



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL SUIT NO. 1 OF 2020

WYCLIFFE MWAVALI ONDARI.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAROK.....1ST DEFENDANT

KESIKE OLE WOTUNI.....2ND DEFENDANT

RULING

1. The file herein emanates from Narok High Court and was transferred to Naivasha following the orders of Bwonwong'a J on 14th July 2020, upon his recusal in the matter.

2. What is before this court is an application by notice of motion by the defendant dated 7th July 2020, which seeks the following orders:

a. That the Court do grant stay of proceedings in Misc Applic No 6 of 2020 in the Chief Magistrates Court Narok, pending the hearing and determination of this application;

b. That the court do set aside its order dated 24th January 2019 dismissing the defendants' application of 30th January, 2018 for non-attendance.

c. That the court be pleased to direct that the main suit be heard and determined on priority basis

3. The application is contested by the Plaintiff.

4. The application is brought under **Order 12 Rule 7** which provides:

***“7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*”**

The Rule applies in respect of judgments entered due to non attendance in terms of Order 12 Rule 1 which states:

***“1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”*”**

5. The proceedings in Miscellaneous No. 6 of 2020 in the Chief Magistrate's court that are sought to be stayed were filed by the plaintiff. They seek to cite the defendant's officers for contempt of court for failure to settle the decretal sum that was awarded by a consent recorded in court for Kshs 50,000,000/- on 1st November, 2017. I need not delve into that matter, save to note that the consent was set aside by the court's ruling in Narok on 6th February, 2018, which decision was appealed in the court of appeal. That consent is therefore still the subject of a dispute.

6. The order of 24th January 2019 dismissing the defendant's application of 30th January 2018 for non-attendance, arose in the following circumstances.

7. Following the setting aside of the consent judgment, the plaintiff was dissatisfied and appealed to the Court of Appeal. According to the record, on 29th November, 2018 Mr Andama holding brief for the plaintiff, and Mr Kamwaro holding brief for the Defendants, were in court. Mr Andama informed the court that they had an Appeal in the Court of Appeal, No 26 of 2018. In light thereof:

“We intend to apply for directions once the Court of Appeal has heard and determined the appeal”

They applied that a mention date be given to give an update on the status of the appeal.

8. Mr Kamwaro on the same date pointed out that since there was no order from the Court of Appeal stopping the ongoing proceedings in the High Court, they should proceed:

“[We] urge the Court give us a hearing date. There is nothing to stop this court from fixing a date for hearing and determining this matter”

9. The Court then stated:

“Proceedings in this court can be stayed by this court upon application by a party or by order of the Court of Appeal. The court has not stayed its proceedings. There is no order of the Court of Appeal staying this Courts proceedings in the circumstances, this matter will have to proceed with the result that the application of the plaintiff is hereby dismissed

Order: Hearing on 24/1/2019”

10. Both parties having been present when the hearing order was given, they were expected to be present at the continuation of the hearing of the outstanding proceedings, which had neither been stayed by an order of the Court of Appeal or by the Court itself. There was no indication that the matter could or would not proceed.

11. The record shows that the day immediately following the fixing of the hearing date, the Defendants – in an act of prudence and for good measure – issued a Hearing Notice dated 30th November, 2018, to the Plaintiff (“ESL 9” in the supporting affidavit of Elizabeth Sanangoi Lolchoki, County Secretary of Narok County).

12. By a letter dated 18th January, 2019, seven days before the date fixed for the hearing, the plaintiff’s Counsel, Mary Muigai, wrote to the defendant making reference to the defendant’s aforesaid Hearing Notice (“ESL 10”). They stated:

“By this letter we notify you that we shall be unable to attend the hearing for the following reasons:

1. That the undersigned who is conducting subject matter before Narok Court was already scheduled to attend hearing of ELC 491 of 2017, in Muranga court....

2. An appeal from the ruling dated 6th February 2018 by this court has already been lodged at the court of appeal, Nakuru.

3. Narok High Court is functus officio in this matter”

Kindly do indulge us.” (Emphasis supplied)

13. Upon receipt of the said letter, the 1st defendant’s counsel wrote to the Deputy Registrar a letter dated 22nd January, 2019, stamped received by the Narok High Court on 23rd January, 2019, (“ESL 11”) stating:

“Vide a letter dated 18th January, 2019, counsel for the plaintiff informed us that they will not be in a position to attend to the Hearing slated for 24th January, 2019 for reasons indicated in the said letter and therefore sought for our indulgence (enclosed for ease of reference).

In light thereof, we should be pleased if the matter was vacated from the day’s cause list.” (Emphasis supplied)

14. The record of the proceedings of 24th January, 2019, the hearing date, show that none of the parties’ counsel were in attendance. Hence, the Court issued the following Order:

“Since hearing date was taken by consent of counsel who were present, then the defendant’s application is hereby dismissed with no order as to costs.” (Emphasis supplied)

15. The only recorded basis upon which the court dismissed the defendant’s application was the failure of the parties to appear when they had taken the date in court. The court was however unaware that the parties had – on record – reasons for non-appearance which were not brought to its attention. That information, had it been in the knowledge of the court, the court would not, or ought not, have taken the decision to dismiss.

16. This court's powers to set aside ex parte orders are discretionary. It is always expected to exercise its discretion judiciously to come to a conclusion while also ensuring that justice is done and seen to be done. Discussing the setting aside of default judgment, the Court of Appeal in **Patel v E.A Cargo Handling Services Ltd (1974) EA 75**, stated this succinctly as follows:

“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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

17. Given the material on record, it is abundantly clear that: Firstly, the court was not made aware of, and did not take into account, the communications between the parties and the court – ultimately, and properly – seeking indulgence and vacation of the hearing date; Secondly, that the plaintiff was asserting their non-attendance on the basis, inter alia, that the court was functus officio, a matter that was subject to a formal determination, and; Thirdly, that the plaintiff had not at any time indicated that it had abandoned its application or its other rights to hearing.

18. The decision of the Court dismissing the plaintiff's application was therefore not based on proper grounds, judiciously arrived at, as indicated. That decision in dismissal, however amounted to a final determination; perhaps – without going into the details of thereof – a judgment. This has been held in many authorities such as the cases of **Njue Njagi v Ephantus Njiru & Anor. [2016] eKLR** and **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** where it was argued that the dismissal of a suit for non-attendance amounts to a judgment in that suit. The Court of Appeal in **Njue Njagi v Ephantus Njiru & Anor (supra)** stated thus:

“Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order; “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.”

19. In my view, the outcome in this matter is not a matter that necessitates serious contestation. Thus, I have no hesitation in readily setting aside the court's order of 24th January, 2019, as I hereby do, as if the same were an error on the face of the record; for the parties had jointly sought or consented to the vacation of the hearing date for the reasons given and updated in the court file. The only hitch was that the court was not apprised thereof.

20. Having set aside the court's orders of 24th January, 2019, the parties are returned to the position they would have been in, had the dismissal not been issued by the court. In the result, the proceedings in the lower court in Miscellaneous Application No 6 of 2020, are hereby stayed pending hearing of the matter herein.

Administrative directions

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

22. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 23rd Day of February, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Kere for the Plaintiff
2. No representation for Mungai Kemei for the Defendant
3. Court Assistant – Quinter Ogutu