REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 381 of 2011

PALACE INVESTMENT LIMITED……..........…..…..…...1ST PLAINTIFF

GEORGE GIKUBU MBUTHIA ……………......…………2ND PLAINTIFF

VERSUS

PENINA ACHIENG OYUGI…………………………...…..1ST DEFENDANT

JANET RUTH OYUGI…….……………………………..…2ND DEFENDANT

NORMAN WILSON OMONDE OYUGI……..…...….…3RD DEFENDANT

MOHAMED GULF…………...……………………….……..4TH DEFENDANT

BARON NANGALAMA t/a HEBROS TRADERS…...…5TH DEFENDANT

THE ATTORNEY GENERAL………………………......…6TH DEFENDANT

RULING

By a Notice of Motion dated 6th June 2012, the 2nd plaintiff herein applied for orders that the defence filed by the 6th defendant (hereinafter referred to as the applicant) herein be expunged for having been served without leave. He also sought that the applications filed by the applicant dated 18th January 2012 be struck out and expunged together with supporting affidavits as well as the Notice of Preliminary Objection filed by the said applicants.

The said application came up for hearing before **Hon. Lady Justice Khaminwa** in the presence of the 2nd plaintiff and upon hearing the 2nd plaintiff in the absence of the other parties who according to the 2nd plaintiff were duly served, the Judge allowed the application and granted the orders as prayed.

The applicant being aggrieved by the said decision filed an application dated 28th September 2012 seeking orders that the said decision be reviewed. That application was expressed to be brought under the provisions of Order 44 and Order 50 of the Civil Procedure Act Cap 21, Section 3A of the Civil Procedure Act as well as under all other enabling provisions of the law. The said application is based on the fact that the matter having been previously listed before me counsel for the applicant expected the same to be placed before me on the said date. It is further contended that though the applicant filed grounds of opposition to the 2nd plaintiff's application service was not effected as the second plaintiff had not furnished his proper physical address and the address indicated was misleading. On the date when the

application came up for hearing the applicant's counsel was engaged before **Hon. Mr Justice Kimondo**.

The application was opposed by the 2nd plaintiff who contended that the application is incompetent having been brought under the wrong provisions of the law. Secondly, the 2nd plaintiff contended that since the order sought to be reviewed had not been extracted and annexed the application was premature and incompetent. Since the applicant was not present when the application was allowed, it was the 2nd plaintiff's view that the option of review was not available to the applicant.

I have considered the foregoing. I must say that the issues raised by the 2nd plaintiff are not frivolous. I agree with the 2nd plaintiff that the application was drafted in a rather casual manner. Whereas the application cites the provisions of Order 44, it is clear that since 17th December 2010, the relevant Order applicable to review is Order 45 and not Order 44. Again it is clear that the relevant order on applications is Order 51 and not Order 50 cited in the application. To make matters worse the application is expressed to be brought under Orders 44 and 50 of the Civil Procedure Act rather than the Rules. That counsel for the applicant failed to notice these glaring mistakes is with due respect amazing especially when it is taken into account that the 2nd plaintiff who is acting in person readily noticed the same. Counsel ought to pay more attention to the manner in which applications are brought to court as failure to properly draft applications may lead to either the applicant being denied costs even if successful and even being penalised in costs.

Having said that I am not prepared to determine the application on such procedural misdemeanours and in the exercise of the powers conferred upon the Court under Article 159(2)(d) of the Constitution and in the wider interest of justice I propose to deal with the matter on merits.

Whereas I admit that the applicant ought to have extracted and annexed the order sought to be reviewed, it is my view and I so hold that the application before the court does not strictly speaking fall within the realm of review as contemplated under Order 45 of the Civil Procedure Rules. What the applicant seeks from this court is an order seeking to set aside the orders which were granted in favour of the 2nd plaintiff as a result of non-attendance by the applicant. Those orders were in effect granted ex parte. In such circumstances the relevant provision in my view is Order 51 rule 15 of the Civil Procedure Rules under which the Court is empowered to set aside an order made *ex parte*. Under the provisions of Order 50 rule 10(1) it is expressly provided that no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule requiring that every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated. Accordingly I will proceed to consider the application as if the same was brought under Order 51 rule 15 aforesaid.

The principles guiding the setting aside ex parte orders are trite that the court has wide powers to set aside such ex parte orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

"**That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".**

In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal

process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".

Under the overriding objective in sections 1A and 1B of the Civil Procedure Act, some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Under the said objective, it has been held that the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.See **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009.**

In this case the 2nd plaintiff has not stated that he stands to suffer any prejudice if the application is allowed. The effect of allowing the applicant's application is that the 2nd plaintiff's application dated 6th June 2012 will be reinstated to hearing and if the same if found to be merited would be allowed. That must be weighed as against the consequences of allowing the ex parte orders made herein on 18th September 2012. In such matters as this court the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

In the result, having considered the foregoing and the reasons advanced for non-attendance on behalf of the applicant, I find merit in the application dated 28th September 2012 which I hereby allow. The costs of the application are, however, awarded to the 2nd plaintiff.

Dated at Nairobi this 7th day of December 2012

G V ODUNGA
JUDGE

Delivered in the presence of the 2nd Plaintiff