REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 211 of 2010

RONALD NDIRANGU NDEGWA ..... 1ST PLAINTIFF

EUNICE MURINGO MUTAHI ..... 2ND PLAINTIFF

VERSUS

WILFRED KASHONGA SARONI .....1ST DEFENDANT

LIBERTY GRAPHICS (K) LIMITED…..2ND DEFENDANT

RULING

1. On 25th May, 2010, judgment in default for Kshs.5million was entered against the Defendants. On 14th June, 2010 the Defendants filed an application to set aside the said judgment. After hearing the application on merit, Hon. Njagi J dismissed the same by a ruling dated 5th March, 2011. Six months later, the Defendants filed an application dated 16th September, 2011 seeking the review of that ruling. The application was brought under Order 45 Rule 1 of the Civil Procedure Rules.

2. The grounds upon which the motion was grounded were set out in the body of the motion and expounded in the Supporting Affidavit of Wilfred Kashonga Saroni sworn on the 16th September, 2011. The grounds were that there are sufficient reasons for the review of the order of 5th March, 2011 that there was an error apparent on the record, that the applicants had discovered new evidence that was not in their possession at the time the application was made and that the Defendants had a sufficient defence including the tenability of the Plaint.

3. The Defendants contended that they were not served with a Notice of entry of judgment before execution was commenced, that the judgment sought to be set aside was entered in error as should not be visited upon a litigant, that the warrants being executed against the Defendants disregarded the substantive and procedural safeguard of a right to be heard.

4. The Plaintiffs opposed the application by way of Grounds of Opposition dated 21st September, 2011. It was contended by the Plaintiffs that the application did not meet the requirements for review, that no error had been shown to be on the face of the record, no new evidence had been produced to warrant the requirement for review, that no error had been shown to be on the face of the record, no new evidence had been produced to warrant the review sought, that the Defendants' defence had been considered by the court and found to be a sham and that in the premises the application was an afterthought. The Plaintiffs

contended that the application was therefore unmeritorious an abuse of the Court process and should be dismissed.

5. The application was head before the Hon. Njagi J on 27th September, 2011. When the matter was mentioned before me on 19th March, 2013, the Plaintiff who was represented by Mr. Kalinga urged that this court do make a ruling based on the submissions on record. I have considered the Affidavits on record and the submissions of the parties recorded on 27th September, 2011.

6. In an application for review under Order 45 Rule 1 of the Civil Procedure Rules, an applicant must demonstrate either that there is an error apparent on the face of the record, or that the applicant has discovered new evidence that could not have been discovered at the time the order was made despite exercise of diligence, or that there is any other sufficient reason to review the order. From the body of the application, it would seem that the present application is premised on all these grounds.

7. On the first ground, the Defendant states in Paragraph 8 of the Supporting Affidavit.

"8. THAT the judgment sought to be set aside was delivered in error as the mistakes of the Advocate should not be visited on an innocent client like myself."

Nowhere else in the said Affidavit or in the submissions of Counsel did the issue of error apparent on the face of the record was addressed. To my mind, what is contained in paragraph 8 aforesaid does not satisfy the first condition in Order 45 Rule 2. The error apparent on the face of the record in that rule presupposes a glaring error such as miscalculation of figures or references to a different issue while the court intended another. In my view therefore, the applicant has not shown that there was an error apparent on the order of 5th March, 2011 to warrant a review.

8. The other ground is discovery of new evidence. In the entire Supporting Affidavit, this issue is not alluded to. It is only to be found in the submissions of Counsel. Mr. Raballa, learned Counsel for the Defendants told the court during submissions:-

"Issue of mistake of advocate was not in evidence at that time. Issue of the willingness to deposit money."

My understanding of this is that the new evidence being alluded to by the Defendants is that the issue of the mistake of the Advocate leading to the entry of the judgment in default was not brought to the attention of the court at the time the application for setting aside was argued. In my view, this cannot be said to be new evidence. The record will show that the previous Advocates entered appearance to the summons on 6th May, 2010. Judgment in default was entered on 25th May, 2010. The application was supported by an Affidavit sworn by one Edward Njenga Muchai, Advocate, the 1st Defendant did swear a Supplementary Affidavit on 29th July, 2010. It is expected that the deponent of the present Supporting Affidavit must have had explained to him the reasons for the failure to file the Defence within time. I do not believe that the allegation that the failure to file the defence within time was caused by the mistake of an Advocate can be regarded as new evidence. These are factors that were in existence as at the time the application for setting aside was being heard. Any diligence of the part of the Defendants would have revealed that fact. I reject that ground.

9. The third ground is any sufficient ground and that the defendants have a good defence to the Plaintiff's claim. In the application to set aside the default judgment the Defendants exhibited a draft defence. The court examined the same and in the penultimate paragraph of the ruling delivered on 5th March, 2011 observed:-

"On account of the foregoing, I find that the defendants draft defence attached to Mr. Njenga's Affidavit does not disclose any triable issues that can revisit the Plaintiff's claim....."

The court proceeded to dismiss the application. I have carefully considered the Supporting Affidavit

herein. No new defence has been raised. No new draft defence was attached. In this regard, I do not think that the ground of a good defence is merited to warrant the review of the order of 5th March, 2011.

10. In conclusion, having carefully examined the Affidavits and the submissions on record, I have not seen any sufficient reason adduced to enable the court review the order of 5th March, 2011. The fact that the Plaintiffs have sought to effect execution by committing the 1st Defendant to Civil jail is not a sufficient reason in my view. That is a process of execution which is legally recognized in law.

11. Accordingly, I find that the application dated 16th September, 2011 is without merit and I dismiss the same with costs.

DATED and DELIVERED at Nairobi this 19th day of April, 2013.

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A. MABEYA

JUDGE