



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 276 OF 2005

ARTHUR NGIGI NDUNG’U.....1ST PLAINTIFF/RESPONDENT

PETER MBURU KIBINDA2ND PLAINTIFF/REPOENDENT

REUBEN MBURU NDUNG’U.....3RD PLAINTIFF/RESPONDENT

VERSUS

JEPHERS NDUNG’U NJOROGEDEFENDANT/APPLICANT

RULING

1. This Court is asked to consider and determine the Defendant’s Notice of Motion of 15th September, 2015 for prayers that;-

1) THAT this Honourable Court be pleased to grant leave for Messer’s Kounah and Company Advocates to come on record in this matter for the Defendant/Applicant.

2) Spent

3) THAT this Honourable Court be pleased to set aside the judgement entered against the Defendant/applicant on the 22nd October 2010.

4) Spent

2. In the Grounds filed alongside the Application and in the Affidavits of 15th September, 2015 and 3rd November 2015, the Defendant states and explains why he thinks he is deserving of those Orders.

3. The contention of the Defendant is that judgement herein was entered on or about 22nd October 2015. He was not aware of the hearing or the judgement until he was served with a Bill of costs by the Advocates of the Plaintiff.

4. The Defendant explains that he was ill at the time of the alleged hearing and was unable to follow up on the proceedings herein. Again, because of his illness he had to rely on the Plaintiff’s Advocates to know the progress of the matter. That the said Advocates failed to provide some correspondence concerning the matter.

5. The Defendant also pointed out that prior to that Judgement he was represented by a firm of Advocates who ceased acting after the Judgement. He has since appointed the firm of Kounah and Company Advocates.
6. The Defendant states that he has brought the present Application without unreasonable and/or inordinate delay.
7. In his latter Affidavit of 3rd November, 2015 the Defendant gives details of his illness. He states that he has been ill since 2007 and has been in and out of hospital for tests and surgeries due to kidney problems. In that Affidavit, the Defendant annexes Medical Report Forms and documents on his illness.
8. In opposing the Application, the 3rd Plaintiff swore an Affidavit on 29th September, 2015. The Plaintiffs are of the view that the Application is incompetent as Kounah & Company Advocates are not properly on record.
9. The 3rd Plaintiff depones that the Defendants' Advocates (then on record) were duly served with Hearing Notices and the Plaintiffs were under no duty or obligation to serve the Defendant directly.
10. As to the illness of the Defendant, the Plaintiffs do not think that the Medical Report proves that the Defendant was unable to follow the proceedings hearing.
11. As I turn to determine the Application, I must point out that there is merit in the argument by the Plaintiffs' counsel that the manner in which the new Advocates for Defendant filed their documents may not have properly put them on record. The first prayer in the instant Motion is for Orders to allow Kounah & Company Advocates to come on record. This Application comes after a Judgment in this matter. That prayer is yet to be granted. It would therefore be correct to argue that the said Advocates could not file any Pleadings or Application before they obtained Leave to come on record.
12. That said it is not uncommon to see omnibus Applications like the one before me where parties approach the Court under urgency. Whilst the Application may fail procedural rectitude, whether or not that failure should deal a fatal blow to the substantive prayer must depend on whether or not the failure prejudices the other party.
13. From the record, the representatives of the firm of Kounah & Company Advocates have appeared in Court on behalf of the Applicant on several occasions (see for instant on 22nd September 2015, 26th January 2016 and 3rd March 2016.) In none of those occasions have the Plaintiffs' Counsel protested their appearance. In addition, this Court is not told that the Defendant's position is prejudiced or any worse as a result of the failure of the incoming Advocates to strictly observe procedure. I am inclined to excuse the failure by the Defendant's Counsel for the sake of determining the matter on merit.
14. On 26th November, 2008 this matter came up for hearing before Justice Kimaru. On that day Mr. Munyalo appeared for the Plaintiffs while Mr. Ligunya held brief for Waigwa for the Defendant. Mr. Ligunya applied for an adjournment which was granted by Court and the matter was rescheduled to 16.3.2009. The Court record shows that the hearing date was given in the presence of Counsel for both sides.
15. On 16th March, 2009 Munyalo appeared for the Plaintiff but neither the Defendant nor his Counsel were in Court and Justice Kimaru observed;

'this Court did on 26.11.2008 grant the Defendant a last adjournment. Today, neither the Defendant nor his advocate is present in Court. This court orders that the Plaintiffs proceed with their case, the absence of the Defendant notwithstanding'.

The hearing proceeded and judgment was reserved for 13th May, 2009. Judgement was eventually delivered on 22nd October, 2010. Although there was again no appearance for the Defendant, the Judge

observed that the Defendant had been served.

16. The hearing date of 16th March 2009 was taken in the presence of Mr. Ligunya, an advocate representing the firm of S. Gichuki Waigwa & Co. Associates who were then on record for the Defendant. If the Advocates for the Defendant failed to communicate that date to Defendant, then the blame can only be with those Advocates.

17. From the Medical documents shown to Court, it is not in doubt that the Plaintiff suffered poor health between 2007 and 2014. The Court is not insensitive to this. However, there is no evidence that the ill health prevented the Defendant from attending Court for the hearing on 16th March, 2009 or for the Judgment on 22nd October, 2010.

18. The Plaintiffs have also pointed out that there has been inordinate delay in the Defendant's bringing the current Application. It is true that the Application was filed about 5 years after the Judgement was delivered. How does the Defendant explain the delay? The Defendant says that he learnt of the Judgement only after being served with a Hearing Notice of the Bill of Costs.

19. Curiously, the Defendant is silent about when he was served with that Hearing Notice. However the Notice itself (annexture JNN 1 to the Defendant's affidavit of 15th September 2015) shows that the Bill of Costs was scheduled for taxation on 8th July 2014. It can be inferred that the Notice was served before that date. If the Defendant has blamed his inaction from 2010 to 2014 on bad health, he has not explained why it took him from July 2014 to 18th September 2015 to file the present Notice of Motion. This is about 14 months later.

20. The chain of events shows that the hearing proceeded exparte but on a date taken and known to the Defendant's Counsel. The record shows that the Defence had previously sought and obtained an adjournment. The proceedings before Justice Kimaru and the subsequent Judgement were therefore regular.

21. In respect to the delay, the delay from 22nd October, 2010 to July 2014 has not been adequately explained while the delay from July 2014 (when the Defendant learnt of the adverse orders) to 18th September 2015 has not been explained at all. That delay is long and inordinate. It is also unreasonable.

22. Because of this unexplained and long delay, this Court is unable to exercise its discretion in favour of the Defendant. The result is that I refuse to set aside the Judgement of 22nd October, 2010. As that Order is in respect to the substantive prayer of the Notice of Motion dated 15th September 2015, I do hereby dismiss the Application in its entirety with costs to the Plaintiffs.

READ, DELIVERED AND DATED AT NAIROBI THIS 21st DAY OF JULY, 2016.

F. TUIYOTT

JUDGE

PRESENT:

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..... Court Clerk