



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 1021 OF 2012

ERICK KIPSAINA CHELIMO.....PLAINTIFF

VERSUS

VINCENT KIPRUTO KIPKONGA.....1ST DEFENDANT

LEWA JEMELI.....2ND DEFENDANT

PAUL CHERUTICH ALIAS LEONARD LORENGA....3RD DEFENDANT

RULING

The application before court is dated 30.12.2016 and seeks orders that the exparte judgment entered against the 2nd and 3rd defendants and all consequential orders thereto be set aside *ex-debito justae* and the 2nd and 3rd defendants be allowed to file defence out of time. The draft defence be deemed as duly filed upon the payment of the requisite court fees. The application is premised on grounds that an exparte judgment and decree has been given against the defendants and the firm of Nyachiro Nyagaka and Company Advocates got instructions from the 2nd and 3rd defendants to come on record in place of the previous Advocates. That since judgment has been entered, this honourable court has to grant them leave before coming on record. The 2nd and 3rd defendants' advocates previously on record failed to file defence as instructed. The 2nd and 3rd defendants were not served with the notice of entry of judgment and that the 2nd and 3rd defendants were neither nor their advocates previously on record served with the hearing notice when this matter came for hearing.

The 2nd and 3rd defendants cannot be condemned without being heard. The 2nd and 3rd defendants have a plausible defence with high chances of success. The 2nd and 3rd defendants are now desirous to have the firm of Nyachiro Nyagaka and Company Advocates representing them as the matter continues. The 2nd and 3rd defendants will suffer irreparable loss if the orders sought are not granted. The application herein has been brought timely and in good faith. It is in the interest of justice that this application be allowed.

Leonard Lorenga states that the plaintiff filed this suit against him and the other defendants herein seeking to evict them from the suit land and that upon receipt of the court pleadings, they instructed the firm of M/s Komen Kipchirchir and Company Advocates to come on record and defend their interest. That the said firm of advocates did file the notice of appointment of advocates. That the said firm of advocates did not file any defence despite being instructed to do so and having been paid the requisite legal fees. That it was a mistake for the said firm of advocates not filing a defence despite the instructions given to them. That he is informed by his advocates on record which information he verifies to be true that an advocate's mistake should not be visited upon an innocent client. That their previous advocates on

record were not served with the hearing notice when the matter came for hearing on 21st November, 2016.

He is a beneficial owner of the said parcel of land having purchased the same at a consideration and that he has been residing on the suit land since the year 2014 as his residential home. He will suffer irreparable loss if the orders sought herein are not granted as the plaintiff/respondent will proceed with eviction process. That land being a sensitive issue, it will be in the interest of justice that this matter be heard on merit. That the plaintiff/respondent will not be prejudiced in any manner if the orders sought herein are granted. That it will be in the interest of justice that the application herein be allowed.

The plaintiff opposed the application and filed a replying affidavit stating that the said application is an abuse of the court process, incompetent, fatally and incurably defective, lacks merit, a mere afterthought meant to derail conclusion of the matter and thus undermine the cause of justice and does not disclose any cause of action against himself. That he is advised by his advocate which advise he verily believe to be true that the applicant has not met the legal threshold for setting aside of the judgment and the consequential orders. That it is not in dispute that the defendants were duly served with summons and/or pleadings in this matter. That he is informed by his advocate which information he verily believes to be true that despite the firm of Komen Kipchirchir & Company Advocates having come on record for the defendants, the said firm neither served the memorandum of appearance nor any pleadings upon their advocates on record to justify and/or facilitate service of the hearing notice.

The application is an afterthought having been brought too late in the day. That it would appear from annexure LLI that the applicant instructed the firm of Kipchirchir Komen on 13.8.2015. That the applicant has not explained why they could not follow up their instructions for more than 1 year between the time they gave out the instruction and when they realized that judgment had been entered/delivered. That the applicant has thus approached this court with unclean hands. That he is advised by his lawyer which advice he verily believe to be true that if at all the applicant's previous advocates were indolent and/or negligent, the applicants have recourse in pursuing the said advocates for compensation.

That this being one of the oldest matters having been filed in 2012, public interest and or policy demands that litigation should have to come to an end.

That he is informed by his advocates which information he verily believes to be true that the draft defence is a sham as such setting aside the judgment would be an academic exercise because of the following reasons;

(i) As per annexure LL 3, the applicant purports to purchase that property known as KUINET SETTLEMENT SCHEME CERTIFICATE OF OUTRIGHT PURCHASE LAND REGISTRATION NO. 10/707/314/20, which property has no bearing of the land parcel that is the subject of these proceedings which is Uasin Gishu/Kuinet "B" Scheme/130.

(ii) That the applicant purported to purchase the land on 7.3.2014 from one Talaa Kipyegon at a time when he was the registered owner.

(iii) That it is obvious that the said Talaa Kipyegon did not have any transferrable interest within which the applicant can assert rights over the said land.

(iv) That gfrom annexed L.J.3, the 2nd applicant purported to have purchased the land from Joseph Kipyego Kebenei.

(v) That the 2nd applicant have not demonstrated that he said Joseph Kipyego Kebenei was the registered owner of the suit property and thus capable of transferring any interest over the suit property.

(vi) That without prejudice to the foregoing, this being Agricultural land within the ambits of the Land Control Act, in the absence of requisite consent of the Land Control Board for

subdivision and transfer, the applicants claim and/or suit is not maintainable.

The defendant/applicant submits that service was effected upon the defendants as required by law. The 2nd and 3rd defendants were served with summons to enter appearance whereby they instructed the firm of KOMEN KIPCHIRCHIR & CO. ADVOCATES who entered appearance on 13/8/15. The 2nd and 3rd defendants further instructed the said firm to defend them in this suit. The plaintiff/respondent did not serve the 2nd and 3rd defendants with the hearing notice. This is evidenced by the applicant annexure LL2(a) and (b) where the firm of BUNDOTICH KORIR & COMPANY ADVOCATES served only the firm of TARUS & CO. ADVOCATES. The hearing notice is dated 14/10/16 while the same was served on 13/10/16.

There are discrepancies on the dates.

The affidavit of service is clear that the hearing notice was only served upon TARUS & COMPANY ADVOCATES. The firm of KOMEN KIPCHIRCHIR & CO. ADVOCATES were not served. Further, the replying affidavit shows that the process server never served the hearing notice on the firm of KOMEN KIPCHIRCHIR & COMPANY ADVOCATES as required by law. The proceedings are therefore irregular as the plaintiff lied to this court that he had served. Proper service is crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice.

He relies on the case of **ABRAHAM KIPTANUI -VS- DELPHIS BANK LTD ANOR, HCC NO.1 864 OF 1 991 (unreported)**, the court stated as follows;

"Once it is established that a judgment on record is irregular, it must be set aside as of right. There are no two ways about it. The same is not susceptible to any variations. Its only fate is vacation from the record. Such a judgment is not set aside as matter of discretion but as matter of judicial duty in order to uphold the integrity of the judicial process itself."

The 2nd and 3rd defendants instructed the firm of KOMEN KIPCHIRCHIR & CO. ADVOCATES to enter appearance and defend them in this matter. The firm of KOMEN KIPCHIRCHIR & CO. ADVOCATES entered appearance but failed to file a defence hence the matter proceeded ex parte. Notice of entry of judgment was never served upon the 2nd and 3rd defendants hence were not aware of the proceedings if they could have been served then they could have cured the mistake. It is not true that we had no intention in defending this suit, but it was due to the fact that our former advocate failed to file a defence to defend our interests despite fully instructing them to do so.

The mistake of an advocate cannot be visited upon an innocent litigant and since the subject matter is in dispute is land it is the best interest of justice that the dispute should be heard and determined on merits since no prejudice will be occasioned to the respondents in the event the application is allowed as prayed.

It is their humble submission that the mistake of an advocate shouldn't be visited on a litigant as this would not be in the interest of justice for a litigant to suffer.

It is their submission that the defendants have a good defence as shown in annexure LL4 triable issue is not necessarily an issue which must succeed but one that demonstrate a plausible defence. In the case of **PATEL -VS- E.A. CARGO HANDLING SERVICES LTD (1 974) E.A. 75**, the court stated:

"That a defence with merit does not mean a defence that must succeed, it means a triable issue, an issue which raises a prima facie defence and which should go for trial for adjudication".

According to the defendants the annexed defence raises triable issues and they pray the honourable court do justice to all parties and find our annexed defence raises a prima facie defence and allow them to file the same in court.

Order 10 Rule 11 of the Civil Procedure Rules provides that "where judgment has been entered under this

order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just". It is their view that the defendants have established that no service was affected against them and that they have a good defence.

In this case, the blame is placed at the door steps of the applicant's erstwhile advocates. It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that bundles will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits. It is their humble submission that their application be allowed as prayed.

The plaintiff/respondent submits that that the appointment of the firm of Komen Kipchirchir & Company Advocates to represent the applicants were Irregular. He submits that the defendants did not approach the court in the right procedure in the sense that despite having been served the defendants filed a notice of appointment instead of entering appearance as provided for under Order 6 rule 1 and 2 of the Civil Procedure Rules. He submits that to today the defendants never entered appearance as envisaged despite being served with summons which the defendant does not dispute to have received where they instructed the firm of Tarus & Company and later Kipchirchir Komen & Company.

There is no proof that such an appointment was served upon the plaintiff's advocates despite having been filed on 13th August, 2015 and this have been demonstrated by the annexed affidavit of the plaintiff's advocates. In any event, the appointment of Kipchirchir Komen and Company Advocates and the notice of appointment dated 13th August, 2015 was incompetent and irregular in the sense that it violated order 9 rule 7 which provides;

7. where a party after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment and the provisions of this order relating to notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

The onus in this case to prove that order 9 rule 5 and 6 of the Civil Procedure Rules were complied with lies on the applicant.

He submits that the question of service of the notice is mandatory and fundamental as such failure by the applicants to demonstrate that service was effected upon all the parties renders the notice of no legal effect.

It is obvious and not in dispute that the former advocates on record being Messrs Tarus and Company Advocates were served as ruled 6 provides that such advocate is deemed to be on record. There is also an affidavit demonstrating service of summons on the defendants but also on former advocates on record which he urges them to peruse. He thus urges them to find that the defendants having duly been served not only with summons but hearing notice and their failure to appear, the judgement on record is regular and ought not be disturbed. Still on the same ground, the court is enjoined to consider all the facts and circumstances both prior and subsequent and of respective merits of the parties. This is a suit that was filed in 2012, the defendants never bothered to file their defence for 7 years until judgement has been delivered.

He submits that the alleged defence by the applicant to plaintiff/decree holder's suit is so hopeless that the court would be engaging in academic exercise were the judgement to be set aside. There is nothing worth going for trial in so far as the material presented before court by the applicant is concerned. The substratum of this suit is that parcel of land known as UASIN GISHU/KUINET "B" SCHEME/130 wherein the plaintiff/decree holder is registered as the proprietor.

I do find that though the 2nd and 3rd defendants filed a Notice of Appointment, which was irregular since they should have filed a Memorandum of Appearance, Article 159 of the Constitution comes to their rescue as it guides the court not to put undue regard on procedural technicalities and should consider

substantive justice. There was no good reason for the plaintiff to fail to serve the 2nd and 3rd defendants with a hearing notice. Every person in a dispute has the right to fair hearing under Article 50 (1) of Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, if appropriate another independent and impartial tribunal or body.

Having found that the 2nd and 3rd defendants were not served with a hearing notice, I will not belabor on the triable issues raised in the defense as this court can only go into the triable issues if satisfied that the defendant was served but failed to attend court. On failure to file and serve defense at all, I do find that this was very serious indolence and mistake of counsel which should not be visited on the party. I do order that that the judgment entered against the 2nd and 3rd defendants and all consequential orders thereto be set aside *ex-debito justae* and the 2nd and 3rd defendants be allowed to file defence out of time. The draft defence be deemed as duly filed upon the payment of the requisite court fees. The cost of the application in the cause.

Dated and delivered at Eldoret this 2nd day of November, 2017.

A. OMBWAYO

JUDGE