Zeki Wanjala Wanyama t/a Zeki Motors Agencies v NCBA Bank Kenya PLC & another (Civil Suit 2 of 2021) [2022] KEHC 16588 (KLR) (28 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL SUIT 2 OF 2021

DK KEMEI, J

NOVEMBER 28, 2022

BETWEEN

ZEKI WANJALA WANYAMA T/A ZEKI MOTORS AGENCIES .... PLAINTIFF

AND

NCBA BANK KENYA PLC .... 1ST DEFENDANT

GARAM INVESTMNTS AUCTIONEERS .... 2ND DEFENDANT

RULING

1. Vide a notice of motion application dated June 6, 2022 and an affidavit in support sworn on even date, the applicant sought the following orders:

   i. Spent;

   ii. That pending hearing inter-parties this honourable court be pleased to stay the proceedings and subsequent delivery of judgement emanating from the ex-parte hearing conducted on May 16, 2022.

   iii. That pending the hearing and determination of the application, this honourable court be pleased to issue an order of stay of the proceedings and orders/directions of May 16, 2022 that allowed the matter to proceed in the absence of the 1st defendant/applicant and/or its witnesses.

   iv. That this honourable court be pleased to set aside its orders of May 16, 2022 that allowed the proceedings of this matter in the absence of the 1st defendant and/or its witnesses and substitute the same with orders re-opening cross-examination of the plaintiff/respondent and the eventual hearing of the 1st defendant/applicant's case.

   v. That this honourable court be pleased to re-open this suit and make orders allowing the 1st defendant and its witnesses to participate in the proceedings, call witnesses, produce evidence

and tender documents for purposes of a fair trial and just determination of real issues of dispute herein.

vi. That this honourable court be pleased to stay and set aside al its orders of May 16, 2022 and subsequently facilitate fresh hearing of the plaintiff, his witnesses and 1st defendant and/or its witnesses for interest of justice.

vii. That costs of the application be in the cause.

2. The application is premised on the grounds set out on the body of the motion and the supporting affidavit of Emmanuel Mumia sworn on June 6, 2022. In brief, the applicant's case is that, the matter was fixed for hearing on January 18, 2022 but later adjourned and the parties were directed to fix a fresh hearing date at the registry. The plaintiff/respondent fixed *ex-parte* a fresh date and served the hearing notice through the 1st defendant's office email on February 25, 2022. Without the 1st defendant/applicant's knowledge, the email was received as a spam email and directed to the junk emails. The 1st defendant/applicant only became aware of the email on June 3, 2022 upon receipt of final submissions and learnt that the matter did proceed for hearing on May 16, 2022 where the court directed the filling of final submissions pending judgement. The applicant had duly complied with the case management in this mater by filing witness statements and its bundle of documents and had no intention of deliberately absconding the hearing.

3. The applicant further contends that it stands to suffer immense financial loss if not offered a chance to participate in the proceedings, call witnesses, produce evidence and tender documents for purposes of fair trial and just determination of real issues in dispute.

4. The plaintiff/respondent has however, opposed the application vide his replying affidavit sworn on July 1, 2022. He contends that the application is brought in bad faith and deserves to be dismissed. According to him, the record does attest the applicant has been too casual in the matter and that upon the satisfaction of the court that the 1st defendant/applicant had been properly served with the hearing notice through its official email address, the court allowed him to proceed *ex-parte*. The 1st defendant/applicant has failed to demonstrate that failure to attend court was occasioned by technological hitches and hence the present application is an abuse of court process which should be dismissed with costs.

5. By the direction of this court, the application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.

6. Vide submissions dated August 1, 2022 the 1st defendant/applicant submitted that the grant of stay of proceedings is discretionary and that the same power must be exercised judiciously. According to counsel, the 1st defendant/applicant was not aware of the email serving the hearing notice for May 16, 2022 as the 1st defendant/applicant's email service at that time was experiencing a technological hitch that paralyzed receipt of emails. It was submitted that the 1st defendant stands to suffer immense loss if the orders are not granted so as to enable it participate in the proceedings and protect its interests. It was also submitted that the application has been made timeously upon the applicant's knowledge of the ex-parte proceedings and that the applicant stands to be driven from the seat of justice without an opportunity of presenting its case. It was finally submitted that the plaintiff/respondent will not suffer any prejudice if the application is allowed and the suit re-opened for hearing interpartes.

7. The plaintiff/respondent submitted that the applicant only seeks to set aside the orders of the court issued on May 16, 2022 and not the respective proceedings and without the order of setting aside the proceedings and hence the request is invalid since submissions are not pleadings. Counsel submitted that setting aside of proceedings is all upon the discretion of the court and urged this court to find the application incompetent. It was also submitted that the applicant has not given credible and plausible

reasons why it was not present during the hearing of the matter and hence the application should be dismissed with costs.

8. I have considered the rival affidavits and the submissions of both learned counsels including the authorities cited. As a result, I find the following issues necessary for determination:

   i. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

   ii. Whether the hearing should be re-opened for the applicant to cross examine the Plaintiff and to proceed to call its witnesses.

9. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

> "This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." (emphasis added)

10. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

11. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011) observed that:

> "Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ..."

12. In this case, the reason given for the 1st defendant's failure to attend court is that it was not aware of the email serving the hearing notice for May 16, 2022 as the 1st defendant/applicant's email service at that time was experiencing a technological hitch that paralyzed receipt of emails. The question that arises is whether the applicant failed to attend the hearing on the said date due to willful neglect or deliberately to delay the course justice. Having carefully considered the explanation given by the applicant and the circumstances of this case, I am satisfied that the failure to attend the hearing by the applicant was not due to its negligence but a genuine error on their technological apparatus, an error that is common especially with cases of full drive storage. Consequently, I hold that the applicant has demonstrated a sufficient cause upon the court to enable it exercise its discretion.

13. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any defence which raises triable issues. In [Patel v East Africa Cargo Handling Services Ltd](#) (1974) EA 75 Duffus P held that:

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

14. Again, in the case of *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the court stated:

> " The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues." (Emphasis theirs)

15. Flowing from the foregoing precedents, it appears clear that for the court to exercise discretion to set aside a regular judgment entered for non-attendance, the applicant must demonstrate to the court by affidavit evidence that-

    a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;

    b) The application for setting aside was made without unreasonable delay;

    c) The applicant has an arguable defence that raises triable issues;

    d) He/she stands to suffer more prejudice compared to the opposing party if the application is declined;

    e) The interest of justice demands that the application be allowed.

16. I have considered the defence filed by the applicant and noted that a charge was registered over a suit property in favour of the 1st defendant/applicant for a loan facility amounting to Kshs 24,000,000/= which was extended to the plaintiff/respondent and that due to his failure to repay the same, it wishes to exercise its statutory power of sale. I have also considered the documentary evidence filed together with pleadings by both parties and formed the opinion that the defence by the applicant is not frivolous but one that raises triable issues. Suffice to add that the 1st defendant/applicant duly complied with the pre-trial directions by filing witness statements and documents in support of their case. It is also noted that the applicant herein has indicated that it is desirous of fast tracking the matter by seeking to have the plaintiff's case reopened so that the plaintiff can be cross-examined and thereafter the 1st defendant will tender its defence evidence. I find the suggestion to be proper and will not unduly delay the plaintiff. In any event, justice demands that every party to a suit ought to be allowed to have his day in court. Further, the plaintiff's concerns could be taken care of by an award of costs.

17. Finally, the discretion to set aside *ex-parte* proceedings must be done upon terms which are fair to both parties. In this case, the plaintiff has closed his case and is yet to file written submissions and that the court has not yet rendered any judgment. Setting aside the *ex-parte* proceedings and reopening the case

for hearing will definitely not prejudice the plaintiff. The plaintiff/respondent has not shown that the prejudice he stands to suffer cannot be remedied by costs.

18. Having found that the applicant has demonstrated sufficient cause warranting setting aside of the orders of May 16, 2022; that its defence raises triable issues; and that the respondent will not suffer damage which cannot be remedied by costs, I proceed to allow the application dated June 6, 2022 in the following terms:

    a. The ex-parte orders issued on May 16, 2022 are hereby set aside to the extent that the hearing is reopened and that the 1st defendant/applicant is allowed to cross examine the plaintiff/respondent as well as any witnesses that had testified.

    b. That upon the applicant cross examining the respondent and his witnesses, the 1st defendant to present its evidence.

    c. The 1st defendant/applicant is hereby ordered to pay the plaintiff thrown-away costs of Kshs 15,000 which should be paid before the hearing date.

    d. Parties to fix the matter for hearing on priority basis.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022

D.KEMEI

JUDGE

In the presence of :

Mumia for 1st defendant applicant

No appearance Nyangacha for Plaintiff Respondent

No appearance for 2nd defendant

Kizito Court Assistant