



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 105 OF 2010

WATER PARTNERS INTERNATIONAL:.....;.....:PLAINTIFF

VERSUS

BENJAMIN K'OYOO T/A GROUP OF WOMEN IN

AGRICULTURE – KOCHIENG (GWAKO) MINISTRIES:.....:DEFENDANT

RULING

1. The application before the court is a **Notice of Motion** dated **21st June 2013** and filed in court on **24th June 2013**. The application seeks the orders namely: -
 1. *That the application be certified urgent and heard ex-parte in the first instance.*
 2. *That pending the inter-partes hearing and determination of this application this honourable court be pleased to order the stay of execution of the decree herein dated 13/12/2011 and/or hearing of the notice to show cause why execution should not issue slated for 25th June 2013.*
 3. *That this Honourable court be pleased to set aside the ex-parte hearing that took place on 8/11/2011 the resultant judgement and all consequential proceedings and/or orders upon such terms as may be just.*
 4. *That the cost of this application be provided for.*
2. The application is premised on the grounds set out therein, namely:-
 1. *That the Defendant/Applicant was genuinely not aware about the hearing that took place on 8/11/2011.*
 2. *That the Defendant/Applicant was let down and misled by his erstwhile firm of advocates M/s Olago-Aluoch & Company Advocates.*
 3. *That mistake of counsel should not be visited upon a hapless and innocent client.*
 4. *That the Defendant/Applicant has on record a formidable defence that raises serious triable issues that even this honourable court on 16/12/2010 found as such.*
 5. *That the failure on the part of the Defendant/applicant to attend court on 8/11/2011 was not deliberate or intentional or calculated to delay the speedy and fair determination of this suit.*
 6. *That it is in the interest of justice to allow this application as the Responded shall not suffer any such prejudice that thrown away costs cannot compensate.*

7. *That the Defendant/Applicant stands condemned unheard for no fault of his own.*
8. *That in any event as at the time of hearing on 8/11/2011 Order 11 of the Civil Procedure Rules 2010 had not been complied with wherefore the said proceedings were irregular.*

3. The application is supported by affidavit of **MR. BENJAMIN K'OYOO**, the Plaintiff herein, dated **21st June 2013** with its annexures.
4. The application is opposed vide a Replying Affidavit by **PATRICK ALUBEE** dated **19th July 2013**.
5. Parties filed written submissions to the application which I have considered. The issues that I raise are:-
 - i. *Whether the Judgement being sought to be set aside, being a regular judgement of this court, can be set aside in the circumstances, and if so, on what condition?*

ii. *Who is to pay costs?*

6. The brief history of this application is that the suit within was heard *ex-parte* on 8th November 2011 and the Defendant alleges that he came to learn about the resultant Judgement and decree on 20th April 2013, more than one and a half years later. The Defendant/Applicant further avers that the suit proceeded to hearing without compliance with Order 11 of the Civil Procedure Rules 2010. The Applicant blames all these to his advocates M/s Olago – Aluoch & Company Advocates who the Applicant alleges failed to attend to the matter thus resulting in the *ex-parte* proceeding. The Applicant submits that sins or omission of counsel should not be visited upon the litigant.
7. The Plaintiff/Applicant opposes the application and submitted that the hearing date was mutually agreed by the parties, and that the Plaintiff should not be delayed from realizing the fruits of the Judgement, and that in any event the Applicant's cause of actions is against his former advocates for professional negligence.
8. I have considered the application. The Judgement sought to be set aside was my Judgement. Before it proceeded on 8th November 2011, I found out that the hearing date was mutually agreed by the parties. This means that the submission by the Applicant that Order 11 of the Civil Procedure Rules 2010 were not complied with is not true. The Plaintiff complied with that Order. There was no way to compel the Defendant to do the same if they were not interested in doing so.
9. The Defendant's submission that they heard about the decree herein after one and a half year is a clear admission that indeed the Defendant had shown no interest in this matter and that is why he could take that much time to know the state of the suit. The Defendant was clearly indolent. The questions of indolence by client and mistake by advocate was addressed in the case of **Bi-Mach Engineers Limited – Vs – James Kahoro Mwangi [2011] ekLR** where Justice Waki held:-

“I have examined the affidavit in support of the application and it is my view that it falls short of candidness and betrays lack of expedition. There is no explanation at all about what the Applicant was doing between 2nd December and 30th December 2010 when an undisclosed informer gave out the information about the decision of the court. The Applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocates (emphasis added).”

In **Josphat Nderitu Kariuki - Vs – Pine Breeze Hospital Ltd (2006) eKLR** the Court was faced with an application similar to the one at hand and Justice Martha Koome held as follows:-

“. . . the Defendant chose their advocate who failed to attend court. This is a proper case

where an advocate should bear the consequences of their own professional negligence of failure to attend court on behalf of their client. Similarly, the client should bear the consequences for the choice of his legal counsel. I am not satisfied that there are good reasons to unseat the Plaintiff from his Judgement. I decline to exercise my discretion, as there are no plausible reasons advanced by the Applicant for me to do so.”

In **Three Ways Shipping Services (Group) Ltd. - Vs – Mitchell Cotts Freighters (K) Ltd. (2005) eKLR** the Court of Appeal laid to rest the question of advocates mistake being visited on the client in the following terms:-

“The question of advocate’s mistake being visited on the client has been raised from time to time. R. Hon. Lord Denning M.R. in “The Due process of Law” London Buterworths at page 93 said:-

“Whenever a solicitor, by his inexcusable delay, deprive a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it property. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them, the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done.”

The learned Judges of Appeal went ahead to hold as follows:-

The above passage is relevant to the present application in which the Applicant is blaming its previous counsel for the misfortune that it finds itself in. It must be emphasized that justice must look both ways. Here the Respondent obtained a Judgement which has now been registered in the High Court of Uganda. Notice to execution was issued and as of now execution is at an advanced state. In our view, it is too late to reverse the process.

10. The above decision of the Court of Appeal and the other two decisions referred to herein are on all fours with this instant application by the Defendant and this court finds solace in the words of the learned Judges.

In words of Justice Ringera in **Omwoyo – Vs – African Highlands & Proudce Co. Ltd. [2002] 1KLR**, time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the Defendant’s advocates. This is a proper case where the Defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the Judgement.

11. The upshot is that in my view the Judgement sought to be set aside was a regular Judgement of this court. The Defendant/Applicant has not satisfied me that it should be set aside. I have also considered the defence. In my Judgement under challenge, I had considered the defence even though the Defendant was not in court. The defence once filed and is on record remains part of the proceedings and must be considered even if the Defendant gives no oral evidence. Again my Judgement was not a capricious judgement. It was not a technical Judgement. It was a twelve (12) page judgement which considered the suit in its entirety and the evidence. I sympathise with the Defendant’s situation, but I am concerned that setting aside the said Judgement would simply delay these proceedings and deny the Plaintiff the just fruits of the Judgement.

12. However, in the exercise of my discretion and to give the Defendant a chance to provide oral evidence in support of his defence, I will set aside the said judgement and all consequential orders related thereto on the following conditions.

a. *That the entire decretal sum now due is deposited in an interest earning account opened in the joint names of the parties advocates within 30 days from the date of this Ruling.*

b. *The costs of this application shall be for the Plaintiff/Respondent.*

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Githii holding brief for Plaintiff

No appearance for Defendant

Teresia – Court Clerk