



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 155 OF 1996

CYPRIANO MURIANKI M'MWAMBA.....PLAINTIFF

VERSUS

MUTHOMI MWAMBA.....1ST DEFENDANT

M'RINKANYA KARAURI.....ND DEFENDANT

R U L I N G

1. This application is dated 3rd December, 2012 . The applicant/1st defendant states that the application is brought to Court Under Order 12 , Rule 7 of the Civil Procedure Rules and under Section 1A, 1B, 3 and 3 A of the Civil Procedure Act.

2. The application seeks the following orders:-

- 1. That the Judgment of the Court delivered on 24/7/2003 be set aside.***
- 2. Costs of the motion be paid by the Respondent /Plaintiff .***

3. The application is supported by the affidavit of Muthomi Mwambia, the applicant/1st defendant sworn on 3rd December, 2012 and has the following grounds:-

- i.The hearing of the suit proceeded without notice to the applicant.***
- ii. The applicant was not served with any hearing notice.***
- iii. The applicant was denied an opportunity to be heard in his defence.***

4. The applicant has submitted that the suit was heard and judgment was entered against him without notice. He says that after he was served with the summons to enter appearance, he entered appearance and filed his defence on 17/1/1997. He says that in his defence, he denied liability in toto. He also says that he was not served with any Hearing Notice and that for that reason the case proceeded without his knowledge.

5. The applicant submits that from the Court record, there is no evidence of service any Hearing Notice upon him and there is no evidence that the hearing date was fixed by consent. He says that as there was no affidavit of service to show that he was served, it therefore follows that it was not possible for him to attend Court during the hearing.

6. The applicant says that the respondent's Replying Affidavit does not aver that the applicant had been served with a hearing notice. He contends that what the respondent has annexed are hearing dates not related to the dates the case was heard.

7. The applicant urges the Court to find that there was no service of the Hearing Notice upon him, that the hearing proceeded without his participation, and he was, therefore, seriously prejudiced as he was denied an opportunity to be heard and was condemned unheard.

8. The applicant asks the Court to note that the suit relates to land which is a sensitive matter. He tells the Court that it is obliged to grant an opportunity to all parties to ventilate their case in order to arrive at a fair decision.

9. The applicant has proffered the following authorities in support of his propositions:-

1. C.A No. 16 of 1999, Kisumu -John Akasirwa Versus Alfred Inat Kimuso.

2. HCCC NO. 81 of 2001, Mombasa-Cacauley Versus De Boer & Another.

10. The 1st respondent, the Plaintiff, submits that the allegation contained in paragraphs 9 and 10 that the suit was heard on 20th January, 2003 is incorrect. He says that the hearing of the case did not proceed on 20th January, 2003 as alleged in the applicant's Supporting Affidavit or on 20th January, 2002 as alleged in the Submissions by the Counsel for the applicant. He says that the impugned judgment emanated from Submissions filed upon directions of the Court. He opines that the hearing date is the date when directions were given.

11. The 1st respondent submits that directions were given on 20th November, 2002, when the case had been fixed for hearing. He says that Hearing Notice was served upon the applicant. He invites the Court to look at the Court record for 20th November, 2002 as well as the affidavit of service on record dated 20th November, 2002.

12. The Plaintiff /Respondent asks the Court to note that Advocate Riungu for the 2nd defendant was present in Court on 20th November, 2002 , when the apposite directions were given, although the 1st defendant /Applicant was absent. He submits that the Court satisfied itself that Hearing Notice had been served upon the 1st defendant.

13. The Plaintiff/Respondent says that the case was to come for mention on 3rd December, 2002 and on 11th December, 2002 to confirm filing of Submissions and to take a date for judgment. He submits that on these two dates, the Court was not sitting. The case was mentioned on 19th February, 2003 and a date for judgment was given. Judgment was eventually delivered on 24th July, 2003.

14. After giving the above explanation, the Plaintiff/Respondent submits that the applicant's allegations that the case was heard either on 20th January, 2002 as per the applicant's submission or on 20th January, 2003 as per the Supporting Affidavit are misleading to the Court.

15. The Plaintiff/Respondent tells the Court not to belabour the issue regarding service of the Hearing Notice as there is an affidavit of Service on record sworn by Counsel for the Plaintiff. He also says that the parties appeared before the Hon. Justice Kasanga Mulwa on 20th November, 2002 and the Judge was satisfied , before issuing apposite directions, that Hearing Notice had been properly served upon the Applicant.

16. The Respondent submits that it is instructive that specific issues raised by the Respondent in his Replying Affidavit which are crucial to the determination of this application have not been controverted by the 1st Defendant/Applicant. He submits that the evidence contained in the Replying Affidavit having not been controverted, it ought to be taken as the truth and an admission by the applicant that the respondent is telling the truth.

17. The Respondent submits that although the Court has discretion to set aside a Judgment entered in default, the discretion must be exercised judicially and on sound principles. He submits that the Court can not aid an applicant who comes to Court with unclean hands and who seeks to mislead the Court in order to achieve his goals. The respondent says that the Applicant is not truthful and this is evidenced by the fact that he has not even attempted to challenge the evidence of service.

18. The respondent says that the judgment which the applicant seeks to have set aside was delivered on 24th July, 2003 almost ten years before this application was filed on 3rd December, 2012. He submits that there has been unreasonable delay on the part of the applicant and this shows that the applicant does not deserve the exercise of this Courts discretions in his favour.

19. The applicant has proffered the case of *Paul Ojigo Omonga Versus Japhet Angila and G.H. Aduda, Nairobi HCCC No. 1740 of 2012*, in which the Honourable Justice J.G Nyamu, as he then was, found no cause to interfere with the judgment on record especially in a situation where the applicant was less than candid concerning service and where the applicant had not explained the delay in filing his application to set aside the apposite judgment.

20. The 2nd defendant has submitted that he will abide by whatever decision the Court makes.

21. I have carefully considered the pleadings, the Submissions and the authorities proffered by the parties.

22. The authorities proffered by the parties are good law in their proper circumstances and contexts. As stated in *Macauley Versus De Beer and Another (op.cit)* every case has to be considered in the context of its own circumstances as no two cases may easily be exactly the same.

23. I take cognizance of the fact that in his judgment , the honourable Justice Kasanga Mulwa, Judge, found as a fact that the 1st Defendant did not enter appearance or file a defence. In so finding he must have satisfied himself that the 1st Defendant had all along been properly served.

24. Perusing the Court record, there is evidence that the 1st defendant had on several times been served with the suit documents, including the Hearing Notice which the 1st defendant is challenging. It is instructive that the 2nd defendant who had been served with the Hearing Notice by the same process server who had served the 1st defendant, fully participated in the proceedings. He also filed , through his lawyer, his Submissions in support of his case.

25. Although the applicant has filed photocopies of an alleged Memorandum of Appearance and an alleged Defence as annexures to his application, there are no such documents in the Court record. I opine that these are documents contrived to support the applicant's application. I do not find that they are genuine documents.

26. The Hon. Justice Kasanga Mulwa, Judge, was a Judge, God rest his soul in peace, who had concordant and horizontal jurisdiction, commensurate to the Jurisdiction I have. This Court is obliged to respect his finding of fact and, consequently, I agree with him that the 1st defendant/applicant despite proper service upon him of the suit documents had not entered an appearance or filed a defence.

27. I find that the 1st defendant /applicant has not controverted the specific issues raised by the respondent in his Replying Affidavit. I find the evidence contained in the respondents' Replying Affidavit truthful. I find that the applicant's assertions are misleading and not truthful. He is, in my view , less than candid.

28. I find the claim by the applicant in his Supporting Affidavit that he learnt that a judgment had been delivered by the Court on 24/07/2003 veritably supercalifragilisticexpialidocious. If he, as he claims, had filed a Memorandum of Appearance and a Defence way back in 1997, he must have been a vintage indolent litigant, for him not to have evinced an interest in a case in which he was a party for a period of about 15 years. In the *Macauley versus De Beer and Another* case which he has proffered as one of his authorities, the court opined that two of the factors to be considered in influencing the Court to exercise

its discretion infavour of the applicant were whether the application had beenfiled without delay and whether the applicant has generally acted diligently . I find that the period of about 10 years before this application was filed constitutes inordinate delay. I also find that the applicant has not acted diligently all along.

29. For the reasons I have given above, I find myself unable to exercise my discretion in favour of the applicant. In the Circumstances, this application is dismissed with costs to the Plaintiff/ Respondent.

30. is so ordered.

SIGNED, READ AND DELIVERED IN OPEN COURT AT MERU THIS 27th

DAY OF JULY, 2016

IN THE PRESENCE OF:-

CC:

Lilian/Daniel

Nyauchi for the Plaintiff

Murango Mwenda for 1st Defendant

Nyaga h/b Riungu for 2nd Defendant

P.M. NJOROGE

JUDGE