sitting at Eldoret for hearing and final determination and for consolidation with Eldoret Environment and Court Case No. 119 of 2017: Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkaitany vs Agricultural Finance Corporation, Kolato Auctioneers and Stephen Kibowen are hereby set aside. Notice of Motion dated 21st March 2017 shall be heard afresh. Costs shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 5th day of October 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Ogame holding brief for Mr. Konosi for the plaintiff/applicant

Ms. Kinuthia holding brief for Mr. Kibii for the defendants/respondents

Court Assistant: Gichaba