



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 152 OF 2014

SAMMY JAPHET KAVUKU.....PLAINTIFF

VERSUS

1. EQUITY BANK LIMITED

2. ROBERT WAWERU

MAINA T/A ANTIQUE AGENCIES.....DEFENDANTS

RULING

1. There was placed before court for determination, on the 5/10/2015, a Notice of Motion by the plaintiff dated 24/9/2015. By court orders dated the 7/5/2015, the parties had been directed to file submissions on the same application and to attend court on a date taken at the registry to highlight the submissions. On the 21/7/2015, representatives of the advocates for the parties attended the Registry and by consent fixed the matter for highlighting of submissions on the 5/10/2015.

2. Come the date fixed only Ms. Ngigi for the 1st defendant attended while there was no appearance by Mr. Kenga for the plaintiff. However, one SAMMY JAPHET KAVUKU, the plaintiff, attended and expressed surprise at the failure by the advocate to attend court on his behalf. He was equally surprised that submissions as ordered by the court were yet to be filed. He pleaded with the court for indulgence on the basis that he had been sick and sought for time to enable him pay the loan because he had since landed a job.

3. Mrs. Ngigi for the Defendant opposed the application for adjournment while noting that the plaintiff had acted in person at some stage but had since appointed an advocate who remained on record and had not given a reason for failure to attend. To her that fact of failure to attend court was deliberate because there had been three previous suits over the same subject matter compounded what she called abuse of the court process. Her opposition was acceded to by the court which observed that this having been demonstrated to have been the third suit filed by the plaintiff over same subject matter. The court invoked its inherent powers and struck out the suit for being abusive of the court process. It was then ordered that the plaintiffs' advocates, Ms. Kenga & Co. Advocates would attend court on the 7/12/2015 and show cause why they should not be condemned to pay the costs of the struck out suit. Mrs. Ngigi was ordered to extract the order and serve Ms. Kenga & Co. Advocates.

4. Come the 7/12/2015, Ms. Kenga & Co. Advocates were duly served and an affidavit of service filed but there was no attendance on their behalf. Ms. Ngigi in those circumstances prayed that the advocate having failed to attend and show cause they be ordered to pay the costs of the 1st defendant. Once again the court granted to Mrs. Ngigi's request and ordered that Ms. Kenga & Company Advocate shall pay the costs incurred by and occasioned to the 1st defendant.

5. Some 10 days later the firm of Kenga and Company advocates filed the Notice of Motion dated the same date seeking orders that the court be pleased to review and or set aside the orders made on 9/12/2015 by which the firm was ordered to meet the costs of the 1st defendant.

6. In the application the reason put forth for failure by the advocate to attend court when required to show cause was said to have been by the failure by a secretary to diaries the date of 7/12/2015 and further that the plaintiff had sacked the firm of advocates on or about 13/10/2014 and collected his file. When that application came up for hearing there was never opposition filed nor representation made by the defendant despite service and as a consequence the orders of 7/12/2015 were set aside and the firm granted an opportunity to show cause.

7. By yet another application dated 21/8/2017, the firm of Kenga & Co. Advocates sought orders that the orders made on the 7/12/2015 be set aside.

8. Nothing that on the 8/3/2017, the court did set aside its orders of 7/12/2015, the application seeking to set aside the same orders can only be said to be misconceived for it is seeking a goal that had long been achieved. The court essentially cannot grant the prayers in that application but can only declare the same as res judicata.

9. However in the course of reading this file, I have noted that on the 21/7/2015 when the date of 5/10/2015 was taken it was taken by the plaintiff in person and not his advocate. This position tallies with the advocates account that the said plaintiff had debriefed him and taken away his file from the advocates offices. It was therefore misleading for the same client to express dismay why submissions had not been filed and why the advocate was not present in court. That plaintiff ought to have been candid with the court and informed the court that the date was taken without the advocate's participation and therefore knowledge.

10. To the extent that he expressed surprise and fell short of blaming the advocate, he did conceal from court material facts or deliberately mislead the court into believing that the advocate was aware of the date when there was nothing to show that he had been notified. The client thereby obtained an advantage which must be taken away when he gets discovered^[1].

11. For that reason alone I invoke the courts inherent powers^[2] to do justice and prevent abuse of court process and set aside the orders granted on the 5/10/2015 asking the advocate, Kenga & Co. Advocates to show cause why they should pay the costs of the 1st defendant and in its place substitute an order that the costs be paid by the plaintiff in person.

12. It is so ordered.

Dated and delivered at Mombasa this 16th day of February 2018.

P.J.O. OTIENO

JUDGE

^[1] Aviation & Airport Services Union vs Kenya Airports Authority [2014] eKLR

^[2] Kenya Power and Lighting Co. Ltd vs Benzene Holdings Ltd [2016] eKLR