



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1246 OF 2004

ABUBAKAR AHMED ABDULRAHMAN..... PLAINTIFF

VERSUS

MUZHIM SALIM MOHAMED BAJABER1ST DEFENDANT

THE ATTORNEY GENERAL..... 2ND DEFENDANT

RULING

1. Abubakar Ahmed Abdulrahman, the plaintiff/respondent herein, filed a suit against Musahim Salim Mohamed Bajaber and the Attorney General the 1st and 2nd defendant (applicant) vide the plaint dated 12th November 2004 in which he sought for judgment in the following terms:
 - i. *Ksh.24,350,000 being special damages.*
 - ii. *USD2,500 being special damages*
 - iii. *General damages for harassment, false imprisonment, mental distress and anguish, conversion and breach of duty of trust and care*
 - iv. *Interest on (i) and (iii) as the court will order*
 - v. *Costs of this suit.*
2. The suit papers were served upon the defendants. The Attorney General (2nd defendant) is alleged to have filed a memorandum of appearance on 28.12.2004 and subsequently filed a defence on 15.12.2005. On 10th June 2005, the plaintiff applied for leave for entry of judgment against the 2nd defendant for failure to enter defence within the prescribed period. The application appears to have been served upon the 2nd defendant on 14.11.2005. On 24th March 2006, this court eventually granted the plaintiff/applicant leave to apply for judgement against the 2nd defendant. On 30th March 2006, interlocutory judgment was entered against the 2nd defendant for the sum of kshs.24,350,000/= and USD,2,500 being special damages plus interest on the same. When the 2nd defendant learnt of the existence of a judgment it took out the motion dated 14th day of May 2007 in which the Attorney General applied for interalia the setting aside of the judgment. The motion was heard and dismissed by lady Justice Sitati on 7th July 2008 for want of prosecution on account of the non-attendance by the 2nd defendant and its counsel. The 2nd defendant has now taken out the motion dated 21st July 2008, in which he now seeks for an order reinstatement of the application to set aside judgement. The same was dismissed for want of prosecution on 10th December 2008 due to non-attendance by the 2nd defendant. The 2nd defendant has now taken out the motion dated 10th October 2014 whereof the Attorney sought for the following orders

1. ***THAT this application be certified urgent and be heard ex-parte in the first instance.***
2. ***THAT this honourable court be pleased to set aside the interlocutory judgement entered against the 2nd defendant on 30th March 2006 and all other consequential orders.***
3. ***THAT this honourable court be pleased to grant a stay of execution of the interlocutory judgement dated 30th March 2006 and the preliminary decree dated 30th March 2006 pending the hearing of this application inter-partes.***
4. ***THAT this honourable court be pleased to grant a stay of execution of the interlocutory judgment dated 30th March 2006 and the preliminary decree dated 30th March 2006 pending the hearing and determination of the suit.***
5. ***THAT the defence filed on 15th December 2005 be deemed as properly on record.***
6. ***THAT upon the grant of prayer 2 above, the honourable court be pleased to order that the matter be set down for hearing.***

3. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support and against the motion plus the grounds stated on the preliminary objection. It is the 2nd defendant's argument that by 30th March 2006, when the interlocutory judgment was entered the 2nd defendant had already filed its defence on 15.12.2005 which was properly on record and had not been struck out for any reason, hence the interlocutory judgement was irregular and ought to be set aside ex dibito justitiae. The 2nd defendant's advocate pointed out that the 1st defendant filed a defence and the case between the 1st defendant and the plaintiff is still pending hearing and determination. The 2nd defendant is of the view that the plaintiff's conduct of executing the decree against the 2nd defendant denied the 1st defendant the right of a fair hearing. The 2nd defendant also pointed out that two previous applications seeking to set aside the interlocutory judgment were dismissed for non-attendance on the part of the 2nd defendant and its counsels. It is argued that the mistakes of learned counsels should not be visited upon the client. The 2nd defendant further argued that the nature of the suit is a claim for detained goods being motor vehicles which required formal proof.
4. The plaintiff urged this court to dismiss the motion by relying on the preliminary objection and the facts deponed in the replying affidavit. It is argued that the current motion is res judicata. It is stated that the same raised similar grounds to those motions which were dismissed for want of prosecution. The plaintiff further argued that the 2nd defendant had failed to offer an explanation as to why there was delay in taking any action to challenge the interlocutory judgment for 8 years. The plaintiff further argued that the current motion was filed in an attempt to frustrate his judicial review application mandamus to compel the 2nd defendant to pay kshs.49,280,929/654 and USD 4,954/25.
5. After a careful consideration of the rival submissions and the material placed before this court, there is one critical point which the 2nd defendant has raised that needs serious consideration. The 2nd defendant has stated that by the time of obtaining interlocutory judgment in default of defence, the 2nd defendant's defence had already been filed. The plaintiff avers that there was no minute in the court file to show that the 2nd defendant had a filed defence. The plaintiff also argued that the same was not in the court file at the time of filling the application for leave to enter judgment against the 2nd defendant. It is clear to me that the plaintiff does not expressly deny that the 2nd defendant had filed a defence before entry of judgment was made. It may not have been by the practice and rules of court but the fact remains that a defence was already in situ in the court file by the time of applying of entry of judgment. The 2nd defendant's application was therefore not frivolous.
6. The second point which was ably argued by the parties the question for the long delay in filing and prosecuting the various applications. There is no dispute that three previous applications before

this one were dismissed for want of attendance on the part of the 2nd defendant. The plaintiff has argued that the 2nd defendant has not given good and satisfactory reasons to justify the delay. What I gathered from the 2nd defendant's arguments is that it was let down by its counsels. Those counsels at times did not attend court for personal challenges and at times for sheer workload to attend in various courts. It has also been pointed out that some of the litigation counsels were transferred who in turn left without proper handing over to the succeeding counsels. I find the reasons advanced by the 2nd defendant plausible. However, what is of concern is the length of the time the 2nd defendant took to address this matter. It would appear that the 2nd defendant was woken up from its slumber when the plaintiff took up judicial review application for mandamus to compel the 2nd defendant to satisfy the decree.

7. However in the circumstances of this case and in broad interest of justice and despite the 2nd defendant's conduct I will indulge the 2nd defendant by entertaining the motion.
8. The other issue which came up for argument is whether or not this motion is res judicata. The principles to be considered in determining whether a matter were restated in **Willie =vs= Michuki & 2 others (2004) K.L.R 357** interalia as follows:

“For the doctrine of resjudicata to apply three basic conditions must be satisfied namely: that there was a former suit or proceeding in which the parties are the same parties as in the subsequent suit, litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.”

9. It is not in dispute that the applications previous filed were dismissed for want of attendance. They were not determined on merits hence the doctrine of resjudicata does not apply here. However, the plaintiff pointed out that rather than filing fresh application, the 2nd defendant should have simply applied to have the dismissed application be reinstated. With respect I agree with the view taken by the plaintiff. I will not however use that to the disadvantage of the 2nd defendant but will instead overlook it as a question choice. The rationale to avoid incurring further costs and to avoid the filing of a plethora of applications over similar prayers.
10. In the end I find the motion dated 10th October 2014 to be well founded. It is allowed in terms of prayers 3 and 4.
11. In order to avoid procrastinating the matter further, I direct the parties to comply with the provision of Order 11 of the Civil Procedure Rules 2010 within a period of 45 days from the date hereof. The matter to be mentioned before this court on 12th May 2016 for pre-trial conference.
12. In the circumstances of this cases, costs of the motion is awarded to the plaintiff.

Dated, Signed and Delivered in open court this 18th day of March, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant