REPUBLIC OF KENYA

IN THE HIGH COUR OF KENYA AT KISII

CIVIL SUIT NO. 154 OF 2011.

JOEL GICHANA NYAMIGWA..... PLAINTIFF

VERSUS

THE SDA (EA) UNION LIMITED.....DEFENDANT

RULING

1. This ruling relates to the application dated 7th February 2017 brought pursuant to **Order 17 Rule (4)** and **Order 18 Rule (9) of the Civil Procedure Rules** among other provisions of the law. In the said application the applicant seeks orders for the setting aside of the ex-parte proceedings taken on 7th June 2016 so as to afford the plaintiff/applicant an opportunity to be heard and to present his evidence in court and further that the applicant be granted an opportunity to cross-examine the defendant's witnesses who testified on 7th June 2016.

2. The application is supported by the applicant's affidavit dated 7th February 2017 wherein he avers that he was not aware of the hearing date as his newly appointed advocates had not been served with any hearing notice and that he only became aware that the case had proceeded when he received a mention notice for the purposes of fixing a judgment date.

3. It is the applicant's case that he has a good case with high chances of success and that the defendant/respondent will not suffer any prejudice if he is given an opportunity to present his case.

4. The respondent opposed the application through the replying affidavit of ALVIN ELIAMANI dated 27th February 2017 wherein he describes himself as the general manager of Africa Herald Publishing Press which is an arm of the respondent. He avers that the plaintiff has since the filing of the suit been unwilling to fix it for hearing and that all the efforts to fix the case for hearing have been at the respondent's instance. He further avers that the respondent has sought numerous adjournments every time the case has been listed for hearing culminating in the hearing date of 7th June 2016 when the plaintiff completely failed to turn up in court for the hearing despite the fact that the hearing date was taken by consent thereby leaving the respondent with no option but to proceed with the case in the applicant's absence.

5. The respondent's deponent reiterates that the respondent has waited for too long for the case to be heard so that it can canvass its counterclaim yet the plaintiff has been deploying delay tactics so that the case can become stale.

6. When the application came up for hearing, parties chose to canvass it by way of written submissions.

Analysis and determination

7. I have considered the instant application, the respondent's replying affidavit and the applicant's written submission. The main issue for determination is whether the applicant has made out a case to warrant the issuance of orders to set aside the ex-parte proceedings of 7th June 2016.

8. Order 17 Rule (4) and **Order 18 Rule (9**) on which the instant application is anchored stipulate as follows:

> **"[Order 17, rule 4.] Court may proceed notwithstanding either party fails to produce evidence.**
>
> **4.Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."**
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> **"[Order 18, rule 9.] Power to examine witness immediately.**
>
> **9. (1) Where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of any party or of the witness, at any time after institution of the suit, take the evidence of such witness in the manner hereinbefore provided.**
>
> **(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the court thinks sufficient, of the day fixed for the examination, shall be given to the parties.**
>
> **(3) The evidence so taken shall be signed by the judge and shall be evidence in the suit."**

9. This court is of the view that the provisions of the Civil Procedure Rules that the applicant has anchored his application are not very relevant to the circumstances of the instant case however, this court is still obliged, under the **Sections 1A, 1B, 3A** and **63 (e) of the Civil Procedure Act**, which the applicant also cited as the basis of his application, to observe the overriding objective of the Civil Procedure Act and facilitate he just, expeditious proportionate and affordable resolution of this dispute.

10. I have perused the proceedings so far taken in this case and I note that indeed, it is true that the plaintiff has been a reluctant party in this case in as far as fixing the case for hearing and actually proceedings with the case when it is listed for hearing is concerned. I note that it is true that the plaintiff/applicant has been responsible for most, if not all, the adjournments that have been sought in this case.

11. Turning to the proceedings of 7th June 2016 which is the subject of the instant application, I note that the said date was on 18th May 2016 taken by consent of the advocates for both parties. It is also noteworthy that on the hearing date of 7th June 2016, neither the plaintiff, nor the nor his advocate on record appeared in court when the case was first mentioned thereby prompting the court to place the file aside till 12.15 pm on the same day for the purposes of giving the plaintiff and his advocates a chance to turn up in court for the hearing in the event that they had been held up elsewhere.

12. Lo and behold, and to the surprise of this court, by 12.15 p.m. when the case was called up again, there was no appearance for both the plaintiff and his advocate thereby leaving the court with no option but to allow the respondent's application for the dismissal of the plaintiff's case and the hearing of the respondent's counter claim. In effect therefore, the plaintiff's case was on 7th June 2016 dismissed for non-attendance and therefore, the appropriate order under which the application ought to have been brought is **Order 12 Rule (7) of the Civil Procedure Rules** which deals with the setting aside judgment or dismissal.

13. The plaintiff applicant alluded to the fact that he was not notified of the hearing date by his advocates on record. I note that the plaintiff was not present in court on 18th May 2016 when the hearing date for 7th June 2016 was taken and therefore, there was no way he could have known of the hearing date except through a notice sent to him by his advocates. Courts have held time and again that the mistakes of an advocate should not be visited on their clients. In the case of **Edney Adaka Ismail vs Equity Bank Ltd [2014] eKLR**, the court observed:-

> ***"It is true that where the justice of the case mandates, mistakes of advocates, even if they are blunders, should not be visited on the clients when the situation can be remedied by costs"***

14. In the case of **Lucy Bosire vs Kehancha Div Land Disputes Tribunal & 2 others**, it was held:-

> ***"It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] KLR 492, [1989-88], KAR 1036 at 1042: [1986-1989] E.A. 74"***

15. The above decisions notwithstanding, it cannot be said that parties can always obtain setting aside orders while having a free ride on their advocates mistakes when they are also under an obligation not only to attend court, but to check the position of their cases with their advocates. This position was aptly articulated by Kimaru J in the case of **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002** when he stated:-

> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.***

16. From the above finding, it is clear that parties must not only blame their advocates, but must also show the positive or tangible efforts that they made towards the prosecution of their cases. In the instant case, I find that by filing this application the moment the applicant leant that the case had proceeded in his absence, the applicant has demonstrated that he is still interested in pursuing his case to its logical conclusion which is not the conduct of an indolent plaintiff.

17. On its part, the defendant has not shown that he will suffer any prejudice that cannot be compensated by way of costs should the instant application be allowed. In any event, the case is still pending a determination on the defendant's counter-claim and in that regard, there is at the moment, no way of telling whether or not the counter claim will be allowed.

18. Courts have been liberal in using their discretion granting orders to set aside ex-parte proceedings or judgments based on the cardinal rule of natural justice that states that a party should not be condemned unheard. The right to be heard before an adverse decision is made against a person is therefore a fundamental principle that permeats the entire judicial system. (See **Onyango Oloo vs Attorney General [1986-1989] EA 456**.

19. The Supreme Court of India succinctly expressed itself on the importance of the right to be heard in **Sangram Singh vs Election Tribunal Koteh, AIR 1955 SC 664, at 711** as follows:-

> ***"[T] There must be ever present to the mind, the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

20. Having carefully considered this application and taking a cue from the above cited authorities, I find merit in the application dated 7th February 2017 which I hereby allow and set aside the ex-parte proceedings and orders of 7th June 2016, however the setting aside is limited only to allowing the plaintiff to present his evidence and thereafter to cross examine the defence witnesses who had already testified.

21. The respondent is granted the costs of this application and thrown away costs in respect to the proceedings of 7th June 2016.

Dated, signed and delivered in open court this 17th day of October, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Okenye for the Applicant

Mr. Soire for Respondent

Omwoyo: court clerk