



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 496 OF 2014

JACKSON NGECHU KIMOTHO.....PLAINTIFF/RESPONDENT

VERSUS

EQUITY BANK KENYA LIMITED.....1ST DEFENDANT/APPLICANT

KENYA REVENUE AUTHORITY2ND DEFENDANT/APPLICANT

RULING

1. The subject of this ruling, are two notice of motion applications dated 26th September 2018 and 20th November 2018, filed by the 1st and 2nd Defendants (herein “the Applicants”) respectively. In a nutshell, the Applicants seek that;

(a) the Court stay the proceedings herein and the date set for judgment of the matter and allow the Applicants to re-open the Plaintiff’s case; and

(b) the Applicants be accorded an opportunity for hearing of their respective cases

2. The two applications therefore seek to set aside the orders issued on 13th and 27th September 2018 and all the consequential orders thereto.

3. The applications are based on the ground that the case was heard during the vacation and although the Applicants Counsels checked on the on-line cause list, the matter was not listed.

4. The Applicants argue that, the failure to attend Court was not malicious or intentional on the part of their Counsels but was due to an inadvertent or bona fide mistake which should not be visited on the litigants.

5. The 1st Defendant/Applicant averred that it has a meritorious defence with a high probability of success and has been diligent in prosecuting the suit to the extent that, it has been fixing and serving hearing dates upon the Plaintiff. On the other hand, the 2nd Defendant/Applicant averred that it has always been keen on the expeditious disposal of this matter and should be allowed to prosecute the case.

6. The Applicants aver that, subsequently they only learnt of the hearing of the Plaintiff’s case ex parte when they were served with submissions and a notice of the date for judgment scheduled for 29th November 2018. Therefore, it in the interest of justice that they be accorded an opportunity to be heard and that the Plaintiff will not suffer any prejudice which cannot be compensated by way of reasonable costs. To the contrary, the Applicants will suffer irreparable harm if they are condemned unheard.

7. The applications were opposed by the grounds of opposition dated 11th December 2018 by the Plaintiff (herein “the Respondent”), on the ground that on 30th April 2018, when the matter was fixed for hearing on 13th September 2018, all the parties were present in Court. Therefore, there was no need of issuance of a hearing notice or relying, or checking on the internet for confirmation of the said date. It was argued that the matter has been pending in Court since 2014 and most of the adjournments have been prompted by the Defendants/Applicants.

8. The parties disposed of the application by filing their submissions. The 1st Defendant/Applicant argued that it has shown sufficient cause for the orders sought for, to be granted in that, it has attached a copy of its defence dated 5th March 2012 to the replying affidavit to show that it raises triable issues for determination. That it seeks for indemnity from liability in that, in transferring the funds in issue it was acting

in adherence of its obligation pursuant to Section 96 of the Income Tax Act. It submitted that, the principles of natural justice require that a man should not be condemned unheard. Reliance was placed on the case of; James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another, Mombasa Civil Appeal No. 6 of 2015.

9. Finally the 1st Defendant submitted that, it filed this application without unreasonable delay in that it discovered the ex parte hearing on or about 21st September 2018 and filed the application on 26th September 2018.

10. The 2nd Defendant/Applicant stated that it has a constitutional right under Article 50 of the Constitution 2010 to a fair hearing and that right should not be taken away. Reliance was placed on the case of; HCCC 1058 of 2000 Charles Mwalia vs Kenya Bureau of Standards; where the Court held that a litigant should not be hindered from approaching a seat of judgment. The 2nd Defendant/Applicant also argued that it has a good defence and should not be condemned unheard. Reliance was placed on the case of; Charles Munyeki Wachira vs Kenya Pipeline Company Ltd – HCCC No. 128 of 2006.

11. Finally, the 2nd Applicant submitted that the Plaintiff can be adequately compensated via an award of costs and to deny a litigant a hearing should be the last resort of a Court. Further reference was made to the case of; Patel vs East African Cargo Services Ltd (1974) EA 75.

12. However, the Plaintiff/Respondent opposed the Applicants submissions by arguing that under Article 159 2(a) (b) of the Constitution of Kenya 2010, the Court is under an obligation to adjudicate cases without unreasonable delay. Similarly, Section 1B of the Civil Procedure Act obligates the Court to dispose of proceedings expeditiously.

13. The Plaintiff/Respondent argued that, delay defeats equity and the Court being (both a court of law and equity) “it is only right and equitable to bring this matter in total finality”.

14. The Respondent argued that prayer (1) of the application has been overtaken by events, as the matter has been finalized and scheduled for judgment. Therefore, the re-opening up of the case will be a waste of judicial time and should not be allowed. He relied on Order 12 rule 2 of the civil procedure rules.

15. Finally, the Plaintiff relied on the case of; Sameer Africa Limited vs Aggarwal & Sons Limited to argue that the main concern of the Court, is to do justice to the parties and that the Applicants must demonstrate that they have a defence which has merit, which they have failed to do.

16. I have considered the application and I find that there is no dispute that, when the matter was fixed for hearing, all the parties were present before the Court, and therefore the issue of service of a hearing notice and/or the cause listing of the matter would only serve as a reminder. It is indeed true that, the period within which the case was heard was during vacation, but it suffices to note that when the date was given, on 30th April 2018, and subsequent thereto, it should have been clear to the Applicants that the date was falling during vacation. If the Applicants were of the view that the case would not be heard, they should have moved the Court before the hearing for further directions. That was not done. In the alternative, even if the matter was not on the on-line cause list, the parties should have physically attended Court to seek for directions. The Plaintiff attended Court in compliance with the directions given on the hearing of the matter despite the fact that the matter was not on the on-line cause list. The saving grace though, is that, the legal Counsels appearing for the Applicants have acknowledged that, they are to blame for non-attendance of their Clients in Court on the hearing date. The questions that arise are; whether in the given circumstance; (a) the case should proceed to judgment as earlier ordered, or (b) the Defendants should be given an opportunity to be heard first.

17. To answer these questions, I will have regard to three issues; (1) the right of the Defendants to be heard; (2) whether the Statement of Defence filed raises any triable issues; and (3) the history of the matter. The fundamental tenet of the rule of law is that cases should be decided on merit and to that end justice is served by reasonably accommodating all parties. This reasonable accommodation is purposed upon protecting the meaningful exercise of a litigant’s constitutional right of access to Courts. (see Blair vs Maynard, 324 S. e.2d 391 (West Virginia 1994)). Right to be heard is enshrined under Article 50 of the Constitution of Kenya 2010 and in the rules of natural justice. In that regard, these provisions fall in favour of the Applicants.

18. However, in exercising its discretion in favour of the Applicants, there must be a genuine mistake inadvertence or excusable neglect on the party who failed to defend the case and that the application to set aside ex parte orders must have been made timely.

19. I have considered the pleadings, and note that the Plaintiff seeks for special and general damages, interest and costs on the ground that, the Applicants herein acted with negligence by debiting his Bank account held by the 1st Defendant with a sum of Kshs. 6,252,136.15 alleged to be tax amount due and owed to the 2nd Defendant without his knowledge.

20. In response, the 1st Defendant filed a statement of defence and at paragraph 8 thereof, and averred that it acted within the scope and limit of the agency and will be seeking for appropriate indemnity from the 2nd Defendant, as it debited the Plaintiff’s account on the authority of the agent’s notice as demanded by the 2nd Defendant under the agency notice.

21. The 2nd Defendant on its part argues that, it issued a notice to the 1st Defendant after assessing the tax payable by the Plaintiff and after the Plaintiff failed to comply with the request for production of records. Therefore it followed the lawful procedure of investigation, collection of evidence, assessment of tax and enforced collection by an agent’s notice. As a matter of fact, the 2nd Defendant has a counter claim against the Plaintiff.

22. It is therefore clear that, there are triable issues as to whether the Plaintiff owed the alleged tax amount due or whether the 1st Defendant

had authority to act on the agent notice served on it by the 2nd Defendant, and/or whether the 2nd Defendant was entitled to the said sum of money. It will be in the interest of justice that the parties are heard.

23. I have considered the history of the matter and I find that from the Court record, this matter was certified ready for hearing on 4th March 2016. On 26th May 2016, it could not be heard because the trial judge had been transferred. On 1st November 2016, the Plaintiff was absent, and on the 13th September 2018, the Applicants were absent. From the above record that the Applicants cannot be squarely blamed for any delay in the hearing of this matter.

24. In the given circumstances and for reasons given above, it will be in the interest of justice to accord the Applicants an opportunity to be heard. If the Plaintiff/Respondent will suffer any prejudice, I find that it can be compensated by way of costs.

25. To mitigate any prejudice that the Plaintiff may suffer as a result of the reverse gear in the hearing of this matter, I order that, the Applicants Counsels not litigants pay the Plaintiff/Respondent throw away costs of Kshs. 10,000.00 each on or before the next hearing date for the matter. In the meantime, I will not set aside the proceedings of 13th September 2018, but will accord the Applicants an opportunity to cross-examine the Plaintiff and prosecute their respective cases.

26. The costs of this application are awarded to the Plaintiff/Respondent but will be covered within the throw costs already awarded.

27. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 27th day of February 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Onwaya for Mr. Ondieki for the Plaintiff/Respondent

Mr. Kalei for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Applicant

DennisCourt Assistant