



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 83 OF 2014

PATRICK WAKOLI SICHANGI.....1ST PLAINTIFF

FRED MZEE NYONGESA.....2ND PLAINTIFF

VERSUS

PATRICK MAKOKHA BONYOLI.....1ST DEFENDANT

JOSEPH BARASA.....2ND DEFENDANT

BENARD MUKHWANA.....3RD DEFENDANT

R U L I N G

1. This is a ruling in respect of an application by the defendants/applicants seeking to set aside an ex-parte judgement which was delivered on 27/1/2016. The applicants contend that the hearing resulting in the ex-parte judgement proceeded in their absence. That their advocate did not inform them of the hearing date and that they have a good defence which they should be allowed to urge. They further contend that a mistake on the part of their former advocates should not be visited upon them.

2. The applicants application is opposed by the respondents based on a replying affidavit sworn by Patrick Wakoli Sichangi who has authority to swear the same on behalf of his co-plaintiff/respondents. The respondents contend that the application is misconceived and ought to be dismissed. That the advocate for the applicants was aware of the hearing date but did not attend court.

3. I have considered the application by the applicants and the objection thereto by the respondents. This is an application which calls for the court's discretion. The only issue for determination in this application is whether the applicants have demonstrated that they have sufficient grounds to warrant the ex-parte judgement to be set aside.

4. The applicants were being represented by the firm of Mwinamo Lugonzo & Co. Advocates until the ex-parte judgement was delivered. The applicants are now being represented by the firm of M/s. Kiarie Co. Advocates. Though M/s. Mwinamo Lugonzo & Co. Advocates were on record for the applicants, that firm never sent an advocate from that firm to appear in court on behalf of their clients. Each time the matter came up for either hearing of an application or main hearing, they used to send an advocate from another firm with instructions to proceed. On 13/10/2015 when this matter came up for hearing, an application for adjournment was made on the ground that Mr. Mwinamo for the defendants was not ready to proceed as he was said to be unwell. The application for adjournment was rejected on the ground that Mr. Mwinamo had never appeared in court before as he had always been represented by an advocate who always had instructions to proceed.

5. The hearing proceeded to completion on 13/10/2015. The applicants were not present in court. The advocate who held Mr. Mwinamo's brief was aware that an adjournment had been rejected and that the case proceeded to full hearing. The respondents filed their bill of costs which was duly served. When the same came up for hearing on 17/5/2016 Mr. Mwinamo sent a lawyer to come and seek for adjournment. The bill of costs was adjourned to 31/5/2016. A day to the date of assessment of the bill of costs an application seeking to set aside the ex-parte judgement was filed. The firm of Mwinamo Lugonzo also allowed the firm of Kiarie & Co. Advocates to come on record for the defendants.

6. In the instant case it is clear that the applicants are out to drag this matter in court. Before the case started being heard, the court ordered that a surveyor do go to the ground and establish the position on the ground. That report was filed in court on 25/5/2015. The applicants were present when the surveyor went to the ground. The surveyor found out that the applicants had closed a road of access between their land and that of the respondents and they were actually claiming part of the respondents land. There is a road which separates the applicants land from that of the respondents.

7. The applicants did not move to the Court of Appeal to challenge the refusal to grant the adjournment which had been sought but denied. They waited for seven months before they moved to court to seek to set aside the judgement which was delivered on 27/1/2016. The court cannot exercise its discretion to assist the applicants in the circumstances. The applicants are clearly out to delay the course of justice. They are the ones who sold the suitland which they now claim that its title was obtained fraudulently. They have not filed any counter-claim. They have closed a road of access which separates that land with that of the respondents. What purpose will be served by setting aside the judgement? I do not think that any useful purpose can be served by setting aside the judgment.

8. The applicants had a duty to follow up their case. They cannot simply come to court and claim that they were not informed of the hearing date by their lawyer. I agree with the decision of *Waki JA in B-Mach Engineers Ltd -vs- James Kahoro Mwangi [2011] eKLR* where he stated as follows:-

“The applicant had a duty to pursue his advocate to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate”

9. I have demonstrated hereinabove that the applicants have no defence to the respondents claim. Theirs is only meant to obstruct the course of justice. *Harris J in Shah -vs- Mbogo [1967] EA* correctly pointed out the parameters for the exercise of the court's discretion when he held as follows:-

“This discretion is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.

10. The applicants conduct is clearly intended to delay the course of justice. They have no defence to the respondents claim. I therefore find that this application has no merits. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this **13th** day of **September, 2016.**

E. OBAGA

JUDGE

In the presence of M/s. Mufutu for Mr. Kiarie for applicants and both respondents who appear in person.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

13/9/2016