



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 2 OF 2019

FATUMA ABUD FARAJ.....APPLICANT/RESPONDENT

-VERSUS-

FRANCIS KADIMA T/A KADIMA

& CO. ADVOCATE.....RESPONDENT/APPLICANT

RULING

1. Before me is an application dated 10th April 2019, filed by the Applicant/Respondent pursuant to Article 159(2) of the Constitution, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1, Order 12 Rule 7 of the Civil Procedure Rules and all enabling provisions of the law. The Applicant seeks for the following orders:-

a. Spent

b. That this Honourable Court be pleased to set aside the proceedings and/or orders made on 8th April, 2019.

c. This Honourable Court be pleased to make such orders as it deem fit and convenient to meet the ends of justice.

d. Cost of the application be costs in the cause.

2. The application is based on several grounds on the face of the application and it is supported by the supporting affidavit sworn on the 10th April 2019 by **Francis M. O Kadima**.

3. The Respondent opposed the Application via a Replying Affidavit sworn on the 26th April 2019. Wherein it is averred that the Applicant was well aware of the hearing date. Therefore, he ought to have been in Court when the matter was called. Furthermore, If this Court is inclined to allow the Applicant's Application, then he should be condemned to pay a thrown away cost of Kshs. 30,000/= payable before the next hearing date.

4. The Application was dispensed with via written submissions. The Applicant's submissions were filed on the 23rd July 2019 while the Respondents submissions were filed on the 24th September 2019.

5. I have carefully considered the application, the affidavits both in support and against, the rival submissions and the authorities cited as well as the pleadings herein.

ANALYSIS & DETERMINATION

6. What this court needs to determine in the present application is whether it should exercise its discretion to set aside the orders issued herein on 8th April 2019. This Court has unfettered discretion under Order 51 rule 15 of the Civil Procedure Rules to set aside any order made ex parte. Section 3A of the Civil Procedure Act on the other hand gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary powers must however be exercised judicially.

7. The principles that guide the court in setting aside of an ex parte judgment or order were laid out in the case of **Shah –vs- Mbogo & Another (1967) EA 116** as follows:-

"...the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought

(whether by evasion or otherwise) to obstruct or delay the cause of justice”.

8. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J**, set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

9. The Applicant avers that it was an oversight on the counsel holding brief as the matter could not be traced on the cause list uploaded on the Kenya law website and that the said advocate was engaged in other matters before my brother **Hon.Yano. J. in ELC 179 of 2009 and ELC 423 OF 2017**. The Applicant produced the aforementioned cause lists as annexures. I have looked at this Court’s cause list for the 8th April, 2019 and I am in agreement with the Applicant’s submission that indeed this matter was not cause listed before it then.

10. Consequently, it is this court’s finding that the Applicant herein has established that it had a reasonable excuse for its non-attendance on the 8th April 2019 when this matter came up for hearing. On the part of the Respondent, she has not demonstrated the prejudice she will suffer if the Application is to be allowed.

11. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice for the litigants. This view is informed by **Article 50 of the Constitution of Kenya** which secures the right to a hearing before the Court. This court is obligated to safeguard that right.

12. In light of this, I am of the view that the inconvenience to be suffered by the Respondent as a result of setting aside the orders and proceedings of 8th April 2019 can be adequately remedied through an award of costs.

13. In the light of the aforesaid, the Notice of Motion Application dated 10th April, 2019, is allowed in terms of prayer (b) on condition that:-

a. The applicant to pay the Respondent throw away costs of Kshs 10,000.00

b. The costs of this Application be in the cause.

14. It is so ordered.

Dated and delivered at Mombasa this 25th day of October, 2019

D. O. CHEPKWONY

JUDGE