REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELC NO. 176 OF 2014

***(FORMERLY* KERUGOYA ELC NO. 815 OF 2013)**

MARION KAAIRI MBUI ..... PLAINTIFF/RESPONDENT

-VERSUS-

ELISHA MBOGO NTHIGA ..... DEFENDANT/APPLICANT

RULING

1. Vide the notice of motion dated **21st June, 2016** Elisha Mbogo Nthiga, hereinafter called the applicant, seeks the following orders:-

i. Certification of the application as urgent and as such deserving to be heard *ex parte* in the first instance;

ii. Leave be granted to the firm of Chuma Mburu & CO. Advocates to act for him in place of E.N Njeru & Co. Advocates in this matter;

iii. Stay of execution of the judgment and decree of this court (Environment and Land Court Nyeri) made on 9/6/2016 and all other consequential and/or subsequent orders pending the hearing and determination of the application.

iv. The judgment of this court made on 9/6/2016 and any consequential and/or subsequent orders be set aside and the suit be heard afresh on merit;

v. Costs of the application be provided for.

2. The application is premised on the grounds that on account of a mistake on the part of his previous advocate, the suit was heard and determined in his absence; that he is desirous of having the suit whose subject matter is land,heard and determined on its merits; that his intended new advocate, Chuma Mburu, has advised him that there is need to apply for setting aside of the judgment hereto and all the consequential orders.

3. Arguing that the mistake of his advocate ought not to be visited on him, the applicant who is desirous of having the suit determined on its merits contends that unless the orders sought are granted, he will suffer irreparable loss and damage.

4. The application is opposed vide the replying affidavit of Marion Kaari Mbui (hereinafter referred to as

the respondent) where a short history of the suit herein is given and contended that the applicant has never been keen in defending the suit, that the failure by the applicant to attend court when the suit came up for hearing was intentional (calculated at delaying the hearing and determination of the case); that the applicant has not given sufficient reason for setting aside of the judgment hereto and that granting the orders sought will unnecessarily delay the conclusion of the case which has been in court for a long period of time, since 2002.

5. The respondent further contends that she will be greatly prejudiced if the suit were to be re-opened and heard afresh and that it would be unfair and unjust to visit the negligence and indolence of the applicant and his advocate on her.

6. When the matter came up for hearing, directions were taken to the effect that the application be disposed of by way of written submissions.

7. On 17th August, 2016 when the matter came up for mention to confirm filing and ex change of submissions, it emerged that only counsel for the plaintiff/respondent had filed submissions as ordered by court. Consequently, an order for determination of the application on the basis of the pleadings filed on behalf of the applicant was made.

Plaintiff/Respondent's submissions

8. On behalf of the respondent, reference is made to **Order 9 Rule 9** of the Civil Procedure Rules and submitted that the application herein is defective for having been drawn by an advocate in respect of whom no order had been issued by court as contemplated under that section of the law.

9. Terming the application frivolous, vexatious, lacking in merit and an abuse of the court process, the respondent points out that from 2002 when the suit was filed, the respondent has never filed a replying affidavit to the suit (Originating summons).

10. It is reiterated that no sufficient reason has been given for the applicant's failure to attend court when the suit came up for hearing.

11. While admitting that this court has discretion to set aside the judgment hereto and the consequential orders issued pursuant thereto, counsel for the respondent based on the decision in the case of **CMC Holdings Ltd vs. James Mumo Nzioki (2004)1 KLR 181** , it is submitted that the applicant has not made up a case for exercise of the court's discretion in his favour.

12. It is reiterated that granting of the orders sought would be prejudicial to the respondent.

13. Arguing that there is no defence by the applicant which can warrant the suit being heard afresh, the respondent contends that ordering the suit to be heard afresh would be a waste of the court's precious time.

14. Arguing that litigation must come to an end, the respondent urges the court to dismiss the application with costs to her.

Analysis and determination

15. It is not in dispute or controverted that the current application was brought by a firm of advocates in respect of which no order to come on record for the applicant had been issued by the court as contemplated by **Order 9 Rule 9**. That being the case, the issue to determine is whether the said defect renders the application fatally defective?

16. The applicable law that settles this issue is **Order 9 Rule 9** and **10** of the Civil Procedure Rules which provide as follows:-

"**When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

a. Upon an application with notice to all parties; or

b. Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".

Order 9 Rule 10 on the other hand provides as follows:-

"An application under rule 9 may be combined with other prayers provided the question of change of ad vocate or party intending to act in person shall be determined first."

17. In the case of **Pravinchandra Jamnadas Kakad v. Lucas Oluoch Mumia (2015) eKLR** it was held:-

"….. Under Order rule 10 of the Civil Procedure Rule, an application to change advocate after judgment may be combined with other prayers provided that prayer is determined first. Both order 9 rule 9 and rule 10 em phasis that there must be an order of the court whether the incoming or outgoing advocates are con senting or whether the incoming advocate files an application to come on record….Since Order 9 rule 9 was intended to protect the interests of an advocate who had represented a party until after judgment, from letting go the brief without a possible guarantee of his or her legal fees being paid, I see no prejudice in endorsing the consent dated 15/2/2013 as an order of the court… That being the case, I find that to hold that Omwoyo, Momanyi, Gichuki & Co Advocates are im properly before the court and therefore the application dated 15th February 2013 is incompetent would not only be unfair, but also unjust and an engagement in procedural technicalities at the altar of substantive justice, which Article 159 (2) (d) of the constitution and Section 1A and 1B of the Civil Procedure Act abhors. (Emphasis supplied).

18. Unlike in the above cited case where the incoming advocate had obtained consent to come on record in place of the outgoing advocate, in the circumstances of this case no such consent was obtained. Be, that as it may, I note that the outgoing firm of advocates was notified about the intended change of advocates and had no objection. In this regard, see the endorsement by the outgoing advocates on the filed notice of change of advocates.

19. Although the incoming advocate ought to have urged the prayer for leave to come on record in place of the outgoing advocate first, there being no prejudice occasioned on the respondent by that failure, I find and hold that the said defect in the application for leave cannot stop this court from dispensing substantive justice to the parties. I say this because no prejudice will be occasioned on the parties to this case if the application is considered on its merits.

20. Turning to the merits of the application, from the pleadings filed in this matter, it is not in dispute that this suit was determined *ex parte*. It is also acknowledged that this court has discretionary power to grant the orders sought.

21. The principles that guide the court in exercise of its discre tion was discussed in the case of **James Wanyoike & 2 others v. CMC Motors Group Ltd & 4 others (2015) eKLR** thus:-

"…The principles and tests for setting aside an *ex-parte* judgment can be summarized as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgment.

2. That the tests for setting aside an ex-parte judgment are:-

a. Whether there is a defence on the merits?

b. Whether there would be any prejudice to the plaintiff?

c. What is the explanation for any delay?"

22. The above determination was arrived at after surveying the provisions of **Order 10 Rule 11 of the Civil Procedure Rules** which 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."**

23. The court also surveyed the following cases:-

a. **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75** at page 76 C and E where the court held as follows:-

'**There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.'**

The court further held as follows:-

'**Where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.**'

b. **Shah -vs- Mbogo [1967] EA166** at page 123B where the court stated as follows:-

'this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.'

c. **Shabbir Din –vs- Ram Parkash -Anand [1955]22 EACA 48** where **Briggs JA** said at page 51:-

'I consider that under Order IX Rule 20 the discretion of the court to set aside an ex-parte judgment is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellants' legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.'

d. **Mohamed & Another –vs- Shoka [1990] KLR 463**, the Court of Appeal held that:-

'**The test for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.'**

e. Shanzu Investments Ltd -vs- Commissioner of Lands Civil Appeal No. 100 of 1993 the

Court of Appeal held as follows:-

> **"a. The court has a wide discretion under Order IXB Rule 10 to set aside judgment and there are no limits and restrictions on the discretion of the Judge except that if the judgment is varied it must be done on terms that are just.**
>
> **b. Jurisdiction to vary being judicial discretion must be exercised judicially and this depends on the particular case."**
>
> **c. The tests for setting aside judgments are:-**
>
> **i. Defence on the merits**
>
> **ii. Prejudice and**
>
> **iii. Explanation for the delay."**

f. Tree Shade Motors Ltd -vs- DT Dobie & Anor [1995-1998] 1EA 324 it was held that:-

> **'Even if service of summons in valid, the judgment will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.'**

g. **Sebei District Administration -vs- Gasyali & Others (1968) E.A. 300** the Judge stated as follows:-

> "**In my view the court should not solely concentrate on the poverty of the applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."**

24. It is common ground that this court has unfettered, unlimited and unrestricted jurisdiction to set aside the *ex-parte* judgment hereto. The only rider in exercise of that jurisdiction is that it should be exercised to do justice to the parties and not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

25. In the circumstances of this case, the applicant admits that he was aware of the hearing date but explains he had been advised by his previous advocate that he was not required to attend court on that day because the case slated for hearing was that of the respondent. In essence the applicant argues that had he been properly advised by his advocate, he would have attended court and defended the case. The applicant deposes that he is still keen to have the case re-opened for hearing on its merits.

26. The respondent on the other hand opposes the application on grounds that the applicant was either negligent or indolent in the manner he handled his case, hence unde serving of the discretion of this court. In this regard, it is pointed that since 2002, when the suit was filed, the applicant has never filed a response to his case, hence the case is undefended.

27. The sole issue for determination is whether the defendant/ applicant has made up a case for being

granted the orders sought.

28. Before determining this issue, given the fact that the applicant was represented by an advocate who allegedly mis advised her concerning his case, thus prejudicing his interest in the suit, I hold the view that it would be unfair and unjust to visit the mistake of the advocate on the appli cant. Having instructed an advocate to defend him, the applicant had every right to expect that the advocate would apply himself diligently and professionally in handling the suit.

29. In the circumstances of this case, it appears that the applicant's advocate abdicated his said duties hence causing the applicant the prejudice complained about.

30. In the case of **National Bank of Kenya Ltd v. E. Muriu Kamau & another (2009)e KLR** it was observed:

> **"there is plainly a duty on all advocates to exercise exceptional care in handling matters on behalf of their clients.**

31. In the case of **Shabbir Din –vs- Ram Parkash –Anand** (*supra*), it was held that a ***mistake or misunderstanding of the appellants' legal advisers, even though negli gent may be accepted as a proper ground for granting relief***.(Emphasis supplied).

32. Concerning mistakes by advocates, **Apoloo J**., (as he then was) rendered himself thus:

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on 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".** See the case of **Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103**.

33. Having determined that the current suit proceeded *ex parte* on account of a mistake on the part of the applicant's previous advocate and being of the view that the applicant deserves an opportunity to defend the case urged against him on its merits, I find and hold that the applicant has made up a case for setting aside the judgment of this court made on 9th June, 2016 and any consequential orders made pursuant to that judgment.

34. With regard to costs, as the applicant through his previous advocates was responsible for the circumstances that necessitated the filing of the current application, I award the costs of defending the application to the respondents.

Dated, signed and delivered at Nyeri this 28 th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Ms Kainga h/b for Mr. Okwaro for the respondents

N/A for the applicant

Court assistant - Lydia