REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 399 OF 2013

LALLY FARM LIMITED.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....3RD DEFENDANT

PRIMEWAYS COMPANY LTD.....4TH DEFENDANT

JOHN KARIUKI & KINYANJUI THEURI T/A

KINYANJUI NJUGUNA & CO. ADVOCATES...5TH DEFENDANT

RULING

(Applications for review and reinstatement of a dismissed suit; both applications dismissed)

1. This ruling is in respect of two applications: 4th and 5th defendants' Notice of Motion dated 31st July 2014 and plaintiff's Notice of Motion dated 26th August 2016.

2. Notice of Motion dated 31st July 2014 is brought inter alia under Order 45 of the Civil Procedure Rules and seeks the following orders:

> ***1. That this honourable court be pleased to review and/or vary its ruling issued on 16th May 2014.***
>
> ***2. That this honourable court be pleased to order the 2nd and 3rd defendants to remove forthwith the cautions placed over land parcels Nos. Nakuru/Moi Ndabi/1322 and Nakuru/Moi Ndabi/1267.***
>
> ***3. That the costs of the application be provided.***

3. On the other hand, Notice of Motion dated 26th August 2016 is brought among others under order 10 rule 11 of the Civil Procedure Rules and seeks the following orders:

(a) That this honourable court be pleased to reinstate the present suit.

(b) That upon grant of prayer (a) the honourable court be pleased to list the present suit together with Nakuru E and L Petition No. 30 of 2013.

(c) That the present suit together with Nakuru E and L Petition No.30 of 2013 be consolidated.

4. Pursuant to the orders of the court made on 13th April 2017, both applications were heard together and by way of written submissions.

5. Notice of Motion dated 31st July 2014 is supported by an affidavit sworn by John Kariuki on 31st July 2014. Mr. Kariuki deposed that he is an advocate and a partner in the firm of Kinyanjui Njuguna & Co. Advocates. He further deposed that in its ruling dated 16th May 2014, the court did not allow prayer 2 of application dated 27th May 2013 because there was no evidence of service upon the 2nd and 3rd Defendants. He deposed that despite being requested to remove the cautions, the 2nd and 3rd defendants did not do so. He annexed a copy of the ruling dated 16th May 2014, copy of Certificate of Official Search dated 25th May 2011 in respect of the two properties and letters dated 2nd June 2011.

6. The application was opposed by the plaintiff through a replying affidavit sworn by Barbara Murithi, an advocate in conduct of the matter on behalf of the plaintiff.

7. As already noted, an order was made that the application be disposed of by way of written submissions. Timelines for filing and serving submissions were initially given on 13th April 2017. When the matter next came up for mention on 25th July 2017, the 4th and 5th defendants had not complied with the order on filing and service of submissions. Counsel appearing for the 4th and 5th defendants sought more time. While expressing its displeasure at the failure to comply, the court indulged the 4th and 5th defendants by giving them 7 days within which to file and serve their submissions, failure to which Notice of Motion dated 31st July 2014 would stand dismissed with costs. The default clause was introduced due to previous failure to comply with set timelines.

8. The environment in which the business of the court is currently conducted is markedly different that of yesteryears. The number of litigants approaching the courts for relief has grown tremendously. The courts have to be efficient in the use of time and other judicial resources. Amidst all this, the courts have given unto themselves a new challenge: slaying the dragon of case backlog. Parties must play their part in dealing with these challenges. Under **sections 1A** and **1B** of the **Civil Procedure Act** both the court and litigants including their legal representatives have a duty to play their respective parts to assist the court to achieve its overriding objective which is the just, expeditious, proportionate and affordable resolution of disputes. This obligation extends to promptly complying with the directions and orders of the court, bearing in mind that court orders are not made in vain.

9. I have perused the record and I see that the 4th and 5th defendants filed their submissions on 15th September 2017, way beyond the 7 days that were given on 25th July 2017. Owing to 4th and 5th defendants' failure to file submissions by the end of the day on 1st August 2017, Notice of Motion dated 31st July 2014 stood dismissed with costs on 2nd August 2017. In the circumstances, I do not need to consider the application.

10. Notice of Motion dated 26th August 2016 is supported by an affidavit sworn by Omollo H. Aseso on 26th August 2016. He deposes that they took over conduct of the matter on behalf of the plaintiff on 10th October 2013 and that on the said date the court was not sitting. That they were surprised to learn that the suit had been dismissed pursuant to an application dated 27th May 2013 and that they had not been aware of the application and were not served with a hearing notice.

11. The 4th and 5th defendants responded to Notice of Motion dated 26th August 2016 through a replying

affidavit sworn by Kinyanjui Theuri on 12th September 2017. He deposed that application dated 27th May 2013 was heard on 20th January 2014 and that the plaintiff's advocates were duly served with the application and a hearing notice and an affidavit of service was filed to that effect. He annexed a copy of an affidavit of service sworn on 20th January 2014 by Henry Mugo and a copy of a hearing notice bearing plaintiff's advocates' date stamp of 25th November 2013. He also deposes that the plaintiff is guilty of inordinate, unexplained and inexcusable delay considering that the application has been filed more than 2 years after the dismissal.

12. As already pointed out, the application was argued by way of written submissions. Applicants filed submissions were filed on 4th July 2017 while the 4th and 5th respondents filed their submissions on 15th September 2017. I have considered the application, the affidavits and the submissions.

13. The plaintiff is essentially seeking setting aside of the orders of 16th May 2014 pursuant to which the suit was dismissed. In such a scenario, 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 by the Court of Appeal 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).**
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> **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.**

14. The general 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; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the orders.

15. From the affidavit evidence put before the court by the 4th and 5th defendants, it is clear that the plaintiff's advocates were served. I have perused the replying affidavit and the annexed copy of the hearing notice which clearly shows that application dated 27th May 2013 was to be heard on 20th January

2014. It was received by plaintiff's advocates and it ears their date stamp of 25th November 2013. Indeed, the Hon. Justice L. N. Waithaka observed as follows while allowing the application:

> **6. An affidavit of service was sworn by Henry Mugo a process server of this honourable court, on 20th January, 2014 in which he depones that he served the plaintiff's counsel Gicheru & Co Advocates who acknowledged service on 25th November, 2013 at 3.15pm. The plaintiff did not respond to the application nor appear despite service.**

In such circumstances of clear evidence of service, there would have to be a sound basis upon which to exercise discretion so as to set aside the orders. No such foundation has been laid in the present application.

16. It is important to remember that the application dated 27th May 2013 was seeking dismissal of the suit for want of prosecution. It allowing it, the court was satisfied that there had been failure on the part of the plaintiff to actively prosecute the suit. Upon the suit being dismissed, the present application seeking setting aside of the dismissal has been filed two years after the dismissal. No explanation has been offered for the delay in filing the application. Further no disclosure has been made as to the date when the plaintiffs came to the realization that the suit had been dismissed. I am convinced that the plaintiff is guilty of inordinate delay. For all these reasons, Notice of Motion dated 26th August 2016 must fail.

17. In the end, 4th and 5th defendants' Notice of Motion dated 31st July 2014 and plaintiff's Notice of Motion dated 26th August 2016 are dismissed. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 8th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for plaintiff.

Mr. Kamau holding brief for Mr. Musili for 4th & 5th defendants.

No appearance for 1st & 3rd defendants.

Court Assistant: Gichaba