



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 27 OF 2011

RAFFAELE TROLESE.....PLAINTIFF/RESPONDENT

VERSUS

PITARELLO PIETRO LUIGI.....DEFENDANT/APPLICANT

RULING

(Notice of Motion Application dated 22nd February, 2017)

1. The Applicant/Defendant Pitarello Pietro Luigi co-owns a residential house with the Respondent/Plaintiff Raffaele Trolese situated on Plot No. 798 at Mambui area in Malindi. Each party occupies a clearly demarcated portion of the house. The said residential house was damaged by fire. The Respondent reconstructed the damaged part of the house using his money and proceeds from the insurer. It was the Respondent's case that the Applicant refused to refund him half the cost of what he used to repair and maintain the house thus prompting him to file the claim before this Court which culminated in the award of Kshs.5,859,018/= to him by my brother S. Chitembwe, J through the judgement delivered on 14th March, 2016.

2. The Applicant subsequently brought the notice of motion dated 22nd February, 2017 seeking orders as follows: -

“1. THAT the application herein be certified urgent and service thereof be dispensed with in the first instance.

2. THAT the Honourable Court be pleased to grant leave to the firm of M/S WESLEY JOHN AUSTIN & ASSOCIATES ADVOCATES to come on record for the Defendant/Applicant herein in place of M/S KIDENDA, ONYANGO, ANAMI & ASSOCIATES.

3. THAT the recognized agent SAMUEL MBUTHIA NYINGE be granted leave to act, plead and swear documents on behalf of the Defendant/Applicant.

4. THAT pending the hearing and determination of this application the Honourable Court be pleased to order a stay of execution of the judgement of this court dated 14th March 2016 and decree therein.

5. THAT the Honourable Court be pleased to vary and or set aside the judgement of this Honourable Court delivered on 14th March 2016 and the decree therein and direct that the

matter be heard on merit to enable the Defendant/Applicant to participate in the hearing.

6. THAT the costs of this application be provided for.”

3. The application which is brought under sections 3A, 1A and 1B of the Civil Procedure Act and Order 9 Rules 1, 2 and 9; Order 12 Rule 7; and Order 22 Rule 22 of the Civil Procedure Rules is premised on the grounds on its face and a supporting affidavit sworn by Samuel Mbuthia Nyinge on the date of the application.

4. In brief, the Applicant's case is that he resides in Italy and was thus unable to follow up his case. It is his averment that whenever he asked his previous advocate on record about the matter, he was informed that a hearing date had not been fixed. The Applicant asserts that this matter proceeded ex-parte without his knowledge and he was thus denied a hearing. He accuses his previous advocate of negligence and prays that the judgement delivered herein be set aside so that he can be allowed to defend the claim.

5. The Respondent swore an affidavit on 8th March, 2017 in opposition to the application. The Respondent's position is that the Applicant failed to attend court despite his advocate on record being served with several hearing notices.

6. It is the Respondent's assertion that although the Power of Attorney in respect of Samuel Mbuthia Nyinge was registered on 19th May, 2016, the Applicant without any explanation from himself or his counsel had taken close to one year prior to filing the instant application.

7. The Respondent avers that although the Applicant was given time to regularize his pleadings, he never filed or served any defence. The Respondent asserts that the Applicant never cared about the house and that is why he never followed up the matter with his advocate. The Respondent urges the court to dismiss the application.

8. When the application first came for hearing on 22nd February, 2017 this Court (S. Chitembwe, J) allowed prayers 2, 3 and 4. What therefore remains to be decided are prayers 5 and 6 noting that the matter proceeded on urgency basis as had been requested in prayer 1.

9. Although the issue of stay of execution needs to be determined substantively at this stage, that issue can only be tackled if the Applicant convinces this Court that there is need to set aside the judgement dated 14th March, 2016. Therefore, the determinant question to be answered in this ruling is whether the said judgement should be set aside.

10. The principles governing the exercise of discretion by a court in setting aside an ex-parte judgement obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing were enunciated by the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**. They can be summarized as follows:-

a. There are no limits or restrictions on the judge's discretion. However, a discretionary power should be exercised judicially and not arbitrarily;

b. The discretion is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice;

c. The court has no discretion where it appears there has been no proper service;

d. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules; and

e. The sins and omissions of advocates should not be visited upon clients especially where the

litigant shows that the default has been due to the advocate's mistake. In an application of this nature unless injustice would be occasioned the other party the court should consider the applicant's case with broad understanding.

11. The Court of Appeal went ahead and stated some of the factors to be considered in exercising the Court's discretion. One of the factors is the facts and circumstances of the case, both prior and subsequent to the entrance of the *ex-parte* judgement. Also to be considered is the nature of the action and the applicant's defence. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered. Above all, it should be remembered that to deny a party a hearing should be the last resort of a court.

12. That the failures of counsel could not be visited upon an innocent client was emphasized by Asike-Makhandia, J (as he then was) in **Patrick Mutunga Mwilu & 10 Others v Mary Katua & 2 Others [2012] eKLR** when he stated that: -

“Finally, I come to the question whether the indiscretions of counsel should be visited upon a client. The general principle and which I agree with is that a litigant should not be punished for the sins of his counsel. The court must guard against undue hardship or irreparable loss being caused to a litigant due to his counsel's negligence and or inadvertence, particularly when he had no hand or role to play in matters leading to his advocate's omissions. He should in the circumstances not be punished for such omissions.”

13. In **Didovsky Igor & 11 Others v International Bulk Carrier Spa & 2 Others [2013] eKLR** Mary Kasango, J stressed the need to establish that the defence raises triable issues. She cited the decision of the Court of Appeal in **Baraka Apparel EPZ (K) Ltd v Rose Ajwang T/A Faida 2002 Caterer [2007] eKLR** where it was stated that: -

“It is our humble view that where there is a Defence which raises bona fide triable issues, or even a solitary triable issue, the same ought to be allowed to proceed to hearing and final determination on merit.”

14. I have pointed out the matters to be taken into account in determining an application like the one before this Court. Those are the principles to be applied in the determination of the current application.

15. The Applicant blames his previous counsel for the events that have led to the current state of affairs. There is nothing on record to show the Court the nature of the relationship between the Applicant and his former counsel. It is however undisputed that the hearing notices were served upon the Applicant's then counsel by the Respondent's advocate. Assuming the Applicant's previous advocate was indeed negligent as alleged, there is nothing in the affidavit in support of the instant application showing how the Applicant tried to keep tabs on his matter.

16. It is also noted that the Respondent attached to his replying affidavit a notice of motion dated 9th November, 2011. In support of that application is an affidavit sworn by one Abdulrahman Sheikh Hassan who averred that he held a Power of Attorney from the Applicant. The Applicant's averment that he was away in Italy and unable to monitor his claim is therefore incorrect as he had a local agent with powers to deal with the case as he would have dealt with himself. There is no indication that Abdulrahman was not served with hearing notices by the former counsel. Since the Applicant has not adduced any evidence to show that his previous counsel was indeed negligent there is no reason for attributing the default herein to the Applicant's counsel on record at the material time. There is therefore no basis for allowing the application on the ground that counsel was negligent.

17. The file in which this application has been filed is a skeleton file. It is presumed that the original file is not available. Although the Respondent averred that he was not aware that the Applicant had filed a defence, this averment is incorrect as the learned Judge indicated in the judgment that the Applicant entered appearance and filed a defence which was subsequently amended in response to an amended plaint. Unfortunately, neither the Applicant nor the Respondent exhibited the pleadings of the case. This

application belongs to the Applicant and it was incumbent upon him to produce evidence that would have supported his case. A party who makes an application should place before the court all the evidence that can aid his application. This Court has not had the benefit of looking at the defence in order to determine whether it raises triable issues. In any case since there was a defence on record the Judge must have considered it against the evidence that was adduced by the Respondent. Without the benefit of the defence, this Court can only presume that the defence raised no triable issue(s). It can also be concluded that no sustainable claim was raised in the counterclaim.

18. I now come to the question as to whether the Court should exercise its discretion in favour of the Applicant. In order for a court to make a decision one way or the other, a party must convince the Court that a particular decision should be made. The Respondent accused the Applicant of bringing this application late in the day. He pointed out that the Power of Attorney through which the Applicant donated powers to Samuel Mbutia Nyinge was registered on 19th May, 2016 and there is no explanation why this application was filed on 22nd February, 2017 several months later. The Applicant did not rebut this obvious fact. Indeed, at paragraph 5 of the supporting affidavit Samuel Mbutia Nyinge avers that the Applicant became aware of the judgement “**sometimes in June 2016**”. There is however no explanation as to why it took the Applicant about eight months before he filed this application. Upon learning of the judgement the Applicant ought to have moved with speed to have the same set aside. He did not do so and it cannot be said that the appointment of Samuel Mbutia Nyinge as an attorney delayed the process as he had been appointed a month earlier. The attitude of the Applicant to this suit can only be said to be lackluster and a court of justice cannot exercise its discretion in favour of a party whose sole aim is to delay the trial and conclusion of his case.

19. For all the reasons stated above, it goes without saying that this is not a matter in which the Court should exercise its discretion in favour of the Applicant. The application herein fails and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 26th day of April, 2017

W. KORIR,

JUDGE OF THE HIGH COURT