REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 73 OF 2017

ROSEBELLA IRAMWENYA MIRIEH.....PLAINTIFF

VERSUS

MWANGI NGUGI.....DEFENDANT

RULING

What is coming up for ruling is the Defendant's Notice of Motion application dated 30th May, 2019 in which the Defendant (hereinafter referred to only as "the Applicant") has sought an order that the judgment delivered herein on 22nd September, 2017 be set aside and the Applicant be granted leave to appear and defend the suit.

The Applicant's case:

The application which is supported by the affidavit of the Applicant dated 30th May, 2019 is brought on the following grounds:

1. That there is judgement against the Applicant that was entered ex-parte.

2. That the Applicant was not served with Summons to enter appearance and notice of entry of judgment and as such he was not heard on his defence.

3. That the Plaintiff (hereinafter referred to only as "the Respondent") obtained the said judgement against the Applicant by concealing to the court the fact that the amount claimed in the plaint was refunded to her by the Applicant and the sale agreement in issue terminated.

4. That the Respondent is using the court to unjustly enrich herself.

5. That it is in the interest of justice that the orders prayed for be granted and the Applicant given an opportunity to defend the suit on its merits.

The Respondent's case:

The Respondent opposed the application through a replying affidavit sworn on 22nd January, 2020. In summary the Respondent set out her case as follows:

The Applicant was duly served with the summons to enter appearance, hearing notices, notice of judgement and bill of costs. The Applicant however failed to participate in the proceedings and judgement was regularly entered in favour of the Respondent against the Applicant for Kshs. 1,550,000/- being a refund of the purchase price and Kshs. 30,000/- being surveyor's fees together with costs and interest from the date of filing suit until payment in full. When the Applicant became aware of the judgement, he introduced the Respondent to his advocates on record who drew up an agreement dated 25th January, 2018 on the settlement of the decretal sum. Since the Respondent needed the money, she did not give much thought to the contents of the agreement which purported to cancel the sale agreement dated 3rd February, 2011 instead of setting out how the decretal sum was to be settled.

Since then, the Applicant has paid Kshs. 1,380,000/- and he is in arrears of Kshs. 250,000/-. The Applicant is also yet to pay the costs of the suit and interest. When the Respondent applied for execution, the Respondent's advocates were not aware of the fact that part of the decretal sum had been paid and as such they did not deduct the paid amount from the amount that was to be recovered from the Applicant. This mistake according to the Respondent does not absolve the Applicant from his obligation to settle the full decretal amount as proper computation can be done to ascertain how much is owing.

The Respondent has contended further that the Applicant's proposed defence does not raise any triable issues. The Respondent has contended further that the Applicant's application to set aside the judgement was filed after 32 months from the date of judgment which amounts to inordinate delay.

The submissions:

During the hearing of the application, the Applicant argued that execution of the judgement of 22nd September, 2017 will lead to the Respondent's unjust enrichment since the Applicant refunded the amount that was paid to him under the agreement for sale of land between him and the Respondent and the said agreement stood terminated by mutual agreement between the parties. The Applicant contended that as far as he was concerned, the dispute between the parties had been settled. The Applicant submitted that attachment that was levied against him came as a shock. The Applicant submitted that he was not aware of the judgement but had nevertheless paid the whole amount that was due to the Respondent. The Applicant argued that the orders sought would not prejudice the Respondent as the debt owed to her had been paid. The Applicant submitted that the Applicant would suffer prejudice since the Respondent would continue with execution against him for a debt that has been satisfied. The Applicant submitted that his proposed defence raises triable issues and he should be allowed to argue the same.

In her submissions in reply, the Respondent submitted that the agreement terminating the sale agreement on which the Applicant had based his application was entered into after the judgement had been delivered herein. The Respondent acknowledged that the Applicant made part payment after the parties entered into the said agreement. The Respondent argued however that the Applicant was yet to pay the balance of the decretal sum and the costs of the suit. The Respondent submitted that her averments regarding the outstanding balance of the decretal amount had not been controverted and as such there is no basis on which the court can set aside the judgment of 22nd September, 2017.

Determination:

I have considered the Applicant's application together with the affidavit filed in support thereof. I have also considered the Respondent's affidavit in reply to the application. Finally, I have considered the submissions by the advocates for the parties. It is not disputed that this court has power to set aside judgment entered in default of appearance or defence or generally in the absence of a party.

Order 10 Rule 11 of the Civil Procedure Rules which deals with setting aside of judgements provides as follows:

Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.

The power given by the court under Order 10 Rule 11 of the Civil Procedure Rules is discretionary. In Patriotic Guards Ltd *v* James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018)eKLR the court stated as follows:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice,

whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

In Patel *v* EA Cargo Handling Services Ltd [1974] EA 75 that was cited with approval in Pithon Waweru Maina *v* Thuka Mugiria [1983] eKLR the court stated that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgement 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."

In Shah *v* Mbogo [1967] EA 116 that was also cited in Pithon Waweru Case (supra) the court stated that:

"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."

The Applicant had a duty to persuade the court that he deserves the exercise of this court's discretion. Judgment was entered in this suit on 22nd September, 2017. The application before the court was filed over 2 years later on 31st May, 2019. Although the Applicant has claimed that he was not served with summons to enter appearance, the Applicant has not denied the affidavit of service that has been placed before the court showing that he was duly served with summons to enter appearance and that he acknowledged receipt of the same. I am satisfied that the Applicant was served with summons to enter appearance. The Applicant has not given any explanation why he never entered appearance and why he did not file the present application as soon as he became aware of the court judgment. The application has been brought principally on the ground that when judgment was entered in favour of the Respondent, the Applicant had already refunded to the Respondent the amount that was awarded to the Respondent in the judgement and that the Respondent had failed to disclose this fact to the court. The Applicant has contended that to pay to the Respondent the judgment amount while the Respondent had already received the said payment would amount to unjust enrichment. I have noted from the documents attached to the Applicant's affidavit in support of the application that the agreement that the parties entered into to resolve the dispute over the agreement for sale dated 3rd February, 2011 was made on 25th January, 2018. This was after the court had rendered its judgment over the dispute on 22nd September, 2017. It is not correct therefore that as at the time the court made the judgement on 22nd September, 2017, the Applicant had already paid to the Respondent the amount that they had agreed on, on 25th January, 2018. I am also unable to see how a matter in respect of which the court had already delivered a judgment could be "settled" by the parties out of court. The parties are free to agree on the settlement of the decretal amount and even to vary the judgment of the court. However, for such agreements to be binding, they should be sanctioned by the court. Since the agreement that the Applicant reached with the Respondent after the judgment of the court was not approved by the court, the same cannot form a basis for the setting aside of the said judgment. The Respondent is however not at liberty to recover from the Applicant more than the decretal amount that was awarded by the court. Such move can be addressed by the court on an application for stay of execution rather than an application for setting aside judgment.

I am also not persuaded that the Applicant has arguable defence to the Respondent's claim. The court entered judgment against the Applicant in the sum of Kshs. 1,580,000/- plus costs and interest. The said sum of 1,580,000/- comprised of a refund of the purchase price that the Respondent had paid to the Applicant and survey fees. From the material placed before the court, the Applicant has admitted that he was liable to refund to the Respondent the payments that the Respondent had made to him pursuant to the agreement for sale between them. I am unable to see any defence that the Applicant can have to a claim for a refund of such payment. There is also no evidence that the Applicant has paid the amount of Kshs. 1,680,000/- that was the subject of his post judgment agreement with the Respondent. The documents placed before the court by the Applicant shows that he still owes Kshs. 350,000/-. In the acknowledgment of receipt of payment dated 18th August, 2018, the Applicant agreed to pay the costs of the suit. The costs of the suit were taxed at Kshs. 173,411.70/-. There is no evidence that this amount has been paid by the Applicant. I am not satisfied therefore that the draft defence annexed to the Applicant's affidavit raises any triable issues.

Conclusion:

In conclusion, I find no merit in the Notice of Motion dated 30th May, 2019. The application is dismissed. I however direct that in any future execution, the Respondent shall give credit to the Applicant for all the payments made by the Applicant to the

Respondent pursuant to the post judgment agreement that the parties had entered into on 25th January, 2018. Each party shall bear its own costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mongeri for the Plaintiff

Mr. Kiplagat for for the Defendant

Ms. Betsy Chelangat-Court Assistant