



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.52 OF 2014

GEORGE GACHAGUA T/A CLUB SIGNATURE.....PLAINTIFF/APPLICANT

-VERSUS-

THE STANDARD GROUP LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 18th June 2018. It seeks to set aside proceedings of 9th May 2019 and 28th May 2019 and for court to extend time within which parties comply with **Order 11 of the Civil Procedure Rules**.
2. Grounds on the face of the application are that after plaintiff filing this suit and being served with defence, he failed to prosecute this suit for more than 900 days leading to notice to show cause dated 10th May 2018 being filed; that the plaintiff filed affidavit in response to notice to show cause; that no appearance was made on the defendants behalf on 24th January, 2019 when the matter was mentioned. The matter was rescheduled to 6th March 2019. The defendant later learned that the matter proceeded for hearing on 9th May 2019 and 28th May 2019 when the plaintiff testified and closed his case followed by closure of defendant's case.
3. The application is supported by affidavit sworn by **Caroline Cheruiyot**, the legal officer of the defendant. She restated grounds on the face of the application captured above.
4. She further averred that its lack of communication by their former Advocates on record that the defendant did not appear in court to defend this suit and that mistake on part of counsel should not be visited on the defendant as if allowed, the defendant will suffer irreparable damage. And if allowed no prejudice will be suffered by the plaintiff as the plaintiff will still have a chance to testify and cross examine the defendant. She urged court to exercise discretion to set aside the proceedings and look at justice on both sides.
5. In response the respondent filed replying affidavit sworn by Denis Mwathe Advocate on 29th July 2019. He averred that the application has not met threshold for setting aside the proceedings of this honorable court on 9th May 2019 and 28th May 2019. He added that contrary to assertions that the defendant/applicant has always been keen to have this matter heard, it took no steps towards fast-tracking it.
6. The respondent/plaintiff aver that despite notifying the defendant/applicant of all the mentions and hearings, the defendant nor its Advocates failed to attend court. That the defendant's/applicant's failure to participate in the proceedings was deliberate and aimed at delaying the hearing and determination of this suit and was ultimately an abuse of this court's process.
7. He averred that the purported mistake of the defendant's counsel/Advocate through miscommunication or otherwise is not sufficient to set aside proceedings in this matter.

ANALYSIS AND DETERMINATION

8. I have perused the court record and note that this matter first came up for hearing on 24th January 2019 but it could not proceed as the defendant was served with erroneous hearing date. The matter was fixed for hearing on 6th March 2019. On that date it was mentioned in the registry and fixed for hearing on 9th May 2019, on 9th May 2009, the defendant failed to attend court for hearing. An affidavit of service filed confirmed that the defendant was served with hearing notice on 6th March 2019. I noted that the hearing notice was stamped as received and directed that the case do proceed for hearing. On 28th May 2019 when the matter was scheduled for hearing, I noted that hearing notice attached to affidavit of service filed was stamped as received by defendant's Advocate.
9. It is evident that on the two occasions the defendant's Advocate was served with hearing notices. The legal officer has however indicated that they lacked communication from their lawyer. It is the responsibility of the Advocate to communicate to client. No sufficient reason has been advanced for defendant's failure to attend court on the two occasions. In view of the fact that plaintiff is unlikely to be prejudiced by allowing the defendant participate in this proceedings the defendant having demonstrated interest in defending this suit, it would be

appropriate for this court to exercise its discretion and allow defendant to set aside proceedings.

10. FINAL ORDERS

1. Proceedings of 9th and 28th May 2019 are hereby set aside on condition that thrown away costs of kshs 20,000 are paid by defendant within 30 days from the date of this ruling.

2. Failure to comply with order 1 above, the case to proceed from where it had reached.

Ruling dated, signed and delivered at Nakuru this 30th day of January, 2020

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Mr. Okumu holding brief for Kibe Counsel for plaintiff

M/s Sambu holding brief for Okiro Counsel for defendant