



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 132 OF 2015

HON DR. EVANS KIDERO.....PLAINTIFF

VERSUS

ERIC AHOLI

CHARLES APPLETON

BRAIN DESOUZA

ANIS PRINGLE

JOSEPHAT MWAURA

JACOB GATHECHA

JOSEPH KARIUKI

BESNON NDUNG'U

JOHN NDUNYU

TRADING AS KPMG.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 22nd February 2019 and filed on 25th February 2019 was filed pursuant to the provisions of Article 159 of the Constitution of Kenya, 2010, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT the Honourable court be pleased to set aside the orders made on 22nd January 2019 marking the Plaintiff's suit as abated and all other consequential orders thereto.

3. THAT the Honourable Court be pleased to revive the Plaintiff's suit.

4. THAT the Honourable Court be pleased to extend the interim orders issued by Seron J on 30th September 2015.

5. THAT the Honourable Court be pleased to grant leave to file and serve Replying Affidavit of the Plaintiff/Applicant dated 14th January 2019 (sic).

2. The Plaintiff's Written Submissions were dated 7th June 2019 and filed on 11th June 2019 while those of the Defendant were dated 14th

June 2019 and filed on 19th June 2019.

3. The parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's present application was supported by the Affidavit of its advocate, Prof Tom Ojienda, that was sworn on 22nd February 2019.

5. The said counsel pointed out that his suit was marked as abated by operation of law under Order 5 Rule 1(6) of the Civil Procedure Rules, 2010 in his absence. He admitted that they were served with the Defendant's Notice of Motion application dated 7th December 2018 seeking dismissal of the suit and while the Plaintiff herein duly executed the Replying Affidavit in response to the said application, the same was not filed due to an inadvertent error on the part of their court clerk. He added that an employee in their firm also mis-diarised the date of the hearing of the Defendant's said application as 22nd February 2019 instead of 22nd January 2019.

6. He averred that the failure to file the Replying Affidavit and the mis-diarisation of the hearing date was their fault and the Plaintiff should not therefore be punished because of their inadvertent errors. It was his contention that the present application had been brought without delay and that they had never failed to attend court. They regretted their failure to attend court on 22nd January 2019 which he said was due to an oversight.

7. It was his further averment that it was in the interests of justice that the suit be revived as the same would meet the constitutional framework.

8. He therefore urged this court to allow her application as prayed.

THE DEFENDANT'S CASE

9. In opposition to the said application, a partner of KPMG, Brian Desouza swore a Replying Affidavit on behalf of the Defendant on 18th March 2019. It was filed on 20th March 2019.

10. He stated that the Defendant had been prejudiced by the Plaintiff's lack of diligence in prosecuting the matter herein since Serгон J issued him with an interlocutory injunction on 30th September 2015. It was his averment that the Plaintiff was content to sit on the said injunction.

LEGAL ANALYSIS

11. The Plaintiff submitted that the court has wide discretionary powers to set aside *ex parte* orders and that it will exercise such power on such terms that are just. He also submitted that blunders and/or mistakes by an advocate ought not to be visited on his client. In this regard, he relied on the cases of **CMC Holdings Limited vs Nzioki [2004] 1 KLR 173**, **Branco Arabe Espanol vs Bank of Uganda [1999] 2 EA 22** as cited in the case of **Republic vs Attorney General & 3 Others Ex parte South and Central (Thika) Investments Limited and Phillip Keipto Chemwolo & Another vs Augustine Kubende [1986] KLR (1982-88) 1 KAR 1036 at 1042 [1986-1898] EA 74** as cited in **Burhan Decorators & Contractors vs Moring Food Limited & Another [2014] eKLR** and **Shah vs Mbogo**.

12. He contended that he was always keen in prosecuting the case which was demonstrated by the fact that immediately he found out that his suit was dismissed on 30th January 2019 through the Defendant's letter, he filed his present application within a month.

13. On its part, the Defendant relied on the cases of **Karandeep Singh Dhillon vs Nteppes Enterprises Limited & Another [2010] eKLR**, **Tana Trading Limited vs National Cereals and Produce Board [2014] eKLR** and **Ochola Kamili Holdings Limited vs Guardian Bank Limited [2018] eKLR** where the common holding was that it was the responsibility of a plaintiff to prosecute his case and the burden to do so cannot therefore shift to a defendant.

14. It asked this court not to come to the assistance of the Plaintiff who had been sitting on an interlocutory injunction for three (3) years and had failed to demonstrate any useful purpose that would be served in setting aside the orders of 22nd January 2019.

15. In addition to the cases that were cited by the Plaintiff, this court also had due regard to the cases of **Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another [2005] eKLR** and **David Oloo Onyango vs Attorney General [1987] eKLR** the common holding was that a party should not be deprived of his right to be heard if the rights of the opposing party would not be prejudiced and that striking out of pleadings should be used sparingly and only in the clearest of the cases.

16. In addition, in the case of **Shah vs Mbogo & Another (1967) EA 1116**, it was held that the court's discretion to set aside an *ex parte* order is intended to be exercised to avoid hardship or injustice resulting from inadvertence or excusable mistake or error.

17. In the cases that were relied upon by the Plaintiff, it is correct that the court has wide discretionary powers to set aside *ex parte* orders and that it will exercise such power on such terms that are just. It will more often than not visit the blunders and/or mistakes of an advocate on his client.

18. In the same breadth, as was demonstrated by the Defendant herein, the court also has wide discretionary powers not to exercise its discretion in favour of an indolent party as had been ably argued by the Defendant herein. In addition to the cases that the Defendant referred this court to, it also referred to the cases of **Waweru Peter vs Robert Njoroge Chege [2018] eKLR** and **Ivita vs Kyumbu [198] KLR 441** where the common holding was that any litigant is expected to take all action to ensure the speedy resolution of his case

19. It is clear that both sides have compelling reasons why an indolent party ought or ought not to be given another chance to be heard by the court. The court is therefore called to cut a balance and to ensure that justice is done to both parties. Indeed, the court is called upon to weigh a respondent's right to a speedy trial as had been enshrined in Article 159 (2) (b) of the Constitution of Kenya, 2010 provides that justice shall not be delayed against and the equally important fundamental right of an applicant to have a fair trial determined in an open and competent court or tribunal as envisaged in Article 50(1) of the Constitution of Kenya.

20. This court noted the contents of the Plaintiff's Replying Affidavit to the Defendant's Notice of Motion application dated 7th December 2019 indicating that the Defendant's had not demonstrated that his advocates had been notified that the Summons to Enter Appearance were ready and that the same should be collected for service upon the Defendant herein. He raised several matters of law in his Replying Affidavit. This court did not analyse the same to ascertain whether or not the same had merit because doing so would be re-opening the prosecution of the Defendant's application.

21. Since the Plaintiff's advocates had alluded to a mistake or blunder on their part, it was necessary that he not be shut out from accessing justice. The question of failure to collect and serve Summons to Enter Appearance upon the Defendant herein was also important as it had been raised in his Replying Affidavit. Whether or not their response would persuade the court at the time of hearing the Defendant's application was a different matter altogether. This court was therefore inclined to giving the Plaintiff an opportunity to be heard on whether there was merit in having its suit dismissed as had been sought by the Defendant herein.

22. On the issue of reinstating the injunctive orders, this court was not persuaded that it should do so for the reason is very clear that in an application where injunctive orders have been granted, the said orders are only valid for twelve (12) months as stipulated in Order 40 Rule 6 of the Civil Procedure Rules unless the same have been extended by the court. The Plaintiff would need to demonstrate why it did not prosecute its case within twelve (12) months in the event it succeeded in persuading this court that the Defendant's application seeking to dismiss his suit for want of prosecution was not merited.

23. However, Plaintiff ought not to go scot free. It ought to compensate the Defendant for being taken back to litigate a case it had obtained orders to dismiss.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's application that was dated 22nd February 2019 and filed on 25th February 2019 was merited and the same is hereby allowed in terms of Prayer Nos (2) and (3) therein on condition that the Plaintiff shall pay to the Defendant's advocates throw away costs in the sum of Kshs 100,000/= within thirty (30) days from today. **Costs of the application herein will be in the cause.**

25. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER 2019.

J. KAMAU

JUDGE