



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 112 OF 2008**

**LOICE WAYUA RICHARD.....PLAINTIFF**

**VERSUS**

**MIKE TROJANOUK.....1<sup>ST</sup> DEFENDANT**

**RICHARD MUTINDA MWANTHI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

The application before the court for determination is a Notice of Motion dated 7<sup>th</sup> July 2014 brought by the 2<sup>nd</sup> Defendant, who is seeking orders that the *ex-parte* judgment of 12<sup>th</sup> June 2014 be set aside. The said application is supported by an affidavit sworn by the 2<sup>nd</sup> Defendant's advocate on 7<sup>th</sup> July 2014, and is premised on the grounds that the Applicant has a good defence, and that his lawyer's mistake of failing to attend court on the hearing should not be visited upon him. Further, that this court has unfettered discretion and therefore it is only fair and just that the application is allowed.

The 2<sup>nd</sup> Defendant's advocate deponed that the 2<sup>nd</sup> Defendant (hereinafter referred to as "the Applicant") filed a defence herein, and that on the 16<sup>th</sup> November 2010, they filed for leave to join Reuben Musyoki Mwitiri and Osaka Motors (K) Ltd as third parties. Further, that on the 8<sup>th</sup> day of March 2012, they filed for leave to join one Nancy Njeroh Njue as a third party, which application was allowed on the 16<sup>th</sup> December 2013. The deponent averred that the order of this court of 16<sup>th</sup> December 2013 held that the issue of liability of the third party to indemnify and/or contribution to the liability of the Applicant was determined at the trial hereof. However, given that the Applicant did not participate at the trial herein, it is not possible to determine the extent of liability and/or contribution of the 3<sup>rd</sup> party.

The 2<sup>nd</sup> Defendant's Advocate further stated that the suit proceeded to hearing in his absence on 21<sup>st</sup> January 2014, and that on that day he travelled to Machakos High Court and found that the suit was not listed, and upon inquiry from the registry, he was informed that all matters for that day had been taken out and fresh dates would be given at the registry. Further, that had he appeared before the Judge on the 21<sup>st</sup> January 2014, he would have asked for an adjournment so as to finalize with the 3<sup>rd</sup> party proceedings. He averred that his client should not suffer because of his failure to attend court.

**The Response**

The Applicant's application was opposed by the Plaintiff in a replying affidavit she swore on 30<sup>th</sup> July 2014. It is the Plaintiff's disposition that the Applicant and his advocate knew of these proceedings and the set judgment but failed to attend court, and that the hearing date for 21-1-2014 was fixed by consent of the Applicant's advocate. Further, that the Applicant's advocate has admitted under oath that he was aware of the hearing date and even attended court on the material day, but was informed that all matters had been taken out.

It was the Plaintiff's contention that this matter was filed in 2008 and has always been adjourned on the behest of the Applicant, who has never had the intention to proceed with this matter, and has adjourned the same since 2010 on account of intending to enjoin a third party. Further, that 3<sup>rd</sup> party proceedings can be taken out even after entry of judgment between the plaintiff and defendant, and the Applicant can still seek indemnity from the 3<sup>rd</sup> party after payment of the decretal amount.

The Plaintiff contended that the Applicant has not advanced any cogent reasons why he and his advocate failed to attend court, and that she stands to suffer immense prejudice and hardship in the unlikely event the applicant's application is allowed as she requires the decretal sum awarded to cater for her medical expenses, the particulars of which she gave in her affidavit.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Applicant and Plaintiff. The issue for determination is whether the judgment given herein on 12<sup>th</sup> June 2014 should be set aside. This Court has discretion to set aside such an *ex parte* judgment under Order 12 Rule 7 of the Civil Procedure Rules, where it is provided that where a hearing proceeds in the absence of one or some of the parties, and judgment is entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

The applications were canvassed by way of written submissions. The 2<sup>nd</sup> Defendant's Advocate, J.B Shilenje Advocates, filed two sets of submissions dated 15<sup>th</sup> January 2015 and 6<sup>th</sup> May 2015 respectively, wherein he reiterated the averments made in the pleadings. He relied on the decisions in **Maina vs Muriuki (1984) KLR 407** and in **Gachago vs Attorney General ,Civil Appeal No. 24 of 1980**, and **Kenwood Trading Company Limited vs Leonard Mutua Nairobi Civil Appeal No. 55 of 1996** in this regard, for the position that an *ex parte* judgment may be set aside if it is shown that there is a defence that raises triable issues.

The counsel for the Plaintiff, Mulu & Company Advocates, filed submissions dated 27<sup>th</sup> January 2015 wherein they reiterated the arguments the Plaintiff made in the foregoing, and submitted that the Plaintiff is yet to enjoy the fruits of her judgment owing to delays occasioned by the Defence.

The principles of setting aside an *ex-parte* judgment are also well stated in the case of **Pithon Waweru Maina V Thuka Mugiria [1983] eKLR** as follows:

- a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**
- b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.***
- c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the**

**case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. (*Mbogo v Shah* [1968] EA 93.)**

**d) The court has no discretion where it appears there has been no proper service (*Kanji Naran v Velji Ramji* (1954) 21 EACA 20).**

**e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton* [1972] SC 30).**

In a nutshell, the Applicant's claim is that his Advocate was misinformed that the Court was not sitting on the date of the hearing. The Plaintiff's response is that the Applicant knew of the existence of the suit and that the hearing date was taken by consent. Further, that the 2<sup>nd</sup> Defendant has been delaying the hearing of this suit.

I have perused the court record and note that the date of hearing of 21<sup>st</sup> January 2014 was set by consent of the Plaintiff and 2<sup>nd</sup> Defendant's representatives at the registry on 23<sup>rd</sup> October 2013. I also am not able to appreciate the reason given by the 2<sup>nd</sup> Defendant's advocate that he was misinformed by the registry that the Court was not sitting on that date. If the 2<sup>nd</sup> Defendant had gone to the Court on that date he would surely have seen that it was sitting as the Court record shows.

In addition, the court record also shows that after the judgment had been delivered, the Plaintiff and 2<sup>nd</sup> Defendant by consent on 5<sup>th</sup> May 2015 took out a mention date for 16<sup>th</sup> July 2015, when again the 2<sup>nd</sup> Defendant did not attend court. Lastly, the Court also notes that the orders referred to by the 2<sup>nd</sup> Defendant's Advocate as regards the issue of a third party notice against one Nancy Wanjue Njeroh were issued on 16<sup>th</sup> January 2014. The 2<sup>nd</sup> Defendant's Advocate did not bring any evidence of service of the same, or of the actions he undertook to ensure the said third party attended the trial.

It is thus my finding that the mistakes and/or errors by the 2<sup>nd</sup> Defendant's Advocate are not excusable for the foregoing reasons. Although I have every sympathy with the 2<sup>nd</sup> Defendant which has been caught out by no mistake of its own, and even though the 2<sup>nd</sup> Defendant had filed a defence which is on record, it is in the interests of justice that the judgment be upheld as the Plaintiff is being prejudiced and suffering hardship by the delay caused in hearing this suit arising from her medical condition, which she detailed in her pleadings.

The upshot of the foregoing is that the application by the 2<sup>nd</sup> Defendant in the Notice of Motion dated 7<sup>th</sup> July 2014 is denied. The 2<sup>nd</sup> Defendant's Advocate shall meet the costs of the application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 29<sup>th</sup> day of October 2015.

**P. NYAMWEYA**

**JUDGE**