



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 144 OF 2004 (O.S)

CHIMBA MBEYO MOKONGA.....PLAINTIFF/APPLICANT

-VERSUS-

AHMED ABDULLA.....DEFENDANT

AND

ABSHIRI MWINYI.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff moved the Court under section 1A, 1B, 3, 3A and 63 (e) and 95 of the Civil Procedure Act seeking that the orders issued on 20.3.2014 be varied/discharged and or set aside *ex – debito justitiae* and the applicant be given leave to file a replying affidavit to the application dated 30.10.202
2. The application is supported by the grounds listed on the face of it and the affidavit sworn by Chimba Mbeyo. The applicant stated that he was never served personally as the former advocates had no instructions and it is against the rules of natural justice that the application proceeded ex parte.
3. The applicant deposed that Mr Mutubia advocate was never instructed to appear for him. He deposes that the orders of the Court were already executed and even part of the property sold to 3rd parties. He urged the Court to grant the orders sought.
4. The application is opposed by Abshiri Mwinyi who deposes that at the time of institution of this suit, the defendant Abdalla bin Ahmed was dead and he annexed a copy of death certificate to support this. Mr Mwinyi deposed that upon being appointed trustee of the wakf, he applied to set aside the exparte judgement. It is his case that since he has filed their documents, this matter should proceed to trial on merits and urged the Court to dismiss the present motion.
5. The order sought to be set aside was in respect to the application dated 30th October 2012 whose effect was to set aside the exparte judgement entered on 24th February 2006. The applicant annexed the Court proceedings of 3rd December 2013 during the hearing of an application to re – construct the file. During those proceedings, Mr Gichana indicated that he last represented the applicant in 2006 and therefore had lost touch with his client and had no instructions.
6. On the proceedings of 3.3.14 it is recorded that Mohamed held brief for Khatib for applicant while Mutubia held brief for Gichana for Plaintiff/Respondent. The application dated 30.10.2012 was granted

on the basis there was no document filed to oppose it despite it being served. On 13.5.14, the Originating Summons was fixed for hearing before the present application was filed.

7. The present applicant feels the orders should not have been granted as his advocates then had no instructions. There is nothing on record to show that E. M Gichana ceased to represent the applicant in this suit. The explanation given that he had lost touch with his client since it was over six years. If that was so then he ought to have filed an application to cease acting before the application of 30.10.2012 was heard. Instead he sent an advocate to hold brief which advocated stated nothing when the application was called out. Further other than the Plaintiff's word, there is nothing by way of affidavit to demonstrate that indeed Mr Mutubia advocate had no instruction to appear for Gichana for the plaintiff on 3rd March 2014.

8. The Applicant has relied on the renowned case of **Shah vs Mbogo (1967) E A 116** on the principles for setting aside to which is to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. This case is distinguishable from the present circumstance because the orders of 3.3.2014 are not ex parte orders but was made in the presence of Counsel holding brief. In my view, the applicant ought to have demonstrated that Mr Mutubia had no instructions to appear. It is the applicant who alleged that Mr Mutubia had no instructions hence the burden of proving the assertion lied on him and not on the respondent.

9. The applicant has not explained the nature of injustice or hardship he will suffer if this case is heard on merits. He deposed that the decree had been executed and part of the property sold to 3rd parties. There was nothing annexed to show that the suit land has been sub divided and sold. It is not just enough for a party to say he will suffer hardship if the orders sought are not granted without giving the nature of the hardship anticipated.

10. The issue of whether proper procedure was followed in obtaining the judgement that was set aside is not open for me to consider in the present application. Those issues ought to have been raised during the hearing of the application for setting aside and or in an application for review of those orders or an appeal lodged against the order that set aside the judgement. The other issues raised in the submissions by the applicant are better dealt with during the hearing of the main suit.

11. In conclusion, I find no merit in the present motion dated 25th September 2014 and hereby dismiss it with no order on costs.

Ruling dated and delivered at Mombasa this 19th day of May 2016

A. OMOLLO

JUDGE