REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 248 of 2011

WILLIAM WAGURA MAIGUA.......................................PLAINTIFF/RESPONDENT

VERSUS

ELBUR FLORA LIMITED..DEFENDANT/APPLICANT

RULING

In a Notice of Motion dated and filed on 15th January 2013 the Defendant/Applicant sought orders -

(1) That this matter be certified urgent and service of this application be dispensed with in the first instance,

(2) That there be a stay of execution of the judgment of the court delivered on 5th October 2012 against the Defendant pending inter-partes hearing of this application,

(3) that the court do set aside the judgment delivered on 5th October 2012 against the Defendant and grant leave to the Defendant to defend this suit,

(4) that costs of this application be in the cause.

The Notice of Motion *(Application)* was premised upon the provisions of Order 12, rule 7, Order 51, rule 1 of the Civil Procedure Rules, and supported by the Affidavit of PETER KAIRU the Defendant's General Manager sworn on 15th January 2013 and the grounds that -

(1) the Applicant's insurance agents who were seized of the matter failed to appoint an Advocate to enter appearance for the Defendant to defend the suit,

(2) the failure to defend the suit was unknown to the Defendant company and the latter only learnt of the same when e-mailed by the Plaintiff's Advocate, the notice of entry of judgment,

(3) that failure to defend was due to no fault of the Defendant company and that the same stands to suffer substantial loss if judgment herein is not set aside and leave granted to defend,

(4) in any event, the Defendant has a meritorious defence and it ought to be given an opportunity to canvas the defence and to call witnesses.

The Defendant/Applicant was granted two orders at the ex parte stage, the application was certified urgent, and a stay of execution, conditional upon payment of a deposit of Ksh 500,000/= into court within

14 days, and a hearing date inter partes was fixed for 4th February 2013.

By that date, the Plaintiff/Respondent had filed Grounds of Opposition but the Defendant/Applicant had not made a deposit of Ksh 500,000/= ordered as a condition for the stay. I will consider both these grounds as well as the Defendants/Applicant's case in the subsequent paragraphs of this Ruling.

The Defendant/Applicant's application is, as already noted at the beginning of this Ruling premised upon the provisions of Order 12, rule 7 of the Civil Procedure Rules 2010. Rule 7 provides that where under this order judgment has been entered, or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.

It is clear from that rule that setting aside or varying the judgment is a matter of discretion and all discretion must be exercised judiciously, that is to say, according to some known principles of law or precedent. The starting point is therefore the procedural law under which the judgment was entered against the Defendant/Applicant.

Order 12 is entitled **HEARING AND CONSEQUENCES OF NON-ATTENDANCE.** Rule 2 thereof lays down what is required to be done on the date fixed for hearing after the suit is called outside the court, and only the plaintiff attends and the court is satisfied -

(a) that the notice of hearing was duly served, it may proceed ex parte,

(b) that notice of hearing was not duly served, it shall direct a second notice to be served, or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the Defendant was unable to attend, it shall postpone the hearing.

Indeed these rules apply in the ordinary suits where a defendant has entered an appearance, filed a defence, and the plaintiff has had the matter set down for hearing and the Defendant fails to appear on the date set down for hearing. This was however no such case.

Here the Defendant acknowledges that it was served. It appears from the Affidavit of Peter Kairu its General Manager that the Summons to Enter Appearance were sent to its Insurer's Agent who took no further action in the matter. The agent did not instruct an Advocate to Enter Appearance for the Defendant, nor did it apparently also inform the Defendant's Insurers. In the absence of any Memorandum of Appearance or Defence, the Plaintiff/Respondent's Advocates filed a Request for Judgment in terms of Order 10, rule 6 *(not rule 1)* of the Civil Procedure Rules which was duly entered.

The Plaintiff/Respondent's Advocates obligation under the said rule was to set down the suit for assessment of damages. Unlike Order 12 rule 2 which requires service of a hearing notice upon the Defendant, this rule does not make such requirement. There is perhaps some logic in this, a defendant who has neither entered appearance nor filed any defence, nor made any inquiry about the case, is clearly not interested in the case. Timeliness are an essential part of the civil process.

The Defendant/Applicant woke up some 15 months after entry of ex-parte judgment 8 months after conclusion of formal proof hearings, 5 months after judgment on damages, and 12 days after proclamation of the judgment-debtor's applicant's goods. I agree with the Plaintiff/Respondent's submission that the Defendant/Applicant who has been indolent and gravely guilty of latches is undeserving of the courts' equity.

As precedents go, the discretion to set aside an ex parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice **– SHAH VS. MBOGO [1967] E.A. 116.** Finally, the court must be satisfied that the defendant has a good defence on merit **– MAINA VS. MUGORIA [1983] KLR 78**.

There is no such indication here. There is no evidence demonstrating the follow-up by the Defendant/Applicant with its Insurance Agent. All that is shown is the initial report of the accident made on 23.04.2009. There is no other follow up.

This is a case of No. 248 of 2011, and by our standards of days past, it can be said to have been heard and determined within a reasonable time, and as it should be. The Plaintiff/Respondent had suffered serious spinal injuries, and is now wheel-chair bound and ridden. The court in the circumstances and the evidence ordered general damages of shs 3 million plus spicial damages of Ksh 10,000/= and costs. The Party and Party Bill of Costs has been taxed at shs 1,318,270.40, all making a grand total of shs 4,328,270/=.

It is the execution of that decree which the Defendant/Applicant seeks to stay. For the court to order a stay the Applicant must satisfy the conditions set out under Order 42 Rule (2) of the Civil Procedure rules -

(1) the Application for stay must be brought without unreasonable delay,

(2) that the Applicant will suffer substantial loss unless a stay is granted,

(3) that the Applicant has offered such security as the court orders for the due performance of such decree or order as may ultimately be binding upon it.

In this case, despite the order to deposit a sum of Shs 500,000/= as security and a consideration for the temporary stay granted, the Applicant has not made any such payment or deposit into court. The Applicant fails on that ground. The Applicant had already failed on the ground of time.

The Applicant has not demonstrated what loss it will suffer if no order of stay of execution is granted. I agree with the Plaintiff/Respondent's submission that if the court were in the exercise of its unfettered discretion to set aside the judgment, the Plaintiff/Respondent decree-holder, would be undeservedly prejudiced by the re-opening of this long running case. Besides litigation must not only come to an end, but the decree-holder *(Plaintiff/Respondent)* ought not to be unjustly kept away from the fruits of his litigation. It is legal policy that litigation shall not be protracted interest *(reipublicae ut sit finis litium")*. But as Lord Atkin said in **RAS BEHARILAL VS. KING EMPEROR [1933] ALL E.R. 723 "finality is a good thing, but justice is better."** The question becomes, what is the justice of this case, that the Defendant/Applicant be allowed to defend a suit which was it was served, and failed to Enter an Appearance let alone file a Defence or that the Plaintiff/Respondent, be denied the fruits of his judgment and decree for no fault of his own or his counsel?

The inaction was on the part of the Defendant/Applicant. The loss must fall on it. If the has Insurance broker/agent and the Insurer to blame, not the Plaintiff/Respondent. The court's discretion to set aside is intended to avoid hardship resulting from accident, inadvertence, or excusable mistake or error and is not fashioned to assist judgment/debtors who have deliberately sought to obstruct or delay the course of justice.

I see no triable issue in the Draft Defence. It is a mere denial.

It is in the interests of justice that the Defendant/Applicant's Notice of Motion dated and filed on 15th July 2012 be and is hereby dismissed with costs.

Dated, signed and delivered at Nakuru this 27th day of February, 2013

M. J. ANYARA EMUKULE

JUDGE