REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1627 of 2001

KENYA ARMED FORCES OLD CORMADES ASSOCATION REGISTERED TRUSTEES……PLAINTIFF/APPLICANT

VERSUS

THE NAIROBI CITY COUNCIL…….……1ST DEFENDANT
THE REGISTERED TRUSTEES OF AGAPE

FELLOWSHIP CENTRE……..……..2ND DEFENDANT
REGISTERED TRUSTEES OF AFRICA

EVANGELICAL PRSBYTERIAN CHURCH …….3RD DEFENDANT
THE REGISTERED TRUSTEES OF BIBLE

SOCIETY OF KENYA…….4TH DEFENDANT

WARP DRIVE LIMITED…….……..5TH DEFENDANT

RULING

On 28th August, 2009 Onyancha J. was seized of two applications dated 23rd June, 2006 and 28th August, 2009 respectively seeking orders for the applicants to be enjoined as defendants and also for injunction orders against the plaintiff/respondent. The plaintiff filed replying affidavits in respect of both applications but on the date of hearing did not appear either in person or by counsel.

In the absence of the plaintiff/respondent the learned judge gave the orders for enjoinment of the applicants in both applications and also injunctive reliefs which are prohibitive. The bottom line is captured in Order No.(c) of the learned judge which reads as follows"

"**Mandatory injunction sought in relation to access road is also hereby granted and the wall built by the plaintiff cutting off or preventing access road shall be demolished by the plaintiff within 7 days otherwise the applicants have liberty to remove the same in the presence and assistance of the local police station OCS."**

Aggrieved by the said orders the plaintiff filed an application on 29th September, 2009 by way of Chamber Summons under Order IXB Rule 8 of the Civil Procedure Rules and under Sections 3A and 63 of the Civil Procedure Act for substantive orders that, there be a stay of execution of the orders granted by the honourable Court on 28th September, 2009 pending the hearing and determination of the application and that, the orders made by the honourable court on 28th September 2009 be set aside and the plaintiff applicant be granted an opportunity to oppose the applications dated 23rd June, 2006 and 28th August, 2007.

The application is premised on the grounds set out on the face of the application which are;

1. That this matter proceeded on 28th September, 2009 in the absence of the advocate for the plaintiff who intended to oppose the applications dated 23rd June, 2006 and 28th August 2007 which were coming up.
2. The cause of non attendance by the plaintiff's counsel was because the said advocate was before Hon. Lady Justice Martha Koome in Milimani HCCC No.69 of 2002 Beatrice Bosibori Matoya vs – Standard Chartered Bank Ltd.

3. That the advocate the plaintiff's counsel had requested to hold his brief and inform the court of his preparedness to proceed and seek the time allocation was unable to attend due to his indisposition which was not informed upon the plaintiff's advocates before the said hearing had taken place.

4. That as a consequence the court has issued orders which are generally pre-judicial to the plaintiff without the plaintiff being heard.

5. That the non attendance was not deliberate but occasioned by excusable circumstances.
6. That the court has a wide unfettered discretion to set aside the orders made on 28th September 2009 and set the matter for re hearing and;
7. The plaintiffs' opposition to the defendants' application is not frivolous and has merit.

In addition to the said grounds there is an affidavit sworn by Mr. Wachira Mari the learned counsel for the plaintiff. The defendants/respondents have opposed this application and I have an affidavit sworn by one Akwana Mahero the learned counsel for the 3rd, 6th , 7th and 8th defendants in this matter.

There is also an affidavit in reply by Pastor John Mugo on behalf of the 2nd defendant herein in opposition to the application. Counsel on record have filed submissions which I have noted. They have also cited several authorities. The record shows that on 1st July, 2009 the hearing date for 28th September, 2009 was taken by consent. The learned judge was therefore correct to note in his ruling that the counsel for the plaintiff was not present.

I have related the present application before me to the pleadings and also the reasons advanced for the absence of the learned counsel for the plaintiff on the hearing date. Order IXB rule 8 cited in this application reads as follows;

"Where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just."

In Civil Appeal No.79 of 1983 Merama Nyang'ombe – vs – Chacha Mwita, Kneller JA said as follows;

"The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just…..

This discretion is intended to be exercised 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"

The learned judge went further to consider the matters which come into play when such an application is made and set out the same as: the facts and circumstances both prior and subsequent and all the respective merits of the parties, together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex-parte, and whether or not it will be just and reasonable to set aside and vary a judgment, if necessary, upon terms to be imposed.

The learned judge also observed that because it is a discretionary power, it should be exercised judicially. He then went on to set out the tests to be applied which are first, was there a defence on the merit? Secondly, would there be any prejudice? And thirdly, what was the explanation for any delay?

In the same judgment the learned judge observed:

"the gross negligence of an advocate should not, it is clear, persuade a court to accede to an application to set aside an ex-parte judgment……..But equally, an advocate cannot, any more than other men, conduct business without sometimes making slips and, if he does, it is in accordance with justice and with the course of practice to restore the action on terms that the party in default shall pay the costs of that day including all the costs thrown away."

The learned counsel for the plaintiff/applicant has given the reasons for his non attendance and annexed an extract of his diary to show that indeed he was before another court. Unknown to him the counsel he had detailed to hold his brief was indisposed. Those reasons in my view are plausible and his non attendance and consequences thereof should not be visited upon the plaintiff/applicant.

I have asked myself whether I should set aside the said orders in their entirety. The question is deliberate because, the orders that are sought to be stayed have been executed in part. The wall that the defendants had moved the court to have demolished has already come down. This appears in the affidavits and pleadings on record. And so, whereas I would wish to exercise my discretion in favour of the plaintiff this discretion cannot not be extended to restore what has been executed.

In the event, I order that the plaintiff shall have an opportunity to oppose the applications dated 23rd June, 2006 and 28th August, 2009 but the *status quo* that shall remain in place is that the defendants shall continue to benefit from the orders granted in respect of the said wall, that is access, until such time that the said applications are heard and determined. The costs of this application shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 12th day of October, 2010.

A. MBOGHOLI MSAGHA

JUDGE