



**COPY**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 417 OF 2010**

**PATRIA PROPERTIES LTD.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....DEFENDANT**

**RULING**

1. The Attorney General has moved the court under Order 12 rule 2 & 7 of the Rules and Section 1A, 1B, 3 and 3A of the Act seeking for prayers ;

- i. ***That the exparte judgment delivered on 27.3.2014 all consequential orders be set aside.***
- ii. ***the defendant be granted unconditional leave to defend this suit and also prosecute their counter - claim***
- iii. ***Cost of the motion be granted to the applicant.***

2. The motion is supported by several grounds on the face of it and the affidavit of Oscar Mmene Eredi the Principal Litigation Counsel. Briefly Mr. Eredi deponed that the matter came up when he was on leave and that the hearing date was not brought to his attention before he proceeded on his leave. He admits being aware that their office was contacted by the plaintiff on the date of 12.2.2014 when the matter was in court.

3. He deposed further that the advocate who received the call was not able to attend to the matter due to indisposition. Mr. Eredi contended that he was diligent enough to have filed and served a statement of defence and counter-claim on 30/7/2013. It is his case therefore that the Attorney General has a good defence. He deposes that the court occasioned a miscarriage of justice by failing to give a date for hearing of the defence and counter - claim and or filing of submissions after the close of the plaintiff's case. He urged the court to allow the application.

4. The motion is opposed by the plaintiff in sworn a replying affidavit. The respondent deposes that the application is misconceived, an abuse of the court process and unmeritorious and undeserving of the courts' discretion. He listed in paragraph 5 (a) - (m) the instances why he argues this application is an abuse of the court process. The respondent also deposes that the amended defence and counter - claim was filed out of time without leave of the court. The respondent states that no proper grounds have been put forth to the court for it to exercise its discretion favourably on the applicant. The respondent

deposed further that there are other State Counsels in the defendant's office other than Ms. Kiti and Mr. Ngari and listed Ms. Lutta and Mr. Masila. The respondent avers that this application was filed after undue delay since the applicant did nothing after being served with notice of judgment. He urged the court to dismiss it with costs.

5. The counsels filed their written submissions supported by case law cited which I have had occasion to read and consider. In the case law cited by the defendant/applicant, the case of Macaulay vs. De Boer & another (2002) KLR pg 1 at holding no. 2 laid down the grounds for setting aside *ex parte* judgments. This case referred to the renowned case of Shah vs. Mbogo & ano. (1967) E.A. 116. It is not in dispute that this court has inherent powers of setting aside *ex parte* judgments but the court while exercising such discretion must consider the circumstances of each case. The discretion is exercised to avoid injustice or hardship resulting from accident; inadvertence or excusable error by parties but is not intended to assist a person who deliberately chose to obstruct or delay the course of justice.

6. Taking into account the principles to be considered while exercising discretion in setting aside orders/judgments and relating them to this case; I will briefly summarise the actions of the parties herein before and on the date when this matter proceeded for hearing *ex parte* and the subsequent judgement entered in order to determine whether the applicant is deserving of the orders sought. On 12<sup>th</sup> November 2013 when the matter came up for hearing; Ms. Lutta who held brief for Mr. Eredi for the defendant/applicant indicated that the defendant was not ready to proceed as Mr. Eredi was out of the country and he intended to file some documents to wit survey maps and plans. They sought another date to enable them have time to file the documents. The adjournment was opposed by Mr Karega for the plaintiff but the case was eventually adjourned to 12.2.2014 for hearing. On 12.2.2014, no appearance was made by the Attorney General when the court commenced its sitting which I assume was at 9am. From the record, the judge indicated that he did not want to proceed without the input of the Attorney General and put off the matter to 3 p.m with a direction that Mr. Karega Counsel for the plaintiff to contact the office of the A.G.

7. At 3.35 p.m Mr. Karega informed the judge that he called the Attorney General's office and spoke to Ms. Kiti and gave her the case details. Still there was no representation from the A.G and therefore the matter proceeded at 1/4 to 4 p.m. The date of 12<sup>th</sup> Feb 2014 had been taken by consent. Was the non-attendance by the Attorney General excusable or inadvertent? The plaintiff deposes that there were more than two State Counsels in the office and listed the names as Ms. Kiti, Mr. Ngari, Mr. Masila and Ms. Lutta. This fact has not been rebutted. The only explanation given is that Ms. Kiti's child was taken ill and she had to attend to him hence she missed to come to court. No explanation is given why Ms. Lutta who took this date did not attend court before they were called by Mr. Karega or explain her whereabouts. Ms. Kiti has also not indicated in her affidavit if she informed Ms Lutta or any of her colleagues other than Mr Ngari who was engaged elsewhere of her predicament.

8. I am alive to the legal precedent that mistake of Counsel should not be visited on their clients. The Attorney General had sought adjournment to put in documents. The court file reveals none was filed between 12.11.2013 and 12.2.2014. The applicant has blamed the trial judge for finding that their defence was a mere denial. Yet with no documents and witnesses statements filed and on record, I do not see any wrong in the judge holding so. This was not just a mistake of counsel only but laxity of the party in putting his documents in time. It creates a doubt in mind that even if the advocate attended, the defendant may still not have been ready to proceed having not complied with the provisions of order 11 of the Civil Procedure Rules. I find the defendant and his advocate are indeed both guilty of delaying the course of justice in causing delay in the prosecution of this case and therefore not deserving of this court's discretion.

In conclusion I find the application fails to meet any of the principles for setting aside *ex parte* judgment and I dismiss it but with no order on costs.

**Dated and delivered at Mombasa in open court this 24th day of March 2015.**

**A. OMOLLO**

**JUDGE**