



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 540 OF 2007

STOJANOVIC MILAN.....1ST PLAINTIFF/RESPONDENT

JACKSON NG'ANG'A WAWERU.....2ND PLAINTIFF/RESPONDENT

- V E R S U S -

HAYATI AKASHA IBRAHIM.....1ST DEFENDANT

BAKTASH AKASHA.....2ND DEFENDANT

NURI AKAKSHA.....3RD DEFENDANT

BONIFACE NGATIA IREGI.....4TH DEFENDANT

DR. JOHN KHAMINWA.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT/APPLICANT

RULING

1. The Hon. Attorney General, the 6th defendant/applicant herein filed the notice of motion dated 6th February, 2017, the subject matter of this ruling in which he sought for the following orders:

- 1. The Honourable court be pleased to postpone the intended judgement pending the hearing of this application inter partes.*
- 2. The honourable court be pleased to set aside the proceedings of 26th July, 2016 and order the plaintiff's case to start afresh.*
- 3. In the alternative, the honourable court to issue an order to recall the witnesses who testified on 26th July 2016 to give evidence afresh.*
- 4. Costs of this application to be provided for.*

2. The motion is supported by the affidavit of Christopher Siro.

When served, the 1st plaintiff filed his grounds of opposition to resist the application. When the motion came up for inter partes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by way of written submissions.

3. I have considered the grounds stated on the face of the motion, plus the facts deponed in the affidavit in support of the motion and the grounds of opposition to oppose the motion. I have also considered the rival written submissions.

The applicant avers that the hearing notice was served upon his office but the same was not brought to his attention. Therefore the hearing on 26th July, 2016 proceeded in his absence when attending to another matter at Kyuso Law Courts. The applicant avers that he thought that the matter was coming up for mention on 6th December, 2016 for hearing and directions, but was surprised to be informed that the purpose of the mention was to confirm filing of submissions. The applicant avers that he is ready to cross examine the witnesses who testified on the 26th

July, 2016 and possibly call his witnesses to give evidence on the matter. The Attorney General argued that, this will in the end assist the court reach at an informed decision and that failure to attend the hearing was not intentional.

4. The 1st plaintiff/respondent stated that the applicant had been made aware of the hearing date when the matter was coming up for hearing. The 1st plaintiff argued that no plausible reasons have been advanced by the applicant as to why he was not present in court when the matter came up for hearing, therefore the application has no merit and ought to be dismissed.

5. The applicant is seeking the setting aside of the ex parte proceedings recorded at the hearing of 26th July, 2016.

The Court of Appeal in the case of **Simon Thuo Mwangi –vs- Unga Feeds Civil Appeal No.181 of 2003 at Nairobi** stated inter alia that:

“The exercise of judicial discretion on hardship is to be used to cure litigation faults resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion to otherwise or obstruct or delay the cause of justice.”

Section 3A of the Civil Procedure Act provides that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

6. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle that a person against whom a claim or charge is made against, should be given a reasonable opportunity of appearing and presenting his case. If this principle is not observed, the person affected is entitled, to have any determination, which affects him set aside.

7. It is the applicant’s submission that in his absence, the case was closed without being accorded an opportunity to interrogate the plaintiff’s evidence by cross-examination. The applicant states that if the plaintiffs’ witnesses are not cross examined, the court might give judgment without testing the evidence of the plaintiffs. In the absence of cross-examination, the applicant states that it would suffer irreparable loss and damage and no prejudice will be visited upon the plaintiffs.

8. The respondent submits that the suit having been filed in 2007, has been pending for so long. The excuse for failure to attend court by the applicant is not convincing. The respondent cited the case of **Attorney General –vs- Law Society of Kenya & another (2013) eKLR** in which the court stated inter alia that:

“sufficient cause in law means, the burden placed on a litigant usually by the court to show why a request should be granted or an action excused. The reason should therefore be reasonable and convincing, so as not to leave doubts in a judge’s mind.”

9. I am convinced that the applicant has given a convincing and plausible explanation for not attending the hearing on the 26th of July, 2016.

10. I find merit in the applicant’s notice of motion, it is hereby allowed. The order closing the defence case made on 26.7.2016 is set aside. The plaintiffs’ case is also reopened. Consequently, the plaintiffs witnesses PW1 and PW2 will be recalled for cross-examination by the defence. The defendants are given a chance to present their evidence in support of its defence. The 6th defendant/applicant to meet the cost of the motion.

Dated, Signed and Delivered in open court this 23rd day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent