REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 274 OF 2016

DANCAN EKWAM AUREN..PLAINTIFF

VERSUS

INSPECTOR GENERAL OF POLICE...................1ST DEFENDANT

ATTORNEY GENERAL..2ND DEFENDANT

RULING

INTRODUCTION

1. The Defendants' Notice of Motion application dated and filed on 3rd May 2019 was brought pursuant to Order 12 Rule 2(c) and 7 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining prayers:-

> **1. Spent.**
>
> **2. Spent**
>
> **3. THAT this Honourable Court do issue an order to recall the witnesses who testified on 24th April 2019 for cross-examination by the Defendants/applicants herein.**

2. Their Written Submissions were dated 17th May 2019 and filed on 17th June 2019 while those of the Plaintiff were dated 10th July 2019 and filed on 17th July 2019.

3. Parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANTS' CASE

4. The Defendants' present application was supported by the Affidavit of Edna Kerubo Makori that was sworn on 3rd May 2019 on behalf of the Defendants herein.

5. She averred that her failure to attend court on 24th April 2019 was not intentional but that it was because the clerk did not bring the Hearing Notice to her attention. She stated that she took over the

matter from her colleague and she could not properly ascertain its position in the absence of a Hearing Notice.

6. She pointed out that she was ready to cross-examine the Plaintiff herein and thus urged this court to allow the application so that the suit could be decided on merit.

THE PLAINTIFF'S CASE

7. In opposition to the present application, the Plaintiff swore his Replying Affidavit on 29th May 2019. The same was filed on 30th May 2019.

8. He stated that the Defendants failed to attend court during numerous pre-trial conferences whereupon the hearing of the case was fixed for 27th November 2018. He pointed out that the Defendants' deponent was not been truthful in saying that she had just taken over the matter because on 27th November 2018, she was granted an adjournment to enable her familiarise herself with the case.

9. He said that on 27th November 2018, the matter was fixed for mention on 21st January 2019 to confirm if the Defendants had put their house in order but no counsel attended court on the said date. The matter was then mentioned on 13th February 2019 but the Defendants' counsel also never attended court. The matter was then fixed for hearing on 24th April 2019 on which date the Defendants' counsel never attended court on 24th April 2019 despite having been served with a Hearing Notice.

10. It was his contention that the present application was a ploy and a delaying tactic. He averred that he was now in wheel chair and depended on well-wishers to meet his travel costs.

11. It was his averment that it was not in the best interest of justice for the said application to be allowed as it was an affront to justice and thus urged this court to dismiss the same with costs to him.

LEGAL ANALYSIS

12. They pointed out that the Plaintiff herein will not suffer any prejudice. In this regard, he relied on the case of **Kibugu Farmers Co-operative vs Phillip Mungai t/a Mungai Electrical Ventures [2014] eKLR** where the court allowed an application that was similar to theirs.

13. They also placed reliance on the case of **Mandeep Chauhan vs Kenyatta National Hospital & 2 Others [2015] eKLR** where Lenaola J (as he then was) held that no party should be condemned unheard.

14. On his part, the Plaintiff argued that Order 12 Rule 2(1) of the Civil Procedure Rules provides that if notice was not served on time and the defendant failed to attend court, the case shall be adjourned and that because the Defendants' counsel admitted having been served with a Hearing Notice, the Defendants could not rely on that provision.

15. He was emphatic that the Defendants had also not demonstrated any sufficient reason why they did not attend court on 24th April 2019. He urged this court to note that they were habitual absentees in court.

16. He referred this court to the case of **Esther Wanjiru Maina vs Zipporah Nduta Karanja [2018] eKLR** where the court dismissed an application for setting aside an *ex parte* order due to the conduct of the applicant therein as she never appeared in court despite having been served to attend court.

17. He also relied on the case of **Allan Kamau Gichuki vs Samuel Gichuki Kimani & 2 Others [2017] eKLR** in which the case of **Shah vs Mbogo & Another [1967] EA 470** that set the following principles was cited:-

> **"applying the principle that 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, the motion should be refused".

18. It was evident from the parties' submissions that they were on diametrically opposite poles. The Plaintiff had relied on the provisions of Order 12 Rule 2 of the Civil Procedure Rules on which the Defendants' application was premised as the reason not to allow the application. The said Order 12 Rule 2 of the Civil Procedure Rules provides as follows:-

"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—

(a) that notice of hearing was duly served, it may proceed *ex parte*;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

19. It is evident that a matter will be postponed if:-

1. The notice was not served; or

2. The notice that was not served in sufficient time for the defendant to attend; or

3. For other sufficient cause the defendant was unable to attend.

20. In this particular case, the Defendants' counsel admitted to having been served with a Hearing Notice. Her only concern was that their clerk brought it to her attention, late. The Defendants could not therefore benefit from the entire provisions of Order 12 Rule 2(8) of the Civil Procedure Rules. They could only seek assistance based on the second part of Order 12 Rule 2(c) of the Civil Procedure Rules.

21. On 27th November 2018, one Benda held brief for the Defendants' counsel, Edna Kerubo Makori because she was indisposed on that day. The said counsel proposed that the suit be transferred to the High Court Lodwar as the accident in which the Plaintiff was said to have sustained injuries occurred along the Kakuma-Lokichoggio Road. This court, therefore, directed the parties to explore possibilities of recording a consent regarding transfer of the matter to Lodwar High Court and fixed the matter for mention on 21st January 2019 to establish whether or not a consent would have been arrived at.

22. The Defendants did not attend court on that date. However, the Plaintiff indicated that it had been agreed that the matter be heard in Nairobi. The matter was fixed for a further mention on 13th February 2019 when the Defendants did not also attend court. The matter was therefore fixed for hearing on 24th April 2019.

23. On the said date, the Defendants did not attend court and the matter proceeded for hearing whereafter the court directed parties to file their respective Written Submissions.

24. The Defendants' conduct in this matter raised more questions than answers. They had failed to come to court several times and only came to seek the re-call of the Plaintiff after he had testified. In fact on the day that this court reserved the Ruling of their present application on 17th October 2019, the Defendants' counsel did not attend court.

25. Notably, there was nothing that had been placed before this court to show that the Defendants were intentionally trying to delay this matter. However, their lack of diligence and proper handling of this case was evidence of indolence on their part and that was causing the Plaintiff great prejudice. It appeared to this court that commencing the trial afresh might cause more delays in the hearing and determination of

this matter.

26. Having said so, this court noted that under Section 146(4) of the Evidence Act Cap 80 (Laws of Kenya), no conditions or time limits have been set for the recall of a witness who had already testified. The said Section 146(4) of the Evidence Act provides that:-

> **"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."**

27. As was held in the case of **Shah vs Mbogo** (Supra), the court must exercise its discretion to avoid injustice or hardship resulting from an accident, inadvertence or error. In exercising its discretion to allow the re-call of a witness who had already testified, a court must keep at the back of its mind the obligations imposed on it by Article 50(1) of the Constitution of Kenya, 2010. The same states that:-

> **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

28. Weighing the Plaintiff's' fundamental right for a speedy trial as envisaged in Article 159(2)(b) of the Constitution of Kenya and the equally important fundamental right of the Defendants to have their dispute determined in a court as contemplated in Article 50(1) of the Constitution of Kenya, this court determined that the Defendants would suffer more harm if they were not allowed to ventilate their case on merit.

29. In the event he was successful in his suit, the Plaintiff would be compensated by way of interest accruing on general and special damages. His advocate's costs would also be factored in in the costs that would be awarded to him after taxation of the Bills of Costs.

30. Faced with the circumstances such as these, it would be best to give an indolent party at least one (1) more chance to participate in the proceedings before a decision can be made on merit.

DISPOSITION

31. For the foregoing reasons, the upshot of this court's decision was that the Defendants' Notice of Motion application dated and filed on 3rd May 2019 is hereby allowed in terms of Prayer No 3 on the following terms:-

> **1. THAT the proceedings of 24th April 2019 be and are hereby set side.**
>
> **2. THAT the Plaintiffs' Written Submissions dated and filed on 13th May 2019 be and are hereby expunged from the court record.**
>
> **3. THAT paragraph 32(1) and (2) will only become operational if the Defendants attend court for a mention on 5th December 2019 for purposes of fixing a hearing date.**
>
> **4. THAT, in the event that the Defendants do not attend court on 5th December 2019 to fix a hearing date of the matter herein, for the avoidance of doubt the status will revert to what it was on 24th April 2019. The proceedings of 24th April 2019 and the Plaintiff's Written Submissions will be deemed to be still on record as if they were never set aside and/or expunged respectively as directed in Paragraph 32(1) and (2) hereinabove whereafter the court will give its decision herein based on the evidence on record and the Plaintiff's Written Submissions.**

35. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **26th** day of **November** 2019

J. KAMAU

JUDGE