REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 132 0F 2011

MANSON OYONGO NYAMWEYA.....PLAINTIFF/RESPONDENT

VERSUS

DR. KITHURE KINDIKI

T/A KITHURE KINDIKI & ASSOCIATES...DEFENDANT/APPLICANTS

OMWANZA OMBATI

RULING

Introduction

1. The plaintiff herein was aggrieved by the declaration of Omingo Magara as the duly elected Member of Parliament for South Mugirango Constituency following the General Election conducted in December 2007. As a consequence, thereof, the plaintiff engaged the legal services of defendants herein to represent him in an Election Petition and the defendants in turn instituted and prosecuted **KISII HCC ELECTION PETITION NO. 3 OF 2008**. On successful completion of the said election petition, the High Court awarded costs to the plaintiff which were subsequently taxed and certified by the Deputy Registrar in the sum of Kshs. 7,554,331. Prior to the conclusion of the petition, the plaintiff had remitted to the Defendants the sum of Kshs. 2,375,000/= only on account of the defendant's professional fees. Party & Party Costs in the election petition were taxed at Kshs. 7,554,331/= after which the Plaintiff sought to recover the amount of money that he had paid to the defendants i.e to obtain indemnity for the sums paid. However, upon demand of the costs awarded, the defendants chose to file an advocate client bill of costs vide KISII HCC MISC.178 OF 2010 which was taxed and certified in the sum of Kshs. 4,155,596/= only. Subsequent to the taxation above, the plaintiff demanded that the defendants pay the sum of Kshs. 3,398,735/= only, being the difference of the sums paid to the defendants, less the amount at the foot of the Certificate of Costs, in favour of the said defendants. However, even after the request to release the monies to the plaintiff, the defendants declined to heed the plaintiff's request thereby forcing the plaintiff to institute the present suit. Upon being served with the pleadings, the defendants entered appearance and filed a defence and counter claim for specified sums of money at the foot of the bill of costs which monies had not been taxed and certified. The defendants also filed a Notice of Motion dated 21st July 2011 which application was dismissed. Subsequently, the matter was listed for hearing of the main suit on 12th October 2016. On the said hearing date, the defendants did not attend court and upon satisfying itself that the defendants were properly served, the court ordered that the matter proceeds for hearing the absence of the defendants notwithstanding. The plaintiff then presented his evidence and on 6th December 2016 judgment was entered in favor of the Plaintiff in the sum of Kshs. 3,398,735 together with interest at court rates with effect from 2nd December 2010 till payment in full plus costs of the suit.

The Application

2. In the wake of the above judgment, the plaintiff filed the instant application dated 9th December 2016 under Order 12 rule 7, Order 10 rule 11, Order 22 rule 52, Order 45, Order 51 rules 1 and 3 of the Civil Procedure Rules 2010 and Section 3Aand 1a B of the Civil Procedure Act seeking:-

1. Spent

2. Spent

3. THAT the court be pleased to set aside the judgment in this matter entered/and or delivered on the 6th December 2016 and remits the matter back foe hearing of the Defendants counterclaim.

4. THAT the Plaintiff be and is hereby recalled for cross examination and the Defendants be and are hereby granted leave to

defend and prosecute the counterclaim.

5. THAT the costs of the application be in the cause.

3. The application was supported by the affidavit of the 2nd defendant herein OmwanzaOmbati sworn with the authority of the 1st defendant herein who deposed that he only came to learn about the judgment through a newspaper report. He concededthat even though a hearing notice was served on his law firm on 9th of September 2016, his secretary inadvertently failed to diarize the matter and as a result thereof he did not attend court on the hearing date thereby leading to the matter being heard *ex parte*. He attached a copy of the newspaper report to his affidavit and marked it as **"001"**.He further deposed that their non- attendance by the defendants on the 12th October 2016 was due to the inadvertent omission to enter the hearing date in the diary and was not due to lack of respect for the authority of the court or seriousness of the matter. He attached a copy of the said diary to his affidavit and marked it as**"OO-2"**.

4. The defendant further deposed that some of the matters that were pending before the Deputy Registrar had been taxed and certified and it was therefore important that the court has this evidence on record before making its final determination. He attached copies of the certificates of taxation and pending applications before the court to his affidavit asannexture**"OO3"**.

5. The defendants' prayer therefore, was that this court sets aside its judgment delivered on 6th December 2016 so as to allow the suit herein to be heard on its merits. They contended that the prayers sought if granted will not be prejudice the Plaintiff in any way as it was in the interest of justice that both parties are given a chance to be heard on the merits of their cases.

6. The application was opposed by the plaintiff through his replying affidavit dated 10th April 2017. In the said affidavit, the plaintiff contends that the defendants were duly served with the hearing notice and therefore, having received notice and upon confirming such receipt, the defendants could not be seen to claim that the hearing date escaped their attention.

7. The plaintiff stated that the 2nd defendant's allegation that the hearing date was not posted in his diary was a conscious and convenient falsehood that had been manufactured at the instance of the defendants with the sole intention of misleading the court. He added that if the claim was true, then the said secretary should have sworn an affidavit to attest to attest to her alleged lapse in making the entry of the date in the diary.

8. The plaintiff further stated that the issue of the defendants' counterclaim had been dealt with and suitably addressed through a ruling made by Sitati J. rendered on 31st day of July, 2015 wherein the learned Judge observed that the claim was separate and distinct from the instant suit. He attached a copy of the said ruling to his affidavit as annexture**"MON1"**. It was the plaintiff's case that the said decision of Sitati J. had neither been appealed against nor challenged in any manner whatsoever thereby rendering the defendants' claim that they had a counterclaim to the his case a misconception.

9. The plaintiff further contended that the defendants were guilty of laches in view of the fact that the judgment sought to be set aside was delivered on 6th December 2016 yet the instant application was filed on the 10th day of January 2017, more than one month later.

10. The application was, at the hearing, canvassed by way of written submissions.

<u>Defendants Submissions</u>

11. The Defendants Counsel submitted that the plaintiff's claim that he had engaged in a 'conscious and convenient falsehood" with a view to misleading the court was unfounded and vexatious.

12. On thestatutory basis for setting aside judgment and jurisdiction, counsel submitted that Order 10 Rule 11 of the Civil Procedure Rules provides that a judgment can be set aside or varied on such terms that are just.

13. On the defendant's right to be heard, counsel quoted **Article 159 (2)(a)** of the Constitution of Kenya 2010 which provides that :-

'In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

a. Justice shall be done to all, irrespective of status:

b. ''

14. Counsel also relied on the case of **John Peter Kiria v Alice M. Kanyithia [2013] eKLR** where the court held:-

"I find the appellants have defence on merit and that in the interest of justice they should not be shut out of ventilating their defence. The Respondent would not be prejudiced in any way as she may have an opportunity to be heard and prove her case on a balance of probability. Further, no party should be condemned unheard in any matter and especially when he demonstrates there is a defence on merits."

15. On whether the defendants are worthy of the orders sought, counsel relied on the Court of Appeal case of **Belinda Murai & Others v Amos Wainana (1978) LLR 2282** that adopted Madan JA's description of a mistake;-

"A mistake is a mistake. It is no less mistake because it is unfortunate slip. It is no less pardonable because it was committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on account of law may be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate."

16. Counsel thus submitted that they had a formidable defense (counterclaim) which they argued that they should be permitted to present and that the prejudice (if any)that will be occasioned to the Plaintiff if the orders sought are granted, is incomparable with the prejudice that the defendant's will suffer if the judgment delivered in default of the Defendant's appearance is executed.

Plaintiff's Submissions

17. Counsel for the plaintiff highlighted the issues for determination as:-

a. Whether the defendants had offered a reasonable explanation for failure to attend court?

b. Whether the defendants are entitled to orders being sought?

c. Whether the defendants are guilty of a consistent scheme to obstruct the cause of justice?

18. On the first issue, counsel submitted that since there was sufficient proof of service, the allegation contained in the Notice of Motion Application together with the Supporting Affidavit were mainly hearsay as it was upon the defendants to prove that their Secretary failed to post the hearing date in the diary through an affidavit sworn by the said secretary. Counsel further submitted that the jurisdiction derived from Order 10 Rule 11 of the Civil Procedure Rules 2010 applies only in cases where judgment is entered against a defendant who has not entered appearance.

19. Counsel further submitted, in reference to Article 50 (1) and 159 (2) (a) of the Constitution, that fundamental rights and freedoms of a citizen are not absolute and the same are subject to Limitations by law. He quoted Article 24(1) of the Constitution which provides that;-

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors, including:-

a. The nature of the right or fundamental freedom.

b. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others."

20. On the second issue, counsel submitted that the instant application was filed 30 days after the said judgment sought to be set aside was delivered and contended that the defendants were therefore guilty of laches.The plaintiff was of the view that should the court allow the application, then the defendants should be compelled to deposit the entire decretal sum in court within a set timeline.

21. On the third issue, counsel submitted that the defendants had formed a pre-meditated scheme to delay the due process of the court by firstly, making an application to transfer this suit to Nairobi on grounds that there existed various suits in the said court between the parties herein which suits were in relation to pending bill of costs in matters not related to the instant suit and secondly by failing to attend court on the 19th October 2016 when the matter proceeded *ex parte*. The plaintiff was of the view that the defendants had not satisfied the threshold set for setting aside judgment so as to warrant the exercise of Judicial Discretion in his favor.

The Finding

22. After considering the application, the affidavit in support thereof,and the plaintiff's affidavit in opposition and the written submissions by each of the parties, I note that the issue that presents itself for determination is whether the defendants have satisfied this court, with sufficient grounds, that they are entitled to the orders sought.

23. The power to set aside an *ex parte* default judgment is a discretionary power exercised with the main aim of doing justice to the parties. In **Patel V EA Cargo Handling Services Ltd (1974) EA 75**the court stated:-

"The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."

24. Similarly, in **Sebei District Administration v Gasyali & Others (1968) EA 300** Sheridan J. remarked:-

"The nature of the action should be considered. The defence if one has been brought to the notice of the court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay

occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court."

25. To my mind, the effect of the above pronouncements in the above decisions is that where a defendant raises a reasonable defence to the plaintiff's claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favor of the defendant, even where the judgment entered is regular.

26. Applying the above principles to this case, I find that it is not in dispute that the defendants were duly served with the hearing notice relating to the scheduled hearing of the instant case. The defendants alleged that their secretary forgot to diarize the slated hearing date in their diary and hence the same escaped their minds. Apart from the defendants allegation that the hearing date escaped their minds and the fact that the secretary who failed to diarize the hearing date never swore an affidavit, this court also notes that the defence and counterclaim the defendants so wish to rely on were the subject of an earlier ruling delivered by SitatiJ. on 31st July 2015 in which the learned judge observed that the counterclaim was founded on a separate and distinct claim from the matter in dispute in this suit. In addition to this, this court notes that the said ruling has neither been appealed from nor challenged by the defendants at the Court of Appeal.

27. In my observation, the monies the plaintiff is claiming were monies due and payable to him after taking into account costs which were due and payable to the defendants, to wit, the Advocate/Client Costs. To this extent, the costs payable to the defendants had been determined and therefore, the defendants have no further stake in the money that is the subject of this suit. Under the above circumstances, I find that denying the plaintiff the fruits of his judgment would be tantamount to driving him away from the seat of justice judging from the defendants past behavior of trying to delay the finalization of this matter.

28. Be that as it may,in the interests of justice and in line with the *audi alteram patern principle*, this court will allow prayers 3 and 4 of the defendants Notice of Motion dated 9th December 2016 subject to the fulfillment of the following conditions by thedefendants: -

1. That the defendants shall deposit the entire decretal amount awarded to the plaintiff by this court in its judgment dated 6th December 2016, in court within the next 30 days.

2. Failure by the defendants to comply with condition (1) hereinabove means that the plaintiff can proceed to execute the judgment of this court delivered on 6th December 2016.

3. The plaintiff shall have the costs of this application.

Dated, signed and delivered in open court this 28th day of February, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

N/A for the Plaintiffs/Respondent

N/A for the Defendants/Applicants

Omwoyo court clerk