Kiritu & another (Suing as the Legal Representative of the Estate of Joseph Ngochi Kiriti) v Muhuri (Sued as the Legal Representative of the Estate of Charles Muhuri Mureithi) (Environment & Land Case 23 of 2023) [2024] KEELC 4492 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4492 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT & LAND CASE 23 OF 2023

YM ANGIMA, J

JUNE 6, 2024

BETWEEN

DANIEL NJUGUNA KIRITU ..... 1ST PLAINTIFF

SALOME WANJIRU NJENGA ..... 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH NGOCHI KIRITI

AND

CHARITY GATHONI MUHURI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES MUHURI MUREITHI) ..... DEFENDANT

RULING

A. Introduction

1. Vide an ex parte judgment dated 08.02.2024 the court made the following orders in favour of the Plaintiff:

    a. A declaration be and is hereby made that the 1st and 2nd Plaintiffs have acquired title over L.R. No. Nyandarua/Mawingo Salient/29 measuring approximately 7.6. ha through the doctrine of adverse possession.

    b. An order be and is hereby made that LR. No. Nyandarua/Mawingo Salient/29 be forthwith registered in the names of Daniel Njuguna Kiritu and Salome Wanjiru Njenga jointly and the Defendant be ordered to sign all the necessary documents to facilitate the transfer in default of which the Deputy Registrar of the court shall do so on her behalf.

    c. The Land Registrar-Nyandarua County shall dispense with the production of the original title deed for LR. No. Nyandarua/Mawingo Salient/29 while transferring the same to the Plaintiffs.

d. There shall be no order as to costs.

B. Defendant's Application

2. By a notice of motion dated 21.02.2024 expressed to be brought pursuant to Order 10 rule 11, Order 22 rule 22 & Order 57 rules 1 & 5 of the *Civil Procedure Rules*, 2010 (the Rules), Section 1A, 1B & 3A of the *Civil Procedure Act* (Cap. 21) and all enabling provisions of the law, the Defendant sought the following orders:

   a. Spent;

   b. Spent;

   c. That the honourable court be pleased to set aside the ex parte judgment and all the consequential proceedings taken in this matter.

   d. That the honourable court be pleased to grant unconditional leave to the Defendant/ Applicant to file their replying affidavit, witness statements and documents out of time upon such conditions as are fair and just in the circumstances of this case.

   e. That the annexed replying affidavit be deemed filed and served upon payment of filing fees.

   f. That the costs of this application be in the cause.

3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant, Charity Gathoni Muhuri, on 21.02.2024. She contended that she was never served with the originating summons by the Plaintiff and that she was unaware of the proceedings until 15.02.2024 when the court delivered judgment in Nyandarua ELCLA No. 13 of 2023 between the same parties whereby the court alluded to the ex parte judgment in this suit.

4. The Defendant contended that at all material times she was a resident of Nairobi Block 74/464 (Bururburu Phase I) and that she had never resided in House No. 419 along Fare Lane Trading Centre., Maungu Court as claimed by the Plaintiff's process server in his affidavit of service dated 12.10.2023. It was her contention that she had a good defence to the originating summons and that it was in the interest of justice to set aside the ex parte judgment so that she may be accorded an opportunity of being heard.

C. Plaintiff's Response

5. The Plaintiff filed a replying affidavit sworn by Daniel Njuguna Kiritu on 18.03.2024 in opposition to the application. It was stated that the Defendant was duly served with the originating summons as deposed by the process server in his affidavit sworn on 12.10.2023. It was contended that the Defendant's late husband had previously been served at the same address with court process in Nakuru HCCC No. 151 of 1996.

6. The Plaintiff contended that granting the orders sought by the Defendant might result in his eviction from the suit property since his appeal in Nyandarua ELCA No. 13 of 2023 was dismissed because he had already acquired the suit property through adverse possession vide the ex parte judgment. The Plaintiff prayed that in the event the court was inclined to allow the application then he should be allowed to remain in occupation until the hearing and conclusion of the originating summons.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant filed submissions dated 18.04.2024 whereas the Plaintiff's submissions were dated 23.04.2024.

E. Issues for Determination

8. The court has considered the notice of motion dated 21.02.2024, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key questions which arise for determination herein:

   a. Whether the Defendant has made out a case for the setting aside of the ex parte judgment dated 08.02.2024.

   b. Whether the Defendant is entitled to the consequential orders sought.

   c. Who shall bear costs of the application.

F. Analysis and Determination

Whether the Defendant has made out a case for the setting aside of the ex parte judgment dated 08.02.2024.

9. The court has considered the material and submissions on record on this matter. Whereas the Defendant submitted that she had satisfied the principles for setting aside the default judgment, the Plaintiff contended otherwise. The provisions of Order 10 rule 11 of the Rules on setting aside stipulate as follows:

> " 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."

10. In the case of *Pithon Waweru Maina -vs- Thuku Mugiria* [1983] eKLR the principles to be considered in an application for setting aside a default judgment were expounded as follows:

> " 2. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the Defendant or upon the failure of either party to attend the hearing are:
>
> a) Firstly, there are no limits or restrictions on the judge's discretion 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. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E b) Secondly, this discretion is intended so 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 course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.

c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93.

3. The court has no discretion where it appears there has been no proper service (*Kanji Naran v Velji Ramji* [1954] 21 EACA 20). dgment does not cease to apply because a decree has been extracted (*Fort Hall Bakery Supply Company v Frederick Muigon Wargoe* [1958] EA 118).

5. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel [1966] EA 547, 555 F).

6. 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, it should be remembered that to deny the subject a hearing should be the last resort of a court. (*Jamnadas v Sodha v Gordandas Hemra*j (1952) 7 ULR 7).

7. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton* [1972] SC 30).

8. The Respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. *(Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48,51 and *Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company* Nairobi HCCC 1547 of 1969)."

11. The court has considered the contradictory evidence of the parties on the place and manner of service of the originating summons. The court is of the view that it is doubtful whether the Defendant was served at house No. 419 as claimed by the process server since the Defendant appears to be resident at Nairobi Block. No. 74/464. However, it is not necessary to determine the issue of service since it is not a decisive factor in an application for setting aside a default judgment.

12. The court is satisfied on the basis of the material on record that the Defendant's proposed answer or defence to the originating summons raises some triable issues worthy of consideration at a full hearing. The acreage of the land which was sold to or occupied by the Plaintiff's deceased father is one such issues. The question of whether or not the Plaintiff's occupation was adverse in the legal sense is also another issue to be tried in the action. As a consequence, the court is inclined to allow the Defendant's

application for setting aside the default judgment in order to accord her a chance to be heard on the merits of the action.

Whether the Defendant is entitled to the consequential orders sought

13. In view of the court's holding on the first issue, the court is of the opinion that the Defendant is entitled to the consequential orders which shall accord her an opportunity of being heard on the merits of the originating summons. In particular, the court is inclined to set aside the default judgment and to accord the Defendant unconditional leave to defend the suit. The Defendant shall also be accorded an opportunity to file a replying affidavit, defence documents and a trial bundle in preparation for the hearing of the suit.

Who shall bear costs of the application

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Since the court is in doubt as to whether or not the Defendant was properly served with the originating summons, the court is inclined to order that costs of the application be in the cause.

G. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court finds merit in the Defendant's application for setting aside the ex parte judgment dated 08.02.2024. As a consequence, the court makes the following orders for disposal of the notice of motion dated 21.02.2024:

    a. The ex parte judgment dated 08.02.2024 be and is hereby set aside together with all consequential orders.

    b. The Defendant is hereby granted leave to defend the originating summons.

    c. The Defendant shall file and serve her replying affidavit, witness statements, defence documents and a trial bundle duly indexed and paginated within 14 days from the date hereof.

    d. The Plaintiff is hereby granted leave to file and serve any supplementary affidavit, witness statements and an indexed and paginated trial bundle within 14 days upon service of the Defendant's trial bundle.

    e. Costs of the application shall be in the cause.

    f. The matter shall be mentioned on 10.07.2024 to confirm compliance and fix a hearing date.

    It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 6TH DAY OF JUNE, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wanjiru Muriithi holding brief for Mr. Waichungo for the Plaintiffs

Ms. Nancy Njoroge for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE