



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL CASE NO. 5 OF 2013.

BERNADETTE CANUTE :::::::::::::::::::: PLAINTIFF/RESPONDENT.

VERSUS

HERBERT SORE MAKATIANI :::::::::::::::::::: DEFENDANT/APPLICANT.

R U L I N G.

1. The defendant/applicant, Herbert Sore Makatiani being dissatisfied with an interlocutory judgment entered against him in default of filing a statement of defence filed an application by way of Notice of Motion on 3rd November, 2015 seeking the following orders:-

- i. *Spent;*
- ii. *Spent;*
- iii. *The interlocutory judgment in default of a Statement of Defence entered herein pursuant to a request for judgment dated the 9th of January, 2010 and all the consequential orders thereof be set aside and the defendant be allowed to file and serve his Statement of Defence within such reasonable time as the court may deem just and expedient;*
- iv. *The costs of this application be provided for.*

2. The said application is based on the following grounds:-

- i. *The defendant/applicant acknowledges receipt of the summons to enter appearance, the plaint and verifying affidavit in time and that he handed over the same to Mr. Mukavale Advocate and asked him to enter appearance and file defence as required by law;*
- ii. *However, owing to the fact that Mr. Mukavale Advocate had an interest in Sigalagala Technical Training Institute, he declined to take up the brief and directed the defendant/applicant to seek legal assistance from Mr. Kiveu Advocate;*
- iii. *Mr. Kiveu Advocate took up the brief and prepared a memorandum of appearance dated 12th March, 2013 which was filed in court on the same day but was not served upon the plaintiff's counsel;*
- iv. *However, there was an oversight on the part of Mr. Kiveu Advocate's chambers as a result of which a statement of defence was not drawn and hence (sic) none was filed;*
- v. *That on 3rd June, 2013, notwithstanding the filing of the memorandum of appearance and on the application by the plaintiff/respondent's counsel, the Deputy Registrar of the High Court entered an interlocutory judgment in default of both appearance and defence;*

vi. The entry of judgment by the Deputy Registrar in default of both appearance and defence was in error as an appearance had been filed;

vii. That on 6th June, 2013, the plaintiff's counsel took a date for hearing of the suit by way of a formal proof and the Deputy Registrar made an order that:-

“Order – Case fixed for formal proof on 3/7/2014 Mr. Ojienda Advocate to serve.”

viii. On 3rd July, 2014, counsel for the plaintiff/respondent appeared in court before the Hon. Judge and addressed the court as follows:-

“Formal Proof. We ask for witness summons for my two witnesses” and the court made an order for the issue of summons as prayed;

ix. On the same day at 12.15 p.m., the hearing of the suit by way of formal proof commenced without the record indicating that the defendant/applicant was served as was ordered on 6th June, 2014 or not;

x. The failure to file and serve the statement of defence was due to an oversight in the chambers of the defendant's Advocates on record;

xi. The mistake/oversight by counsel should not be visited on an innocent party who had no role to play in the same;

xii. The defendant/applicant has a good and plausible defence against the plaintiffs' claim as set out in the plaint;

xiii. It is in the wider interest of justice that the defendant/applicant is accorded an opportunity to be heard in his defence and in line with overriding objectives of the court;

xiv. It is fair and just that the defendant/applicant is accorded a chance of being heard in line with the rules of natural justice.

xv. The judgment herein was read and delivered on 19th of October, 2015 in which the plaintiff was awarded a sum of Ksh. 2.5 Million and that unless there is a stay of execution of the decree herein, the plaintiff/respondent may commence the process of execution to the detriment of the defendant/applicant;

xvi. The defendant/applicant is ready, able and willing to offer reasonable security as a show of good faith and as a condition for the grant of the orders sought;

xvii. The plaintiff/respondents(sic) will not suffer any prejudice should the orders sought for herein be granted as prayed;

xviii. On the other hand, the defendant/applicant stands to suffer substantial loss and damage if the orders prayed for herein are not granted as prayed.

3. The application is supported by the affidavit of the defendant/applicant dated 2nd November, 2015 and that of Mr. Michael M. Kiveu Advocate dated 30th October, 2015.

Applicant's submissions

4. At the hearing of the application, Mr. Onsongo, learned counsel for the defendant/applicant submitted that the defendant filed a memorandum of appearance but failed to file a statement of defence. That the judgment dated 19th October, 2015 was entered after the plaintiff was heard in the absence of the

defendant.

5. Mr. Onsongo submitted that after delivery of the judgment and notice being given to the defendant of the same, he moved with haste and filed the present application. It was submitted for the defendant/applicant that he approached a law firm which failed to file a defence and passed on the brief to another firm of Advocates. That was done without the knowledge of the defendant/applicant who came to know about this arrangement after the judgment. Mr. Onsongo submitted that the sins of the Advocates should not be visited upon the defendant/applicant. He informed the court that the cause of action is a tort of defamation and the defendant/applicant is of the view that he has a good defence. A copy of a draft statement of defence was attached to the defendant/applicant's affidavit.

6. The defendant/applicant's counsel relied on the decision of **Kanwal Sarjit Singh Dhimar Vs. Keshavji Jivraj Shah [2015] eKLR** in which the Court of Appeal stated at page 7 that courts exist for the purpose of dispensing justice and that the sword of justice cuts both ways. The court further stated that a technical judgment is not the best judgment.

7. Mr. Onsongo also relied on the case of **Richard Ncharpi Leiyagu Vs. Independent Electoral Commission & 2 Others [2013] eKLR** where the Court of Appeal at page 7 held that it was not proper to shut out a litigant. Mr. Onsongo prayed for the application dated 30th October, 2015 to be allowed and that the setback to be suffered by the respondent, if the application is allowed can be compensated by throw away costs.

The respondent's submissions

8. Mr. Ojienda, learned counsel for the plaintiff/respondent opposed the application and relied on the affidavit sworn by the plaintiff/respondent on 9th November, 2015. Mr. Ojienda pointed out that the defendant/applicant had admitted that his previous Advocates on record were negligent. He submitted that the conduct of the defendant/applicant cannot be wished away. He referred the court to paragraph 12 of the defendant/applicant's affidavit where he deposes that he knew of his own knowledge that 3rd July, 2014, at 12.15 p.m., the hearing of the suit by way of formal proof commenced without the record indicating that the defendant/applicant was served as was ordered on 6th June, 2014 or not.

9. Mr. Ojienda also submitted that the issue of the case was raised by the chairman of the Board of Governors of Sigalagala Technical Training Institute. Copies of minutes of the meetings where the matter was discussed were attached to the plaintiff/respondent's affidavit.

10. Mr. Ojienda submitted that it is well settled that a party whose Advocate is negligent has a recourse to the Advocate. He relied on the decision of **National Bank Kenya Ltd. Vs. Muriu Mungai & Co. Advocates & Another [2009] eKLR** where justice Warsame made a finding that where there is negligence on the part of the Advocate he should pay compensation. It was submitted that it was not explained why the memorandum of appearance was not served. Mr. Ojienda, submitted that this is not a proper case for the court to exercise discretion in favour for the defendant/applicant and prayed for the application to be dismissed.

11. In respect to costs, Mr. Ojienda prayed for Ksh. 200,000/= which would translate to Ksh. 20,000/= per attendance.

The defendant/applicant's response

12. Mr. Onsongo submitted that the case cited by counsel for the plaintiff/respondent was on negligence of counsel and oversight thus not relevant to the present case.

Analysis of the facts and the applicable law

The issue that calls for determination is if a justifiable cause has been shown to set aside the exparte

judgment entered for the plaintiff.

13. plaintiff and verifying affidavit which he handed over to Mr. Mukavale Advocate to enter appearance and file a defence. The said Advocate declined to take up the brief due to a certain interest he has in Sigalagala Technical Training Institute and he directed the defendant/applicant to seek legal assistance from Mr. Kiveu Advocate, which he did.

14. In paragraphs 3, 4 and 5 of the said affidavit, the defendant/applicant deposes that Mr. Kiveu Advocate took up the brief and prepared a Memorandum of appearance dated 12th March, 2013 which was filed in court on the same day but was not served upon the plaintiff's counsel. He further deposes that an oversight on the part of Mr. Kiveu Advocate's chambers resulted in a statement of defence not being drawn and filed.

15. In paragraph 6 of his affidavit, the defendant/applicant deposes that on 3rd June, 2013, on request of the plaintiff/respondent's counsel, the Deputy Registrar of the High Court entered an interlocutory judgment in default of both appearance and defence. The applicant/defendant contends in paragraph 7 of his affidavit that, the entry of the judgment by the Deputy Registrar in default of both appearance and defence was in error as an appearance had been filed.

16. In paragraph 12 thereof, the defendant/applicant deposes that formal proof proceeded on 3rd July, 2014 but the court did not indicate that the defendant/applicant was served with a hearing notice for that day. The defendant/applicant deposes in paragraphs 10 and 11 that failure to file and serve a statement of defence was due to an oversight on the part of his counsel and that the said oversight should not be visited upon him.

17. In paragraph 16, the defendant/applicant deposes that he has a plausible defence against the plaintiff's claim as set out in the plaint.

18. The plaintiff/respondent in her affidavit deposes that the defendant/applicant has not explained to the court why he did not serve the plaintiff/respondent with a copy of the memorandum of appearance. It is the plaintiff/respondent's contention that the defendant/applicant's remedy lies in an action for professional negligence under the Law Society Kenya Professional negligence regulations.

19. In paragraphs 7 and 11, the plaintiff/respondent deposes that the applicant/defendant was served with a hearing notice for formal proof on 17th June, 2014 and a return of service was filed in the court on 25th June, 2014.

20. The plaintiff/respondent deposes in paragraph 12 that the defendant/applicant was well aware of the proceedings in court as he was once directed by the Board of Governors of Sigalagala Polytechnic to which he is a member to apologize to the plaintiff/respondent but he refused to do so. The issue was revisited in other board meetings. The plaintiff/respondent contends that the defendant/applicant cannot claim oversight on the part of his Advocates as he ought to have been liaising with his Advocate to know the status of the case.

21. In paragraph 14, the plaintiff/respondent deposes that the defendant/applicant attended court for delivery of the judgment in person meaning that he was well aware of the matter.

22. In his supplementary affidavit, the defendant/applicant deposes that he knows that the issue, the subject matter of this suit was discussed in a Board of Management meeting where it was agreed that he and the plaintiff/respondent would have the suit withdrawn from court as the issue had been resolved and they were asked to shake hands in front of the members in attendance which they did as a sign of agreement.

23. In paragraph 6 thereof, he deposes that he honestly believed that the plaintiff/respondent was to instruct her Advocates on record to have the suit marked as withdrawn, only for him to learn later that she

renewed on the gesture before the Board of Management and prosecuted the suit.

24. The defendant/applicant's affidavit also brings to fore legal issues which the plaintiff/respondent did not comply with before listing the suit down for hearing such as filing of a pretrial questionnaire, framing of issues for determination, setting down the suit for pretrial conference and obtaining a certificate for the readiness of the suit being set down for hearing.

Determination of the application

25. The defendant/applicant admits having been served with pleadings by the plaintiff/respondent. He instructed Mr. Kiveu Advocate to enter appearance and file a defence on his behalf. The law firm of Kiveu Advocates entered and filed appearance in court but failed in its primary duty to serve the memorandum of appearance on the defendant/applicant's Advocates. The said law firm failed to file a defence and the relevant documents in support of the defendant/applicant's case. The provisions of order 6 rule 2 and order 7 rule 1 of the Civil Procedure Rules were thus not complied with.

26. Order 11 on pretrial directions and conferences which the defendant/applicant claims was not complied with by the plaintiff/respondent, envisages a situation where a pretrial questionnaire would be filed and served after parties have closed the pleadings. In the instant case the defendant/applicant was non responsive from the word go. The defendant/applicant has placed the blame squarely at the feet of his then Advocates who failed to prudently file and serve pleadings on his behalf.

27. Mr. Michael M. Kiveu Advocate in his affidavit in support of the application deposes that he was approached in the year 2013 by J.J. Mukavale Advocate to act for the defendant in this matter. In paragraph 2 of his affidavit, he deposes that he entered appearance and was to liaise with the said Senior Advocate to obtain instructions so that he could file a statement of defence.

28. In paragraphs 4 and 5 thereof, Mr. Kiveu states that he knew the plaintiff as the Principal Sigalagala Technical Institute and he had for a long time acted for the institution in various matters since 2002 and he could not therefore take instructions to act against the said Principal.

29. In paragraphs 6, 7 and 8, Mr. Kiveu deposes that he alerted Mr. J.J. Mukavale over the issue and due to an oversight on his part, he inadvertently did not follow up on the case. He was surprised to be notified that he was on record and judgment had been entered against the defendant. Mr. Kiveu contends that his actions were not deliberate and the applicant should not be made to suffer due to communication breakdown between himself, Mr. Mukavale Advocate and the defendant.

30. The point of departure in Mr. Kiveu Advocate's affidavit and that of the defendant/applicant is that while Mr. Kiveu claims that the brief was handed over to him by Mr. Mukavale Advocate the defendant/applicant on the other hand contends that Mr. Mukavale Advocate directed him to seek legal assistance from Mr. Kiveu Advocate and it is in his knowledge that the said Advocate took up the brief, prepared a memorandum appearance dated 12th March, 2012 and filed in court on the same day but was not served on the plaintiff's counsel.

31. Although the defendant/applicant would like to depict himself as an innocent party who has been greatly aggrieved by Mr. Kiveu Advocate, I note that having been aware that the plaintiff/respondent had filed a suit against him he made no follow up on the same with Mr. Kiveu Advocate. The minutes attached to the plaintiff/respondent's affidavit shows that the Board of Management of Sigalagala Technical Training Institute was desirous to have the matter settled amicably between the two parties and prevailed upon the plaintiff/respondent to withdraw the court case against the defendant/applicant. The onus was upon the defendant/applicant to find out if the same had been done. He seems to have been least bothered to do so.

32. From the analysis of the facts on record, I find that the defendant/applicant was personally served with a hearing notice for formal proof but did not update Mr. Kiveu on the same to seek directions on the way forward. I find that the defendant/applicant sat on his laurels and hoped by a stroke of luck that the

case would fade away. This was not to be. He seems to have not made any efforts to talk to the plaintiff/respondent to withdraw the case as a gesture of reconciliation.

33. On the issue of the defendant/applicant attending court on 19th October, 2015 for delivery of the judgment, it is apparent from the court record that a judgment notice was served on him and the plaintiff/respondent as directed by the court.

34. This court has been moved to set aside the interlocutory judgment under the provisions of order 10 rule 11 of the Civil Procedure Rules which provides as follows:-

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

35. plaintiff/respondent though a good precedent, is applicable in a case of professional negligence against an Advocate. I find that it is not applicable to the present circumstances as the application before me is not seeking damages for professional negligence.

36. The Court of Appeal decision cited by the defendant/applicant in the case of **Richard Ncharpi Leiyagu (supra)** buttresses the point that in an application for setting aside interlocutory judgment, the discretion lies with the Judge that hears an application of this nature.

37. In the case of **Patel vs. E.A Cargo Handling Services Ltd (1974) EA 75**, the Court of Appeal held thus:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by failure to follow any rule of procedure.”

38. On the issue of the defendant/applicant being allowed to file his defence, I am guided by the case of **Thayu Kamau Mukigi Vs. Francis Kibaru Karanja [2013] eKLR** where the court stated.

“On the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Motor Limited Vs. DT Dobie Co. Ltd CA 38/98 where the court held that when an ex parte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence.”

39. A perusal of the draft defence attached to the defendant/applicant’s affidavit shows that there are triable issues for consideration by the court. In the Court of Appeal decision of **CFC Stanbic Limited Vs. John Maina Githaiga & Another [2013] eKLR**, the court was of the view that the appellant should not suffer because of mistakes of its counsel. In so stating the court was guided by the case of **Lee G. Muthoga vs. Habib Zurich Finance (K) LTD & Another, Civil Application No. Nair 236 of 2009** where the court held:-

“It’s a widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

40. Although this court has observed that the defendant/applicant sat on his laurels, I also find that his counsel failed to serve the memorandum of appearance to the plaintiff’s/respondent’s Advocate. Mr. Kiveu also failed to bring the defendant/applicant up to speed by informing him of the status of the case and that he had a conflict of interest in the said case.

41. In the decision of **Maina vs. Muriuki [1984] KLR 407**, the court held that ***“the discretion to set***

aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The court further held that where the common thread was that there were triable issues in a defence. It was in the interest of justice that a defendant be given an opportunity to defend the suit.”

42. In view of the foregoing, I hereby exercise my discretion and make the following orders:-

- i. *The interlocutory judgment herein against the defendant/applicant is hereby set aside. I grant the defendant/applicant leave to file and serve a memorandum of appearance and a statement of defence within 14 days from today’s date. In default, the ex parte judgment shall take effect.*
- ii. *I award costs of the application to the plaintiff/respondent, payable within 30 days after assessment, in default thereof, execution to issue for recovery of the same.*

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **18th** day of **MAY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant/Defendant.**

..... **for the Respondent/Plaintiff.**

.....**Court Assistant.**