Case Number:	Environment and Land Case 129 of 2013
Date Delivered:	16 Dec 2015
Case Class:	Civil
Court:	Environment and Land Court at Busia
Case Action:	Ruling
Judge:	Anthony Kaniaru
Citation:	Joseph Rajula Lunani v Donald Oyatsi [2015] eKLR
Advocates:	none mentioned
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Busia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Prayer 3 in the application granted
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA

ELC. NO. 129 OF 2013.

JOSEPH RAJULA LUNANI.....PLAINTIFF

VERSUS

DONALD OYATSI .....DEFENDANT

RULING.

1. The application under consideration was filed here on 24th September, 2015 and is dated 22nd August, 2015. It is a Notice of Motion brought under Sections 3 and 3A of the Civil Procedure Act (cap 21) Order 10 Rules 7, 11 and 12, Order 51 of Civil Procedure Rules, Section 76 of Land Registration Act 2012, and all enabling provisions of Law. The application is brought by the defendant – DONALD OYATSI – against the plaintiff – JOSEPH RAJULA LUNANI.

2. As filed, the application has six (6) prayers but for consideration at this stage are paryers 3, 4, 5 & 6, which are as follows:

Prayer 3: That the exparte orders made on 16th June, 2015 entering judgment in favour of the plaintiff/respondent together with the consequential orders be set aside and the consent order of 26th January, 2016 (") be set aside.

Prayer 4: That the period within which to comply with the consent order of 26th be extended appropriately.

Prayer 5: That there be leave to apply.

Prayer 6: That the cost of this application be provided for.

3. The grounds spelt out in support of the application state interalia, that the counsel holding brief for the defendants advocates inadvertently misplaced the relevant file; that because of that, the counsel holding brief was not able to communicate to defendants counsel the consent order of 26th January, 2015 which had granted the defendant 30 days to file and serve defence and counter-claim; that the defendant did not in any way contribute to the delay; that the application dated 24th March, 2014 which vacated the consent order was never served on the defendant's counsel; that the subject matter is land and therefore the need to hear it on merits; and that the plaintiff can be compensated with costs.

4. The plaintiff responded vide a replying affidavit filed on 7th October, 2015. The averments of the defendant were termed as untrue. The application had its hearing date taken in presence of Manwari, who was the counsel holding brief, and failure by Manwari to diarise the hearing date was said to be no excuse. And if the defendants file was misplaced, it was averred that the court file itself was available and could be accessed. It was pointed out too that the defendant had advanced similar reasons as those advanced herein to set aside an earlier judgment entered against him. The defendant is thus accused of abusing the court process.

5. Submissions were availed in lieu of oral hearing. The defendants submissions were filed on 15/10/2015. The submissions generally re-state and amplify what the defendants application contains. In addition the decided cases of **PATEL VS E.A. CARGO HANDLING SERVICES LTD [1974] E.A 75, GIRADO VS ALAM & SONS LTD [1971] E.A 448** and **CENEAST AIRLINES LTD VS KENYA SHELL LTD [2000] 2 E.A 362** were all availed to articulate various legal standpoints.

6. In particular the decided cases emphasized that the courts discretion to set aside a default judgment is unlimited and unfettered (Patel's case). And this is so even where there is no sufficient cause shown for failure to enter appearance considering that it is necessary to avoid injustice against the applicant (Girado case). The main concern, it was emphasized, is to do justice and the court will not impose conditions on itself to fetter its wide discretion (Ceneast Airlines case).

7. The plaintiffs submissions were filed on 16th November, 2015. By and large, the submissions reiterated what was averred in the replying affidavit.

8. I have considered the application, the response made, and the rival submissions. It appears clear that when the suit herein was filed, a judgment similar to the one contested now was entered for reasons of non- entry of appearance and/or filing of defence. The defendant filed an application contesting that judgment but it appears clear that the application was compromised when both side entered a consent allowing the defendant to file defence and counter-claim.

9. The defence and counter-claim were to be filed within 30 days, something the defendant didn't do. The plaintiff then filed the application dated 24th March, 2015 seeking re-entry of judgment against the defendant. The date for hearing of the application was taken in court on 27th May, 2015 in presence and concurrence of Manwari, the counsel instructed to hold brief. The date taken was 16th June, 2015. When that day (16/6/2015) came, nobody from defendants side was present, not even Manwari. It was clear too that application was not responded to. The court treated it as na unopposed application and allowed it.

10. That is what gave rise to the present application. Manwari says he inadvertently misplaced the file. That is meant to explain why he couldn't file defence and counter-claim within the period allotted. If that was the only thing Manwari failed to do, one would understand and treat it as excusable. Unfortunately however, Manwari failed to do more: the plaintiff applied for re-entry of judgment against the defendant and Manwari clearly became aware of it since the hearing date was taken in his presence. He went away and apparently forgot it. The consequence was entry of judgment yet again against the defendant.

11. According to defence, the defence should have been served. The court disagrees. Manwari was aware of it. He should have communicated everything to the defence. It is clear that Manwari has been the counsel holding brief for the defence counsel. A similar situation arose in the case of **WANDERI & OTHERS VS PUBLIC TRUSTEE & 9 OTHERS [2009] KLR 562.** The court held that notwithstanding the provisions of the then Order III Rule 6 of Civil Procedure Rules, the applicant having granted authority to her main advocate to delegate her brief, it could not lie in her mouth to complain that the other advocate who had been served on her behalf had no authority to accept service.

12. To this court, no convincing reasons have been proffered to justify failure to utilize the second chance given by the court and the buck stops with Manwari. He behaved in a dilatory manner. First, he failed to ensure filing of defence and counter-claim. Second, knowing that that had not been done so, and the application for re-entry of judgment was a foot, he failed to respond to the application or at least inform the defence counsel about the new development.

13. That said, something pricks the conscience of the court here. Nothing can be blamed on the defendant himself yet what might happen if the application herein is not allowed is bound to affect him most, It is the defendants counsel, not the defendant himself, whom is to blame for all that happened.

14. In **GITHIAKA VS NDURIRI [2004] 2 KLR 67,** the court held interalia that mistakes by counsel are not reason for denying an otherwise deserving applicant for a favourable exercise of discretion. In **TULIP APARTMENTS LTD & ANOTHER VS SOUTHER CREDIT BANKING CORPORATION LTD & Another [2002] 2 KLR 357,** an objection had been raised that counsel appearing for a party had no practicing certificate. The court sympathized with such party for the predicament he found himself in and observed that to say that such a party must be punished would appear unfair.

15. This is the same situation that obtains here. The court must be alive to the fact that the defendant is not to blame. The blame lies elsewhere. I have looked at the defence and counter claim proposed to be filed. They merit consideration just as much as the plaintiffs suit itself. It is for this reasons that 1 will exercise my discretion in favour of the defence. I must however warn that the lackadaisical approach adopted by the defence in handling this matter cannot be tolerated indefinitely. The defence must pull up its socks and get things moving. Prayer 3 in the application is hereby granted. The defence however will pay the costs of the application.

A.K. KANIARU.

JUDGE.

DATED AND DELIVERED ON 16TH DAY OF DECEMBER, 2015

IN THE PRESENCE OF;

PLAINTIFF……

DEFENDANT……

COUNSEL……..

JUDGE.