



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 602 OF 2001

SULEIMAN KASUTI MURUNGA.....PLAINTIFF

VERSUS

BULLION BANK LIMITED.....DEFENDANT

RULING

1. The Application herein is a Notice of Motion filed by the Plaintiff (herein “the Applicant”) dated 31st January 2017 and brought under the provisions of Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 50 of the Civil Procedure Rules, 2010.
2. The Applicant is seeking for orders that, the Court grants him leave to produce evidence in support of his claim and that the Defendant’s witness be recalled for cross examination before the final determination of the suit. That, the Court do issue any other appropriate order for purposes of ensuring a fair and just determination of the dispute. That, the costs of the Application be in the cause.
3. The Application is supported by the grounds on the face of it and an Affidavit sworn by the Applicant dated 31st January 2017. He deposes that on 12th January 2017, when this case was set for hearing, it was heard in his absence. That he only learnt of the same from his lawyer who informed him that the hearing date was not diarized and therefore the lawyer could not notify him of the hearing and neither did the lawyer attend hearing. He pleaded with the court that; he should not be condemned due to the inadvertent mistake of his lawyer. That he should be granted an opportunity for the case to be heard on merit.
4. The Application was also supported by an Affidavit sworn by Mr. Fredrick Okeya, an advocate of the High Court of Kenya, representing the Applicant. He deposed that on 24th October 2016, when this matter was scheduled for hearing, he deputized his clerk, Margaret Wairimu, to get a lawyer to apply for an adjournment in the matter as he was at Aga Khan Hospital with his wife who had suffered a stroke the night before due to a haemorrhage of the brain. When the clerk returned to the office, she did not indicate in his diary that the case had been set for hearing on 12th January 2017. On 15th December 2017, his law firm was closed for Christmas holiday, and re-opened on 16th January 2017. On 20th January 2017, when the law firm was served with the Defendants submissions and that is when he learnt that the case had been heard on 12th January 2017. He deposed that a law firm takes the blame for failure to attend the Court on 12th January 2017, as such that the Plaintiff should not be punished for his mistake. That as a lawyer and law firm, they are ready to pay any costs that the Court may order and in that case, the Defendant (herein “the Respondent”) will not suffer prejudice.
5. Margaret Wairimu, a court clerk in the law firm of M/S Otieno Okeyo & Co. Advocates also swore an

Affidavit stating that she attended Court on 24th October 2016 on instructions of Mr. Okeyo. When the matter was adjourned to 12th January 2017, she went back to the office to transfer the information into the new diary of 2017; however she inadvertently forgot to do so. On 15th December 2016, the law firm closed its offices for the Christmas holiday and re-opened on 16th January 2017. She only learnt that the case herein proceeded for hearing on 12th January 2017 when she was served with the Defendants' submissions, on 20th January 2017. She took the blame for the failure to diarize the hearing date and profusely apologised to the Court, the Plaintiff and Defendant for the inconvenience caused.

6. The Application was opposed by the Respondent vide a Replying Affidavit dated 2nd February, 2017 sworn by Keziah Ruto, a Senior Legal Officer in the Defendant Bank. She detailed out the various dates when the Plaintiff was not ready and able to proceed with the hearing of the case for various reasons as follows;

i. 7th October 2004, the matter was adjourned on the Plaintiff's request.

ii. 1st February 2011, both the Plaintiff and his lawyer were not in court, the case was adjourned.

iii. 23rd February 2012, the Plaintiff's advocate sought for an adjournment as he was bereaved.

iv. 7th July 2014 the matter was adjourned as the Plaintiff's advocate was unwell.

v. 25th February 2015, the Plaintiff sought for an adjournment to allow him to make a settlement proposal.

vi. 24th October 2016, the matter was adjourned on the grounds that the Plaintiff's lawyer had an emergency.

vii. 12th January 2017, the Plaintiff and the lawyer were absent yet the date was taken inter-parties

7. She further stated that, on 23rd January 2017, when the matter came for hearing the Plaintiff sought for more time to file submissions. He did not request to file this Application. However he did not file the submissions but this Application. That in the given circumstances, the Plaintiff's conduct shows he has lost interest in pursuing this matter. The Respondent averred that the Plaintiff has enjoyed an injunction order since 2001, for a period of over 15 years thus causing the Respondent inability to recover the loan for all that while.

8. The Parties agreed to dispose of the Application by filing written submissions. I have considered the Application in total. I find the main issue for determination is whether the Applicant has offered a convincing, sufficient and/or adequate explanation of his absence from Court on the hearing date of 12th January 2017. The Plaintiff reiterated the in his submission that its due to failure to diarize the hearing date that he failed to attend to the hearing. He relied on several cases to argue that matters in Court should be heard on merit and substantive justice be administered. That, lapses by an Advocate ought to not necessarily debar a litigant from pursuing his rights. The cases cited are *inter alia*:

i. Shah -Vs- Mbogo & Another 1976 EA 116.

ii. Savings & Loans Kenya Ltd -Vs- Onyancha Bwomote 2014 eKLR.

9. The Applicant further submitted Article 159 (2) (d) of the Constitution of Kenya "admonishes 'us' to administer justice without regard to technicalities". That, a mistake as the one herein is excusable.

10. The Respondent on the other hand submitted that, the Plaintiff has adjourned the matter five (5) times and this conduct is in breach of section 1A and 1B of the Civil Procedure Act where Parties should assist

the Court dispose of matters expeditiously. The Defendant submitted that overriding objectives and Article 159 of the Constitution should not be used to relieve a party of its clear obligations under the Civil Procedure Rules. The Respondent relied on the cases of:

i. Republic -Vs- Attorney General & Another Ex parte Derek Gyidei Mareo 2016 eKLR.

ii. Ceres Estate Ltd -Vs- Kieran Day & 4 others 2013 eKLR.

11. The Respondent also submitted that careless and leisurely approach to work by advocates must fall on their shoulders. The case of *Ann Njoki Murani -Vs- Kenya Commercial Bank Ltd & 2 others 2016 eKLR* was cited. The Respondent further cited the case of *Francis J. K. Ichatha Vs Housing Finance Company of Kenya* to submit that;

“No court of equity will allow a man to derive advantage from his wrong..... He who seeks equity must do equity...”

12. I have considered the rival submission as aforesaid. It is not in dispute that this case has been in Court for a period of over 15 years. That is too long a period. In fact, that should be the very reason why it should be heard on priority basis and expeditiously disposed of. The Respondent gave a detailed account of the various dates when the case has been adjourned on the Applicant’s application. These facts have not been rebutted by the Applicant. It is the Plaintiff who initiates the suit. It is therefore its primary responsibility to set the fast speed at which the case will move. Apparently the Plaintiff herein is said to be enjoying an injunction order for the last 15 years. That explains the slow pace taken by the Plaintiff to progress this matter.

13. Indeed, although the setting aside of an ex parte order is within the discretion of the Court, it must always be remembered that discretion of the Court must always be exercised judiciously. It will not be invoked to assist a litigant who has clearly demonstrated lack of interest in progressing the matter. The Applicant, who benefits from the exercise of these discretionary powers of the Court, must demonstrate a sufficient cause for the same. In the case of *Savings & Loans Kenya Ltd (Supra)* the court held that:

“As for sufficient cause, in our view, sufficient cause means no more than reason enough that explains or excuses the applicant’s default”

14. The question thereof is: Has the Applicant advanced a sufficient cause herein to warrant the grant of the orders sought? The simple reason advanced as aforesaid is that the matter was not diarized by the Applicant’s law firm. Is this an excusable. In the case of *CMC Holdings Ltd -vs- James Mumo Nzioka 2004 KLR* the court observed:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”

15. The Applicant’s counsel in an effort to mitigate matter on behalf of the Applicant submitted that, the provisions of Article 159 of the Constitution to favours the Applicant and invited the Court to treat his failure to diarize the hearing date as a technicality. In my opinion, that argument has no basis, with due respect. What happened in his law firm was a pure act of “negligence” and it cannot be casually termed as a technicality. I therefore uphold the Respondent’s submissions that Applicant is bound by the overriding objectives to assist the Court in the expeditious disposal of this matter. The Applicant’s counsel’s conduct, of requesting for time to file submission and beating retreat to this Application cannot also go unnoticed. In my opinion, that conduct is to say the least “insincere and/or unprofessional”. Although the Respondent has sought that, the Court should disentitle the Applicant of the reliefs sought due to this conduct of the Counsel, I find that would be too harsh on the innocent litigant. In this matter I find that, the Applicant’s Counsel is entirely and squarely to blame for the non-attendance of Court on 12th January 2017. The saving grace is that, he readily admitted the same and seeks for forgiveness and accepts liability and consequences of his “omission”.

16. I note the findings of the Court in the case of *John Onger Mariaria & 2 Others Vs Paul Matundura Civil Application no. 301 of 2003 (2004) 2 EA 163*, that,

“Some clients must learn at their costs that, the consequences of careless and leisurely approach to work by the advocate must fall on their shoulders.....”

17. However, in the case of *CMC Holdings (supra)* the Court held that, the ***“blunders made from time to time”*** by Advocates should not be visited upon the Parties. Failure to hear a case on merit due to a mistake or negligence of an Advocate, is an injustice to the ***“innocent litigant”***. The compensation in forms of damages from a counsel cannot be equated to the constitutional right of a Party to be heard, as enshrined under Article 48 of the Constitution of Kenya. Indeed, the Purport of Article 159(2) (d) of the Constitution is to uphold decision based on the substance of the matter. The substance thereof can only be tested through a hearing of the substantive issue. Such rights cannot be enjoyed where a Party is prevented from entering the temple of justice, and/or approaching the seat of justice.

18. All in all, I find that, it is in the interest of justice to accord the Plaintiff an opportunity to be heard as the case has not been concluded. I therefore allow the Notice of Motion Application in terms of prayers 1 and 2. The costs of this Application ***“paid”*** and of the recall of the Defendant’s witness be borne by the Applicant’s lawyer in person. I further order that, the suit be set down for hearing within thirty (30) days of this order. Failure to comply with the time frame of setting down the suit for hearing, the orders issued herein stand vacated forthwith, without further reference to Court; and interim orders herein (if any) be vacated.

19. Ordered accordingly.

Dated, signed and delivered on this 21st day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In open Court in the presence of:

Mr. Angwenyi for Okeyo for the Plaintiff/Applicant

No Appearance for the Respondent/served

Teresia - Court Assistant