REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.112 OF 2004

1. ELIZAPHAN NYAMWEYA OBARE …… 1ST PLAINTIFF

2. JOSEPHINE MORAA NYAMWEYA……2ND PLAINTIFF

VERSUS

HARON KINGOINA BOGITA ……..…….. DEFENDANT

RULING

1. What I have before me is thedefendant's application by way of Notice of Motion dated 25th June, 2014 in which the defendant has sought the setting aside of the judgment entered herein on 29th May, 2014 and the extension of time within which to amend the defendant's statement of defence. The defendant's application was brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 12 rules 2 and 7, Order 22 rules 22, and Order 8 rules 3, 5, and 6 of the Civil Procedure Rules, 2010. The main ground on which the application was based is that the defendant's advocate, Mr. Momanyi Aunga of M/s Momanyi Aunga & Co. Advocates got involved in two (2) election petitions, one in the High Court and the other in the lower which had strict time lines and due to pressure of work and fatigue arising from the said petitions he forgot to enter into his diary the hearing date of 18th December, 2013 that was given in court on 23rd May, 2013. For the same reason, he was also unable to amend the defendant's statement of defence following the leave that was granted to the defendant on 23rd May, 2013. The application was also premised on the ground that the defendant has a good defence to the plaintiff's claim that he should be given an opportunity to put forward.

2. In his affidavit sworn on 25th June, 2014, Joseph Momanyi Aunga, advocate who practices in the name and style of M/s Momanyi Aunga & Co. Advocateswho is on record for the defendant stated that the hearing date of 18th December, 2013 was taken by consent in court. On the same day, the court also granted leave to the defendant to amend his statement of defence within 14 days to introduce a counter-claim. He stated further that he had taken on two election petitions and due to pressure of work resulting from the said petitions, he forgot to put the said hearing date in his court diary and to effect the amendment of the defendant's statement of defence within the time that was fixed by the court. He stated further that he not only forgot to diarize the said hearing date but also to notify the defendant of the same. The defendant's application was also supported by the affidavit of the defendant.

3. In his affidavit also sworn on 25th June, 2014, the defendant gave the history of the dispute between the plaintiffs and him, why the case has taken long to conclude, why he did not bring a counter-claim earlier, why he failed to amend the defence pursuant to the leave that was granted to him and why the case proceeded against him ex parte on 18th December, 2013. The defendant deposed that his advocate

on record did not inform him of the hearing date of 18th December, 2013and of the fact that he had been granted leave to amend the defence to plead a counter-claim. The defendant stated that the mistakes of his advocate should not be visited upon him. The defendant's application was opposed by the 2nd plaintiff through a replying affidavit sworn on 8th July, 2014. In her affidavit, the 2nd plaintiff stated that the defendant is occupying the property in dispute in this suit which is the registered in the name of the 2ndplaintiff illegally since the year 2004 and that the application herein is intended to extend the defendant's illegal occupation of the said property.

4. The 2nd plaintiff stated further that the defendant's advocate was aware of the hearing date for this matter and of the fact that leave had been granted to the defendant to amend his defence. The 2nd plaintiff stated that the defendant has not given good reasons for the failure by the defendant and his advocate to attend court on 18th December, 2013 for the hearing of this matter. The 2nd plaintiff stated that the fact that the defendant's advocate was busy with two election petitions is not a plausible explanation for his failure to amend the defendant's statement of defence and also to attend court for the hearing on 18th December, 2013. The 2nd plaintiff stated further that the application herein has been filed after inordinate delay which delay has not been explained.

5. When the defendant's application came up for hearing before me on 17thJuly, 2014, the advocates for the parties agreed to argue the application by way of written submissions. The defendant filed his submissions on 10th October, 2014 while the 2nd plaintiff filed her submissions on 21st October, 2014. The defendant filed a reply to the 2nd plaintiff's submissions on 29th October, 2013. I have considered the defendant's application together with the two affidavits filed in support thereof. I have also considered the 2nd plaintiff's affidavit filed in reply to the defendant's application. Finally, I have considered the written submissions filed by the advocates for both parties and the authorities cited.

6. In the Court of Appeal case of, **Pithon Waweru Maina vs. Thuku Mugiria (1982-88)1KAR 171**, Potter J.A stated as follows at page 172 on the court's power to set aside judgment entered in default of appearance or defence or upon failure of either party to attend a hearing; "**This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948,to set aside an exparte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law. Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E**: "**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 or fetter the wide discretion given to it by the rules.**" **Secondly, as Harris J. said inShah vs. Mbogo [1967] EA 116 at 123B**, "**This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, 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**". **That judgment was approved by the court of appeal in Mbogo vs. Shah [1968] E. A 93 and in Shabbir Din vs. Ram Parkash Anand [1955] 22 EACA 48Biggs JA said at 51 "I consider that under Order 9 r20, the discretion of the court 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 appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised**".

7. The plaintiffs' claim against the defendant is set out in the plaint dated 14th July, 2004. In the said

plaint, the plaintiffsaverred that the plaintiffs are the proprietors of all that parcel of land known as **LR No. Central Kitutu/Daraja Mbili/2603**(hereinafter referred to as "**the suit property**") and that on or about 30th June, 2004, the defendant entered the suit property without the plaintiff's permission, demolished the plaintiff's semi-permanent structures that were standing thereon and started assembling building materials thereon with the intention of constructing a permanent building. The plaintiffs sought an order for the eviction of the defendant from the suit property and a permanent injunction to retrain the defendant from in any way interfering with the suit property. The defendant entered appearance and filed his statement of defence on 24th August, 2004. In his statement of defence, the defendant contended that the plaintiff's acquired the suit property fraudulently from LR No. Central Kitutu/Daraja Mbili/ 1233("Plot No.1233"). The defendant denied the plaintiff's claim that he had trespassed on the suit property. The defendant claimed that the suit property was sold to the plaintiffs after the same had been sold earlier to the defendant and the defendant had taken possession thereof.

8. It is not very clear from the record why this case was not listed for hearing until 31st January, 2011 about 7 years after the case was filed.It was on 31st January, 2011 when the hearing took of this case took off for the first time before Sitati J. Sitati J. took the 1st Plaintiff's evidence before the matter was adjourned to 24th March, 2011 for further hearing. On 24th March, 2011 the case was adjourned to 20th June, 2011 on the ground that the plaintiff's advocate was sick. It is not clear as to what happened on 20th June, 2011. The matter was once again listed for hearing on 14th May, 2013 when the same was placed before Muriithi J. who directed that the matter be mentioned before this court on 23rd May, 2013 for directions. When the matter came up for mention before me on 23rd May, 2013, the advocates for the parties agreed that the case should start de novo. It was further agreed that the defendant should amend his defence within 14 days from the date of the order and that the case be heard on 18th December, 2013.

9. On 18th December, 2013, only the 2nd plaintiff and her advocate appeared in court for the hearing. The 1st plaintiff had passed on by then. Since the hearing date was taken by consent, I allowed the 2nd plaintiff's advocate to proceed with the hearing the absence of the defendant and his advocate notwithstanding. As at that date, the defendant had also not amended his statement of defence pursuant to the leave that was granted on 23rd May, 2013. After the close of the 2nd plaintiff's case, the 2nd plaintiff's advocate made brief closing submissions after which the court reserved the judgment to be delivered on notice. The judgment was delivered on 29th May, 2014 with notice to both parties. In the judgment, the court ordered the defendant to vacate and hand over the suit property to the 2nd plaintiff within 45 days at the risk of forceful eviction in default. It is after the delivery of this judgment that the defendant moved the court with the present application on 25th June, 2014.

10. In the application before me, the defendant has admitted that the hearing date of 18th December, 2013 was given by the court in the presence of the advocates for both parties. The same applies to the court order that granted leave to the defendant to amend his statement of defence. The defendant's case is that he failed to attend court and to be represented in court on 18th December, 2013 due to the mistake of his advocate who failed to insert the hearing date in his diary. The same advocate also failed to amend the defendant's statement of defence within the time that was fixed by the court. The defendant's advocate has sworn an affidavit in which he has owned up to his mistake and urged the court not to visit his own mistakes on the defendant. The defendant's advocate has attributed his mistakes aforesaid to the pressure of work and fatigue that arose from two election petitions that he was handling. As was stated in the case that I have cited above, this court has a wide discretion while considering an application to set aside judgment entered ex-parte in default of appearance by one of the parties at the trial. This discretion must however be exercised judicially so as to ensure that justice is done to the parties.

11. The question that I need to answer is whether this is an appropriate case to exercise my discretion to set aside the judgment entered herein on 29th May, 2014 and also to extend the time for the defendant to file an amended defence. From the history of this suit that I have set out above, it is clear that the defendant has been keen on defending this suit. The defendant filed a statement of defence and has been participating in the proceedings herein until 18th December, 2013 when he failed to attend court together with his advocate. The defendant has stated in his affidavit in support of the application herein that his advocate failed to notify him of the hearing date. He has urged the court not to punish him for the mistake of his advocate. He has pleaded with the court for an opportunity to be heard in his defence. The defendant's advocate as I have stated above has owned up to his mistake.

12. In the Court of Appeal case of, **Belinda Murai& others vs. Amos Wainaina (1978) LLR 2282(CA), Madan J.A** described what constitutes a mistake as follows;- " **A mistake is a mistake. It is no less mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on appoint of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly do whatever is necessary to rectify it if the interest of justice so dictate."**

13. In the case of **Philip Chemwolo & another vs. Augustine Kubede (1982-88) KAR 1039 at 1040,** Apaloo J.A (as he then was) stated as follows;- " **Blunders will always 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 merit. 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 deciding the rights of the parties and not for the purpose of imposing discipline."**

14. Finally, in the Court of Appeal case of, **Richard Nchapi Leiyagu vs. IEBC & 2 others, Court of Appeal Civil Appeal No. 18 of 2013(unreported)**, the court stated as follows;- "**The right of a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law**."

15. From what I have set out herein above, it has come out clearly that the defendant was bungled by his advocate. As stated in the cases that I have cited above, a mistake is a mistake whether by a senior lawyer or by a junior one. I am of the view that in the circumstances of this case it would be unjust to punish the defendant for the mistakes of his advocate. I am satisfied that this is appropriate case to exercise this court's discretion to set aside the judgment that was entered herein without the defendant's participation. From the history of this case that I have highlighted above, I am satisfied that the defendant has been keen to defend this suit. I am also satisfied that the failure by the defendant to attend court on 18th December, 2013 was not intended or calculated to delay the disposal of this case or to defeat the cause of justice. I have considered the age of this matter and the 2nd plaintiff's desire to bring the matter to a conclusive end. I have also considered the nature of the dispute between the parties. I am convinced that despite the delay, justice can still be done. I am also convinced that the inconvenience and the injury that the 2nd plaintiff would suffer by the setting a side of the judgment entered herein on 29th May, 2014 can be compensated in costs. I am persuaded therefore that the defendant has made out a case for granting the orders sought. I am not in agreement with the submission by the 2nd plaintiff that the application herein was brought after inordinate delay. The defendant's advocates seems to have realized only on 29th May, 2014 that the hearing of this matter had proceeded ex parte and that they had failed to amend the defence within the time that had been fixed by the court. The application herein was filed on 25th June, 2014 less than a month after the defendant had

notice of the judgment and of the fact that he had failed to amend the defence.

16. Although the defendant's application has merit, I am of the opinion however that from the facts of this case, it would be unjust to grant the orders sought unconditionally. The defendant's application dated 25th June, 2014 is therefore allowed in terms of prayers (d) and (e) thereof on condition that the defendant shall pay to the 2nd plaintiff the costs of this application and thrown away costs assessed at Ksh.20,000.00 payable forthwith and in any event within 14 days from the date hereof. The defendant shall file amended defence within 14 days from the date hereof. In the event of default in the payment of the said sum of Ksh.20,000.00 on due date, the judgment entered herein on 29th May, 2014 shall stand reinstated automatically and the defendant's amended defence if the same would have been filed shall stand struck out.

Delivered, signed and **dated** at **KISII** this**19th day** of **December, 2014.**

S. OKONG'O

JUDGE

In the presence of:-

Mr. Masese for the 2nd plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE