



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 635 OF 2010**

**EDWARD NGERA MWANGI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**PHILLIS ROSE WAMBUI THUO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**VERONICA NDINDA KIMENDE.....DEFENDANT/APPLICANT**

**RULING**

1. The application dated 24<sup>th</sup> February, 2020 seeks the following orders:

**1. Spent.**

**2. The honourable court be pleased to grant a date on priority basis for the hearing and dispensation of the Defendant/Applicant's application dated 6<sup>th</sup> April, 2011**

**3. In the alternative to prayer (2) above, the honourable court be pleased to grant prayer (3) & (4) of the Defendant's application dated 6<sup>th</sup> April, 2011.**

**4. The costs of this application be provided for.**

2. It is stated in the grounds and the affidavit in support of the application that the Applicant was served with a Notice to Show Cause dated 2<sup>nd</sup> January, 2020. That subsequently the Applicant instructed her current Advocates, Imbosa & Associates Advocates to appear for her in the matter on 6<sup>th</sup> February, 2020 and seek more time to peruse the court file and file a response to the Notice to show Cause. That they were allowed more time and upon perusing the court file and the ruling herein dated 16<sup>th</sup> February, 2017, the Advocate advised her to file an application to have the application dated 6<sup>th</sup> April, 2011 heard and determined on priority basis.

3. That the Plaintiff's herein had abandoned this matter as it was last in court on 16<sup>th</sup> February, 2017 and on 4<sup>th</sup> February, 2019 the court issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution. That it is when the Plaintiff's herein revived the matter. The Applicant blamed her previous advocates for failing to inform her of the service and proceedings in regard to the Notice to Show Cause and further blamed the previous advocates for acting negligently and failing to defend her interests in accordance with the instructions she had given in January, 2019.

4. It is further averred that in January 2019, the Applicant suffered a fracture of the right knee while she was in the house. That this second fracture complicated the initial fracture she had suffered and caused her health to deteriorate further. That the Notice to Show Cause why she should not be arrested and committed to civil jail in execution of the decree herein proceeded *exparte*. That as per the Notice to show Cause dated 2<sup>nd</sup> January, 2020 the decretal sum is Ksh.16,203,598.49 and therefore she stands to be greatly prejudiced.

5. The Applicant further stated that she was charged in a criminal Case **CMCR Milimani No CR 1510 of 2012** arising from the same subject matter herein and was acquitted in December, 2018. That in the year 2009 the Applicant had suffered a life altering gunshot injury to the right leg femur for which she had several surgeries which have caused her to be disabled.

6. That the injuries have affected her mentally and physically and she has been unable to follow up on her advocate and the instructions given. That the Applicant has developed depression and chronic gastritis due to the unhealed bone structures and is currently being treated at Mathari. That the Applicant has also suffered loss of livelihood and is unable to conduct her day to day business.

7. The application is opposed. It is stated in the replying affidavit that the application is an abuse of the court process and is made in a bid to buy time so that the judgment herein is statutorily barred on expiry of 12 years. That prayer No. 2 herein seeks the fixing of a hearing date for the application dated 6<sup>th</sup> February, 2011 on priority basis but the court had fixed the said application for hearing but it was taken out as the Applicant's Advocate was not ready to proceed and the Applicant did not thereafter fix it for hearing.

8. That prayer No. 3 of the application in the alternative to prayer No.2 seeks orders that prayer (3) and (4) of the application dated 6<sup>th</sup> April, 2011 be allowed. That the same alternative prayer is outrageous and unknown in law and the Civil Procedure Rules and should be dismissed.

9. It is further contended that judgment was entered herein on 7<sup>th</sup> May, 2011 and a certificate of costs issued on 15<sup>th</sup> June, 2011. That the application dated 6<sup>th</sup> April, 2011 was not served until on 3<sup>rd</sup> December, 2014 when the court made orders for the said application to be served. That service was not effected until 27<sup>th</sup> January, 2015. That a replying affidavit was filed and served on 2<sup>nd</sup> February, 2015 but instead of fixing the application for hearing, the Applicant filed the application dated 9<sup>th</sup> February, 2015 seeking to have this matter allocated to a different court which application was dismissed on 16<sup>th</sup> February, 2017.

10. The Respondent further stated that since the entry of the judgment herein the Applicant has filed numerous applications to scuttle the execution process and buy time. That Notice to Show Cause has been issued more than ten (10) times but the execution process has not yet born any fruits.

11. The application was canvassed by way of written submissions which I have considered.

12. The background to the instant application is that vide a plaint dated 22<sup>nd</sup> December, 2010 and filed the court on 23<sup>rd</sup> December, 2010, the Plaintiffs prayed for judgment for the sum of Ksh.7,931,410/= interest and costs. The said amount of money is stated to be the loss suffered by the Plaintiffs following a failed transaction for the purchase of a property NBI/Block/12/128 when the Defendant was engaged by the Plaintiffs as their advocate. Judgment was entered for the said sum of money on 21<sup>st</sup> December, 2011 after the Defendant who had been served with summons failed to enter appearance and/or file a defence.

13. On 6<sup>th</sup> April, 2011 the Defendant filed the application dated 6<sup>th</sup> April, 2011 which seeks the following orders:

**1. This application be hereby certified urgent and be heard ex-parte in the first instance.**

**2. This honourable court be pleased to set aside, vary or review judgment entered in default of appearance on 21<sup>st</sup> March, 2011 by the honourable Deputy Registrar.**

**3. This honourable court do hereby grant a stay of execution of the aforementioned judgment and any consequential orders pending the hearing and determination of this application and suit.**

**4. This honourable court do hereby grant leave to the Defendant/Applicant to enter appearance and defend the suit against her.**

**5. The cost of this application be provided for.**

14. The application dated 6<sup>th</sup> April, 2011 is still pending and has never been disposed of. In the meantime, the Plaintiffs have been trying to execute the decree herein. The Defendant in the meantime filed the certificate of urgency dated 28<sup>th</sup> November, 2014 seeking orders that the application dated 6<sup>th</sup> April, 2011 be fixed for hearing and disposed of urgently as warrants of Arrest orders had been issued against her and there was a real risk of being committed to civil jail. Subsequently, an interim order of stay of execution was issued on 3<sup>rd</sup> December, 2014 but the same was lifted on 5<sup>th</sup> December, 2015 after the Defendant's side applied for adjournment.

15. Thereafter, the Defendant filed the application dated 9<sup>th</sup> February 2015 seeking leave for a new firm of advocates to come on record for her, that the interim orders of stay of execution vacated on 5<sup>th</sup> December, 2015 be reinstated and that the matter be allocated to a different court. The application was dismissed with costs. The court observed that the application dated 6<sup>th</sup> April, 2011 ought to be addressed. That was not to be. Subsequently, the current application was filed.

16. There is no sufficient explanation from the Defendant why the application dated 6<sup>th</sup> April, 2011 has taken so long to be prosecuted. There is no explanation why the said application was not fixed for hearing instead of filing the instant application which also seeks the fixing of the application dated 6<sup>th</sup> April, 2011 for hearing on priority basis.

17. This court has been asked to in the alternative grant prayers 3 & 4 of the application dated 6<sup>th</sup> April, 2011. The said prayer seeks grant of orders of stay of execution and leave to enter appearance and defend the suit. The grant of leave to enter appearance and defend the suit cannot be allowed at his stage while the judgment herein still stands and has not been set aside, varied or reviewed as prayed in prayer No. 2 of the application dated 6<sup>th</sup> April, 2011.

18. The delay in the prosecution of the application dated 6<sup>th</sup> April, 2011 is inordinate and not sufficiently explained. Although this court empathizes with the Defendant in respect of the issues of health averred in her affidavit, it is noted that the Defendant has all along had an advocate on record. Blame of negligence by the Defendant against her previous advocates ought to be a matter between the Defendant and her Advocates and cannot be visited on the Plaintiffs.

19. With the foregoing, this court finds no merits and the application dated 24<sup>th</sup> February, 2020. Consequently, the same is hereby dismissed with costs.

**Date, signed and delivered at Nairobi this 16<sup>th</sup> day of Dec., 2020**

**B. THURANIRA JADEN**

**JUDGE**