



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 32 OF 2015**

**JOSEPH KOITUMET NGAUR *Suing as the father and Legal guardian of the***

*Estate of Elijah Sunte Melomuki Koitumet.....***PLAINTIFF/RESPONDENT**

**VERSUS**

**JACOB LEMASIKA KIPAA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ODHIAMBO COLLINS.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. By an application dated 28<sup>th</sup> March, 2019 expressed to be brought under **Order 10 Rule 11 of the Civil Procedure Rules and Section 3A and 63E of the Civil Procedure Act** the defendant/applicant herein seeks the following orders:-

**1. Spent**

**2. Spent**

**3. THAT at the interpartes hearing, this court be pleased to set aside its judgement/ Decree and all consequential orders thereto issued on 5<sup>th</sup> Day of August, 2016.**

**4. THAT this honourable court be pleased to set aside the proceedings conducted in this matter and set down this suit for hearing de novo on priority basis.**

**5. THAT costs of this application be provided for.**

2. The application is supported by the affidavit of Jacob Lemasika Kipaa, the defendant/applicant, in which he states that the his counsel previously on record entered a consent that was not within his knowledge and that the said advocate did not carry out the instructions of the insurer to institute third party proceedings as well as came on record for the 2<sup>nd</sup> Defendant who was not a policy holder and also failed to have on record the witness statements of the 1<sup>st</sup> Defendant and as such he was condemned unheard.

3. The applicant/deponent adds that he has a triable defence that raises issues of liability for consideration and further that due to the fact that the decretal sum exceeds Ksh 3m/- he shall suffer great prejudice and immense loss.

4. The plaintiff/respondent opposed the said application through the replying affidavit of Joseph Koitumet Ngaur sworn on 2<sup>nd</sup> April, 2019 in which he states that the instant application should be dismissed because there is no default judgement in record to invoke Order 10 of the Civil Procedure Rules; that the judgement on record is pursuant to the consent of the parties; there is no draft defence on record; the applicant is guilty of laches and that the respondent shall suffer prejudice. He further depones that none of the proceedings was conducted ex-parte and there is a regular judgement on record and that it has taken the applicant two years from the date of the judgement to file the instant application. Further that the applicants' advocates filed a defence and memorandum of appearance for both defendants and it cannot be alleged after judgement that the instruction was limited to one defendant; that the applicant has not demonstrated that the instructions were limited to one defendant. Further that the email marked as JKL 5 was made after the consent was recorded and no time during the proceedings before or after the judgement was an application made to cease acting for any of the defendants. The deponent averred that a consent cannot be set aside on the grounds of mistake of the advocate and that the matter was heard inter partes and the defendants were accorded time and opportunity to be heard all through the pleadings, recording of consent, cross-examination of witnesses and filing of written statements and filing of written submissions. The deponent reiterated that what was on record was a regular and defended judgement.

5. When the application came up for hearing the parties agreed to canvass it by way of written submissions. Learned counsel for the applicant argued that the previous counsel failed to carry out instructions to refer the plaintiff for a 2<sup>nd</sup> medical report and also recorded a consent on liability without the instructions of the 1<sup>st</sup> defendant and that the said counsel purported to act for the 2<sup>nd</sup> defendant who had no policy of insurance with the 1<sup>st</sup> defendant's insurer. It was also alleged that the said advocate failed to secure a witness statement from the 1<sup>st</sup> defendant to be relied upon in the case.

6. According to counsel, the main issue is whether the court should set aside the judgement that was entered on 31<sup>st</sup> October, 2017. Learned counsel submitted that the 1<sup>st</sup> defendant has sought leave to enjoin a third party and none was done and that the mistake of counsel ought not to be visited on the litigant. Learned counsel added that the mistake of counsel should not amount to the 1<sup>st</sup> defendant being unheard. On the issue of laches, counsel submitted that he only came on record on 6<sup>th</sup> March, 2019. According to counsel, the mistake of counsel amounted to sufficient cause to warrant setting aside of the judgement and cited the case of **Republic v University of Nairobi ex parte Lazarus Wakoli Kunani & 2 Others (2017) eKLR**.

7. Learned counsel for the Respondent submitted that there were four issues for determination and listed three, *to wit*; whether judgement by consent can be set aside, whether the previous advocates were negligent, and whether the application was brought without undue delay. On the first issue, counsel submitted that nothing had been presented to the court to show that the previous advocate had instructions and because a consent judgement had contractual effect, then the same could only be set aside on grounds that would justify setting aside of a contract and cited the case of **Flora N. Wasike v Destimo Wamboko (1988) eKLR**. On the 2<sup>nd</sup> issue, counsel submitted that the plaintiff should not be made to shoulder the consequences of the negligence of the previous Defendants' advocates and cited the case of **Pravichandra Jamnadas Kakad v Lucas Oluoch Mumia (2015) eKLR**. On the issue of unreasonable delay, counsel submitted that judgement was entered on 31<sup>st</sup> October, 2017 and the application was filed on 28<sup>th</sup> March, 2019 and that the applicant was woken up from his slumber after execution had commenced. Learned counsel pointed out that Mulwa and Mulwa advocates filed a notice of appeal and which has not been prosecuted therefore he submitted that the court ought not to applaud the indolence of the applicant. On the aspect of jurisdiction, counsel submitted that the decretal amount did not deprive the court of jurisdiction.

8. I have read and duly considered the submissions filed by the parties herein and I note that the only issue that presents itself for the determination by this court is whether the applicant is entitled to the orders sought. In other words, has the applicant made out a proper case for the granting of orders of settings aside the judgment issued on 5<sup>th</sup> August, 2016 as indicated in the pleadings and should the court direct that the matter start de novo?

9. Order 10 Rule 11, under which this application has been brought stipulate as follows:

**[Order 10, rule 11.] Setting aside judgment.**

**11. "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

10. My observation is that the instant application ought not to have been filed under **Order 10 Rule 11** as stated by the applicant because there is no *ex parte* judgement that was entered. The well-established principles of setting aside interlocutory judgements were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P.** who detailed:

***"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."***

11. In the instant case, the 1<sup>st</sup> defendant/applicant stated that it did not defend the suit because the plaint and summons to enter appearance were filed on behalf of the wrong parties and that the previous advocates on record had instructions to file 3<sup>rd</sup> party proceedings and did not do so. I find the argument and position taken by the defendant to be dishonest, mischievous, misleading and not befitting. A perusal of the court record clearly shows that the defendant duly entered appearance in this case through its previous advocates. The defendant subsequently participated in the proceedings with a consent being recorded on 11<sup>th</sup> May, 2017 and the counsel for the applicant was present and told the court that the defendant closed its case and that followed the judgement that was entered on 31<sup>st</sup> October, 2017. To my mind this conduct of the defendant was that of a litigant who had either given up its rights to defend the suit or had admitted the plaintiff's claim against it and it cannot therefore turn back and reclaim that right at this stage of the case. It is an act of dishonesty to turn up at the eleventh hour after the case has reached the execution stage, and claim that the previous advocates acted without instructions and yet the said advocate participated in the suit, was given an opportunity to be heard and was heard.

12. Be that as it may, **Order 51 Rule 10 of the Civil Procedure Rules** states:

**[Order 51, rule 10.] Provision under which application is made to be stated.**

**10. "(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

13. In view of the provisions of **Order 51 Rule 10 (1) (2)**, cited above, my finding is that even though the instant application was filed under the wrong rules, the same is not fatally defective and this court is still bound to deliver its ruling on the substance of the application, which is, the setting aside of the judgement/ decree entered on 5<sup>th</sup> August, 2016.

14. I have also mercifully perused the affidavit in support and thought the judgement dated 5<sup>th</sup> August, 2016 is not annexed to the application indicating that there were instructions to take out third party proceedings. There is also a proclamation by the auctioneer together with a warrant of attachment dated 5<sup>th</sup> March, 2019 issued by this court. The applicant has imputed that the court has no jurisdiction to handle the matter, whereas on one part I agree with him because there was no decree issued on 5<sup>th</sup> August, 2016 by this court, there is a decree that was passed by the court in respect of this suit and in this regard, I am guided by the provisions of **Section 34 of the Civil Procedure Act that provides that** (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. This resonates to the fact that the court has jurisdiction to handle the instant matter. The applicant's allusion to a judgement dated 5<sup>th</sup> August 2016 must have been by genuine error as the correct one ought to be 31<sup>st</sup> October 2017. Such errors are common and ought to be excusable in a bid to do justice in the matter.

15. In this regard, I am of the view that that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application. It has transpired that the applicant herein had been kept in the dark over this matter and only came out after warrants were issued. The previous advocate has since been replaced and now the applicant wants to be given a chance to be heard. He has alluded to the existence of a third party against whom he seeks indemnity and or contribution. He has indicated that there is another suit pending before the lower court being Machakos Cmcc No. 703 of 2014 in which the said third party has been enjoined since it relates to the same accident. All these circumstances warrants this court to look favourably at the applicant's claim that the consent entered into ought to be tampered with in the interest of justice. This court being a court of equity will not shut its eyes and lock out the applicant from being heard.

16. In **Phillip Keipto Chemwolo and another v. Augustine Kubende [1986] eKLR 495** the Court of Appeal held that:

**Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.**

17. Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law or with the instructions. It is fair and just to grant the applicant an opportunity to be heard in the main suit. It has come out clearly that the applicant appears to have been left with the baby alone and it would be unjust to shut him out without being given a hearing. The plaintiff indeed obtained judgement regularly but the justice of the case warrants that the applicant should be given an opportunity of a hearing so as to enable him enjoin the third party into the proceedings. The respondent's inconvenience would be cushioned by an award of costs. It is in this regard that I will grant prayer (3) in the application save that the judgement sought to be set aside is the one dated 31<sup>st</sup> October 2017 and not 5<sup>th</sup> August 2016.

18. The other prayer sought is that the suit starts de novo. I notice that none of the parties, not even the applicant has addressed this issue in their submissions, however because it is an issue that arose from the pleadings I shall address the same. **Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others [2016] eKLR the** Court said in part at para. 52 of the Judgment.

***"... this Court is clothed with residual jurisdiction to re-open and rehear a concluded matter where the interest of justice demands but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation."***

19. In **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited [2014] eKLR**, the court declined to reopen a case and set aside the consent because the said applicant was represented by counsel and the said counsel was present though later passed on and there was no evidence of bias, or injustice and that if the said counsel had no authority to act, he should have deposed an affidavit to that effect. The court observed that

***"This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice"***.

20. Because no case has been made for grant of prayer (4), the same fails.

21. In the end, the notice of Motion dated 28<sup>th</sup> March, 2019 partially succeeds in terms of prayer (3). I direct that the applicant shall pay throw away costs of Kshs 20,000/- to the plaintiff/respondent. In addition, the applicant shall meet the auctioneer's fees since there is a warrant of attachment that has been issued.

It is so ordered.

Dated and delivered at **Machakos** this **24<sup>th</sup>** day of **September, 2019**.

**D. K. Kemei**

**Judge**