REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 328 OF 2015

APOLLO MBOYA.....PLAINTIFF/APPLICANT

VERSUS

ASSA NYAKUNDI.....DEFENDANT/RESPONDENT

RULING

1. The application dated 5th February, 2018 seeks orders that

> **"1. Spent**
>
> **2. That the honourable court review orders granted herein and reinstate the suit herein.**
>
> **3. That pending the determination taxation be suspended.**
>
> **4. That the costs of this application be provided for."**

2. It is stated in the grounds and the affidavit in support sworn by the Plaintiff's counsel D. B Mungatana that the parties herein are distinguished members of the legal profession and efforts were being made to resolve the matter herein amicably. That the Plaintiff's side was waiting for tempers to cool down following a big public exchange between the parties. That in the meantime the application for the dismissal of suit was heard without the participation of the Plaintiff and the suit dismissed. It is stated that the Plaintiff was not served with the said application and came to learn of the same when the matter was fixed for taxation. The Plaintiff's counsel has further blamed the delay on their part on the electioneering period and stated that his political work as a Governor of Tana River County kept him away from his law office.

3. The Applicant's side has further stated that they did not serve summons to enter appearance as the Respondent had already appeared in the matter through counsel. The court was urged to allow their application given the history of the matter.

4. The application is opposed. It is stated in the replying affidavit sworn by the Respondent that there was no public exchange of words between the parties herein. That there were no attempts made to settle this matter and no such request was made either verbally or in writing. That the Plaintiff's suit was instituted on 18th September, 2015, way before the electioneering period and if the Plaintiff intended to settle the matter out of court there was ample time to do so.

5. It is further averred that the application for the dismissal of the suit was served on the Plaintiff's advocates and no response was filed and neither was there any representative in court on behalf of the Plaintiff's side.

6. It is asserted that there was prolonged inaction on the Plaintiff's side and no Summons to Enter Appearance had been extracted for over a period of twelve months. It is contended that the application lacks merits and ought to be dismissed.

7. The application was canvassed by way of written submissions. I have considered the application, the reply to the same and the submissions.

8. The Respondent has exhibited a copy of the Notice of motion dated 13th February, 2017 which sought orders for the dismissal of the plaint. The said application on the face of it bears the stamp of Mungatana and Co Advocates. A hearing notice duly stamped by Mungatana

& Co Advocates reflecting the hearing date of the application as 4th October, 2017 has also been annexed to the replying affidavit. The application was allowed as prayed on the said hearing date. The allegations of lack of service are therefore baseless.

9. On whether the Plaintiff was desirous of settling this case out of court, it seems there was no such communication to the Defendant. The Plaintiff's side has not stated whether such intentions were communicated to the Defendants and if so through what means.

10. The Respondent has filed a Notice of appointment and also filed a statement of defence. The Respondent has also participated in the many applications filed herein. The purpose of summons is to notify the Defendants of the suit against them. There was therefore no prejudice occasioned to the Applicant by the failure to be served with summons.

11. In this regard I am persuaded by the reasoning in the case of **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR:**

> **I agree with the approach adopted by Sergon, J. in the Hussein Mohamed Awadh Case (supra), that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless there it is demonstrated that the defendant suffered some prejudice occasioned by the invalidity of the summons....the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice."**

12. I have considered the background to this suit. The Plaintiff alleged to have been defamed by the Defendant who denied the same in the statement of defence. It appears the Plaintiff's side made errors and failed to take steps to prosecute this matter. Being a politician as stated by the Plaintiff's counsel is also not a bar to the making appropriate arrangements in his law office. However, the errors made should not lock out the Plaintiff's from having their case heard on merits. No prejudice that cannot be compensated by costs has been demonstrated by the Defendant.

13. As stated in the court of Appeal in the case of **Republic & 3 others v Joseph Mburu Gitau & 635 others [2015] eKLR** as follows:

> **".....are sufficient authorities of this Court that have recognized that mistakes by counsel and/or their clerks would not in themselves deprive an otherwise deserving litigant of a favourable exercise of the Court's discretion.**
>
> **Depending on the circumstances of each case, this Court, while not condoning those mistakes, often excuses them in the interest of justice."**

14. The Court of Appeal went further to state that:

> **"The best elucidation of them all on this point was by Madan, J.A. in MURAI VS. WAINAINA, (NO.4) [1982] K.L.R. 38 at page 47 paragraph 40 where that erudite Judge let fall from his lips that:-**
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> **""A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of Justice".**

15. In the upshot, I allow the application with thrown away costs and costs of the application to the Respondent. The Applicant to comply with Order 11 Civil Procedure Rules and fix the suit for directions within 30 days from the date hereof. In default the suit to stand dismissed.

Dated, signed and delivered at Nairobi this 28th day of June, 2018

B.THURANIRA JADEN

JUDGE