



No. 2788

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 30 OF 2002

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

-VERSUS-

SHEM SANYA BALONGO.....DEFENDANT

RULING

According to the plaintiff and who is the applicant herein, it instructed the firm of **Khan and Katiku Advocates** sometimes on 19th February, 2001, to commence proceedings against the defendant, the respondent herein to recover a principal sum of Kshs. 395,753/55 plus costs and interest. Acting on the instructions, the said firm of Advocates filed the instant suit. Apparently, in or about January, 2009, the firm of **Khan & Katiku Advocates** was dissolved and **Mr. Katiku** moved on and became a partner in firm of **Messrs Musyoka Wambua and Katiku Advocates**. The applicant opted to retain this new firm in this case. By a letter dated 27th April 2009, the new firm notified the earlier firm of its appointment and also sent a Notice of change of Advocates to them to file it in court on their behalf.

Unfortunately, due to an error in the Postal Address, the earlier firm did not receive the letter and therefore did not file the Notice of change of Advocates as required. This fact only came to the knowledge of the new firm on 6th July, 2010 when this case came up for hearing. Unknown to the new firm, a hearing notice had in fact been served by the defendant on the old firm which in effect had no instructions in the case as it had handed over the file to the new firm. It was not until the day of the hearing of the suit viz 6th July, 2010 that an advocate in the old firm notified the new firm of the hearing date and since the firm was based in Nairobi, it could not dispatch a representative for the trial. As a result of the absence of the applicant to prosecute its claim, the court made the following order:-

“...The plaintiff is absent. The defendant is present and does not admit the defendant’s claim or any part thereof. In the circumstances the plaintiff case is dismissed with costs to the defendant...”

That order triggered the instant application dated 13th July, 2010. The applicant in the main seeks that the order aforesaid be set aside and that the applicant’s suit be fixed for hearing. The application is expressed

to be brought under Order IXB **rules 4** of the old **Civil Procedure Rules** section, 3A of the **Civil Procedure Act** and **all other enabling provisions of the law**.

The grounds and affidavit in support of the application revolve around what I have already set out at the beginning of this ruling. Suffice to add that the failure to attend court by the applicant was in the circumstances outlined above excusable as it was caused by an error not attributable to it but by inadvertence of its advocates for which it should not be punished. It had a good claim against the respondent with overwhelming chances of success as the respondent had admitted the claim in previous correspondences. It would be just and fair to have the suit heard on merits as the respondent stood to suffer no loss that cannot be compensated by way of costs.

The application was opposed. **Jeremiah Onsare Soire** swore a replying affidavit. In pertinent paragraphs, he deponed that the affidavit in support of the application is defective, failure by the applicant's counsel to be in court for the hearing of the case had not been properly and fully explained, that the applicant had not been desirous of having the case heard and determined and finally, that there was no sufficient cause or reason shown in the application to warrant the grant of the orders sought in the application.

When the application came up for interpartes hearing before me on 21st March, 2011, **Mr. Kiboro** for the applicant and **Mr. Soire** for the respondent agreed to canvass the application by way of written submissions. They subsequently filed and exchanged those submissions which I have carefully read and considered alongside cited authorities.

In this kind of application, the court in deciding whether or not to allow it, exercises discretion. However such discretion ought to be exercised judicially and not capriciously or whimsically. Accordingly, the conduct the applicant prior to and after the order sought to be set aside comes into focus. The applicant will be undeserving of the exercise of discretion in his favour if in the past it had exhibited indolence or if it is not candid with the court. I am also aware that the principle which guides the courts in the Administration of Justice when adjudicating on any dispute is that where possible disputes should be heard on their merits. This view has of course been recently reinforced by the overriding objective in civil litigation, now commonly referred to as the "**oxygen principle**". I am also cognizant of the fact that there is no error or default that cannot be compensated by way of costs unless prejudice to the other party is so grave as to amount to injustice and that it is the policy of the court not to shut out a litigant from putting forward his case. See generally, **Crown Berger (K) Ltd –vs- Hysal Hardware (2008) eKLR**, **Trust Bank Ltd –vs- Amalo Co. Ltd (2003) E.A 350** and **Republic –vs- Shinyalu Land Disputes Tribunal & Another (2005) eKLR**.

From the record and contrary to the submissions of the applicant, it did appear in court on 6th July, 2010. The record shows that on that occasion it was represented by **Mr. Ogweno**. Infact the coram of that day was as follows:

“6/7/2010

Before D. Musinga

Mobisa court clerk

Mr. Soire for the defendant

Mr. Ogwen for the plaintiff”

It is therefore clear that when the case was called out for hearing, the applicant was ably represented by counsel. What did its counsel say “...*I do not have the file with me. I sent it to Mr. Katiku. I am unable to proceed with the hearing...*”. That is all that the counsel said. He did not tell the court why he sent the file to **Katiku** in the first place nor seek an adjournment to enable the said **Katiku** to appear. What was the court supposed to do when even the applicant’s witnesses if at all were absent in court?

This application has been framed as though the proceedings on that occasion were ex-parte and that the case was dismissed for want of attendance on the part of the plaintiff. That cannot possibly be correct. Order IXB **rules** 4 and 8 under which the application is brought are inapplicable therefore. As a matter of fact, this case was heard and determined by **Musinga J.** This was after the learned counsel for applicant when called upon to prosecute the applicants case categorically stated “...*I have no evidence to offer...*”. The decision of the court to dismiss the case therefore was not ex-parte but interpartes.

As correctly observed by counsel for the respondent in his submissions, the dismissal of a suit in the circumstances outlined above operates as *res judicata* and the same can only be set aside by way of appeal. In the case of **Salem Ahmed Zaid –vs- Faud Hussein (1960) E.A 92**, the Court of Appeal observed “... *I see no reason to differ from the Indian decisions on the effect of a decision under Order XVII. V3, and I think that the same reasoning and conclusion applied equally to a judgment pronounced against the plaintiff under rule 178 of rules of court, that such a judgment must be deemed to be a decision on the merits and must have the same effect on a dismissal upon evidence, that accordingly the matters in issue on the suit must be deemed to have been heard and determined, and that the decision operates as res judicata...*”. In essence what is being said here is that where the plaintiff is called upon to lead evidence in support of his claim and declines to do so perhaps for want of witnesses and closes his case as it happened here, those proceedings cannot by any stretch of imagination be deemed ex-parte. Instead the court will deem it as though the case was heard on merit.

The upshot of all the foregoing is that in this case, the applicant was represented in the proceedings. He opted not to offer any evidence to advance his claim. Instead he opted to close his case without calling evidence. The respondent did not admit the claim or any part of it. On that basis the applicant’s claim was found unproved and therefore the suit was dismissed. The applicant cannot therefore claim that the proceedings were ex-parte so as to underpin the application under Order IXB **rule** 4 and 8 of the **Civil Procedure Rules**. The suit was not dismissed for non-attendance by the plaintiff.

Is this the kind of technicality that can be ignored vide article 59 of the Constitution or by the Oxygen principle and for purposes of substantive justice? I do not think so. The mistake goes to the root of jurisdiction and cannot be cured under the foregoing considerations. The issue is not that the advocate failed to attend court on the material day but it is that he attended but offered no evidence in his wisdom or lack of it. Again it is not a case of the sins of an advocate being visited upon an innocent litigant. The applicant made that beeline on the basis that it was not aware that the case was due for hearing on that date. However, as I have endeavoured to demonstrate, its advocates were all along aware of the hearing date. Indeed the advocate who appeared did not say that he was holding brief for **Mr. Katiku**. The record shows that he appeared as counsel for the applicant. Perhaps this one case where the sins of an advocate may very well be visited upon a client. The advocate had a wide range of arsenal at his bidding to ensure that the case could not proceed in the absence of his witnesses. He failed to unleash any. That cannot be held against the respondent.

The record also shows that the applicant has been indolent in the prosecution of this case since filing it in 2002. The applicant has not on any single occasion fixed the case for hearing. All along it has been the

respondent who has been nudging on the applicant. This is not the kind of conduct that can hold the applicant in good stead so that this court in its wide and unfettered discretion can exercise it in its favour.

It does also appear to me that the applicant is neither candid nor forthright in this application; for the simple reason that whereas the case was dismissed on 6th July, 2010, the Notice of change of Advocates was filed in court on 13th August, 2010. Yet it was deponed in the affidavit in support of the application that the new firm had, by the time the case was being dismissed, forwarded its Notice of change of Advocates that was lying in the offices of the old firm. That cannot possibly be true since the same is dated 13th July, 2010 which as counsel for the respondent correctly points out, presupposes that it could not have left their offices in Nairobi earlier than 13th July, 2010. Further there is no affidavit or any other material before this court from the old firm to support the assertion that they were indeed in possession of Notice of Change of Advocates as at or before 6th July, 2010. It is obvious that the issue of Notice of Change of Advocates is a fabrication and a deliberate attempt by the applicant to mislead the court.

Finally, the order complained of was made on 6th July, 2010. The instant application was filed on 13th August, 2010, a month or so later. There is no explanation for that delay. In the absence of such explanation it cannot be said that the application to set aside the order was made without undue delay and yet that is one of the considerations in such applications.

The application stands dismissed with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 4th day of May, 2011

ASIKE-MAKHANDIA

JUDGE