



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 35 OF 2000

NICOMA CONSTRUCTION CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

KEN SOUTH PLASTIC CO. LTD.....1ST DEFENDANT/RESPONDENT

ANNE KILELE.....2ND DEFENDANT/APPLICANT

THE ESTATE OF THE LATE WALTER KILELE...3RD DEFENDANT/RESPONDENT

RULING

1. By an application dated 19th July 2012 the **2nd Defendant Anne Kilele** approached the court for orders of stay of execution of the Exparte Decree and all consequential orders pending hearing and determination of the application. She also sought an order for release of motor vehicle registration Number KBJ 303E seized on 19th July 2012 by **M/S Elan Traders** on terms as the court may deem fit. She further sought for an order of unconditional leave to be allowed to defend the suit. Lastly, she sought that the exparte judgment entered on 19th April 2000 be set aside.

2. Among the grounds for the application are that the Decree sought to be executed was more than twelve years old, that no notice to show cause was issued to her, and that the plaintiff failed to seek leave to proceed with the suit after the 1st defendant was placed under receivership in the year 2002.

3. An affidavit in support was sworn by the applicant on the 19th July 2012. It is her averments that she was not served with court process and that she has a good defence to the plaintiffs claim. A draft defence is attached to the affidavit.

4. In opposing the application, the plaintiff's director swore an affidavit on the 10th October 2012 and also filed a preliminary objection that the application was incurably defective and bad in law, in that the Advocates M/S W.G. Wambugu and Company had no *locus standi* to institute the application on behalf of the 2nd defendant.

Both parties filed written submissions on the application.

5. The application is anchored on **Order 10 Rule 11 of Civil Procedure Rules, Section 63 1A, and 1B of the Civil Procedure Act.**

I have considered the affidavits for and in opposition, together with the submissions.

The issues that arise for determination, in my view are:

- 1. Whether the applicant is guilty of inordinate delay in attempting to set aside a judgment delivered in April 2000, over seven(7) years after.***
- 2. Whether the applicant was served with summons to enter appearance and if not, when she became aware of the existence of the suit and what action if any, she took to protect her interests thereto.***
- 3. Whether reasonable and satisfactory reasons have been given to persuade the court to exercise its discretion to set aside the 2000 exparte judgment against the applicant.***
- 4. Whether execution of the judgment is time barred by virtue of Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of***

Kenya.

6. The issues framed are interrelated and therefore shall be canvassed together.

There is no dispute that the applicant was served with summons to enter appearance. In her supporting affidavit to this application, she acknowledges service and avers that she forwarded the court papers to her family advocates, Archer and Willock who failed to file a Memorandum of Appearance and a defence.

7. However it is on record that a Memorandum of appearance and defence were filed six days out of time on the 6th May 2000 after entry of the exparte judgment on the 14th April 2000.

It has not been explained why the applicant never took the action she took after seven years to bring this application. It is urged that an advocate's mistake should not be visited on an innocent litigant. This is however not always the case. The mistake must be explained and what action is taken to remedy the same.

8. The advocates did not swear an affidavit to explain the alleged mistake - **Civil Appeal No. 604 of 2012 Burhani Decorators & Contractors -vs- Morning Foods Ltd & Another (2014) e KLR** Once the court is satisfied as to the reasons it will reasonate and in exercise of its discretion refuse to penalise the client – See **Philip Chemolo & Another -vs- Augustine Kubede (1982-88) KAR 103** and cited with approval in **Nyeri C.A18 of 2013 and C.A NO. 114 of 2009 Peter Kiria & Another -vs- John Kagwiria (2013) e KLR**.

9. The court of appeal in the above case considered whether the exparte judgment had been regularly entered and held that:

“1. the court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.

2. Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a trial issue----”

The courts discretion however is to be exercised to avoid injustice or hardship arising from excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice - **Shah -vs- Mbogo & Another (1967) EA 470**, and **Charles Chege Njoroge -vs Transnational Bank Ltd (2006) e KLR**, a case cited by the 2nd Respondent.

10. In answer to the question of inordinate delay, I find no reason whatsoever, and the applicant has demonstrated none, why despite there being a Memorandum of Appearance and defence filed albeit out of time, the application was not brought timetiously. A period of seven years by all standards is inexcusable and would cause prejudice and injustice to the 2nd respondent.

In **National Bank of Kenya Ltd -vs- Syntax Printers Ltd & 2 Others (2010) e KLR**, Mwilu J (as she then was) refused to set aside an exparte judgment entered three years before the application was made as in her words:

“to allow it would be equivalent to aiding a negligent pleader---”

11. In the same breath in **CFC Bank Ltd -vs- Charles K. Arap Tanui(2008)e KLR**, the court declined to allow an application to set aside exparte judgment brought seven years after the entry of the judgment and found the application to have been an afterthought.

12. If indeed the alleged mistake was due to the Advocates negligence as vaguely alluded, then the applicant has a remedy against the Advocates, by way of a suit for compensation for professional negligence.

13. It was avered by the applicant that the 1st defendant was placed under receivership in the year 2002. Other than alleging, no material was placed before the court to that effect. It is trite that if a party wishes the court to rule in its favour, it ought to place all relevant materials before the court.

An allegation *per se* will not suffice – See **Section 107-109 Evidence Act**. No winding order or an order appointing an interim liquidator were provided in terms of **Section 228 and 235 of the Companies Act**. The allegation that the 2nd respondent failed to obtained leave to continue with the court proceedings therefore must fail.

14. It was alleged that the applicant was not served with a notice of entry of judgment. I have earlier stated that a memorandum of appearance and defence were filed by the applicants advocates six days after entry of the exparte judgment. The advocates no doubt became aware of the exparte Judgment at the point of filing of the Memo and defence. They did nothing about it. The applicant too did nothing about it. All went to sleep, and intermittently negotiated a settlement that never materialised, and was only woken up by execution proceedings in 2012.

15. The conduct of the applicant in my view is one of an indolent litigant who had no interest in following up her case yet she knew the magnitude of the decree, well over Kshs.9,000,000/= as stated in the plaint.

I am also not persuaded that the applicant was not served with a notice to show cause why execution should not issue. There is no application by the applicant summoning the process server for examination as to who or where he effected service. It is not enough to aver

that in 2004 when the Notice to show cause is alleged to have been served she had left the premises. No evidence was adduced to that effect.

16. In **Kabuthu -vs- Mucheru HCCC No. 82 of 2002 (Nakuru)**, Musinga J (as he then was) held that:

“Where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity, and must be set aside ex debito justiae---.”

17. The above holding is appropriate where a party demonstrates that no service of process was effected unlike in the present application.

Under **Order 10 rule 11 and 9A rule 5 of the Civil Procedure Rules**, the court has wide discretion to set aside *ex parte* judgments or orders but only when it is satisfied that there are good and persuasive reasons to do so, with a view to achieving substantive justice in terms of **Section 1A, 1B and 3A of the Civil Procedure Act as well as Article 159(2) (d) of the Constitution**.

18. It is a statutory right under **Article 50(1)** that every person shall be accorded a fair trial but such is subject to other persons rights that Justice shall not be delayed - **Article 159(1) (b) and Sections 1A, 1B and 3A of Civil Procedure Act** where the overriding objective of the Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes under the Act.

19. Having stated as above, I now come to the more thorny issue as to the matter of **Limitations of Actions Act, Cap 22 Laws of Kenya**. It has been urged that execution of the judgment is barred by virtue of Section 4(4) as the judgment is more than twelve(12) years old.

Section (4) (4) states:

“An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods), the date of such default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date of which the judgment became due.”

20. I have been urged by the applicant that as judgment hereof is more than twelve years old, an attempt to execute the same would be in breach of the law.

The judgment was delivered on the 14th April 2000.

The first execution proceedings from the material placed before me and upon perusal of the court proceedings were taken by the plaintiff on the 19th March 2012 when a notice to show cause why execution should not be issued was taken out. It further shows that warrants of attachment were issued but upon application by the 2nd Respondent, the execution was stayed by a court order dated 9th August 2012 pending hearing of an application for review of orders issued on the 20th July 2012.

21. Since then numerous applications were filed by the applicant including the present application. Thus execution proceedings that commenced by way of the Notice to show cause started on the 29th March 2012 before the twelve year limitation period.

Looking at the *ex parte* judgment date, the execution proceedings were ongoing when stay orders were issued by the court. Going by the above, the twelve year period under **Section 4(4) (Supra)** would have lapsed on the 14th April 2012.

22. Faced with a similar situation, the **Court of Appeal in M'Ikiara M'rinkanya & Another -vs- Gilbert Kabeere M'mbijiwe (2007) e KLR** discussing the true interpretation of **Section 4(4)** held that execution is an act, and a proceeding in a court of law is a matter of procedure in enforcement of a judgment.

The court was firm that all

“post judgment proceedings including proceedings for execution of judgments are statute barred after 12 years.”

23. In **Miscl. Civil Application No. 278 of 2015 (O.S) Koinange Investments & Development Co. Ltd -vs- Ian Kahi Ngethe & 3 Others (2015) e KLR** – the court reiterated the above principle, but added that if there is a stay order on the execution proceedings, that period stops to run upto the final ruling on the stay order, including any appeals that may be filed, so long as execution proceedings commenced within the 12 years.

24. It is thus my finding that the *ex parte* judgment of the court having been delivered on the 14th April 2000, and execution proceedings commenced on the 29th March 2012 the enforcement thereof was within the limitation period prescribed under the law.

25. I find no merit in the applicant's submission that the judgment is not capable of enforcement.

Reviving a case eighteen years after entry of judgment cannot, by any measure, be in line with any constitutional and legal provisions. Litigation must come to an end.

26. Towards that end, I find no merit whatsoever in the applicant's application, and none in the issues stated, and as canvassed above.

I therefore dismiss the application dated 14th November 2012 with costs to the plaintiff, the decree holder.

Dated, Signed and Delivered this 31st Day of July 2018.

J.N. MULWA

JUDGE