



REPUBLIC OF KENYA

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

Civil Case 1902 of 2001

JACINTA M. WANJIRU & ANOTHER.....PLAINTIFFS

VERSUS

C.P. WAITHAKA & TWO OTHERS.....DEFENDANTST

RULING

A perusal of the Court record reveals that the Plaintiff herein presented to Court a plaint dated 23rd October 2001 and filed in Court on

7th November, 2001. It sought Kshs 2,000,000.00 from the defendants plus interest at 26% from 16th February 1999 and costs of the suit. On 12.3.2002 judgment in default of appearance and defence was entered in favour of the Plaintiff against the 1st and 3rd defendants. On 7th day of May 2002 the Principal Deputy Registrar certified costs of the suit in favour of the Plaintiff as against the 1st and 3rd defendant pursuant to rule 68 A (1) and (2) of the Advocates remuneration order to the tune of Kshs 121,425.00. The decree was issued on 15th April, 2002. The certificate of costs was issued on 7th May 2002. On 4.6.2002 on the basis of an application for attachment made on 14.5.2002 and attachment order was made as prayed.

On the record is traced an application which is undated but file don 13.6.02 on behalf of the 1st and 3rd defendant. It was brought under Order 1XA rule 10 and 11 of the Civil Procedure Rule and Section 3A of the Civil Procedure Act. The orders relevant to this ruling are:-

- 1)** That the default judgement entered herein against the first and 3rd defendants be set aside and the defendants be allowed to defend the suit.
- 2)** That there be a stay of execution on the decree herein pending hearing of this application.
- 3)** That the process server Conrad Wekesa be summoned for cross-examination on the alleged service.
- 4)** That the costs be provided for.

The said application came before court on 13.6.02 when it was certified as urgent and fixed for hearing on 27.6.02 with an order for interim stay till then on 27.16.02. The entry of the record of 27.6.02 reveals that Counsels of both sides appeared, the applicant informed the court that they had been served with a replying affidavit the previous day at 4.35 p.m. which replying affidavit was in response of the application served on 17.6.2002, the applicant sought leave to file a

further affidavit. The Plaintiff/respondent to that application confirmed the time for service. The Court made orders to the effect that:-

- (1)** Leave to file a further affidavit was granted to the defendants/applicants.
- (2)** The said further affidavit was to be filed within 7 days.
- (3)** The respondents were to pay court adjournment fee and the applicant's costs for that date.
- (4)** A date was to be taken at the registry on priority basis.
- (5)** Interim orders were to be extended to that date.

On 6.6.2003 interlocutory judgment was entered against the second defendant. On 18th November, 2003 the Plaintiffs costs against the second defendant were certified under rule 68 A (1) and (2) of the Advocates Remuneration Order to the tune of Kshs 121,600.00. On 21st November, 2003 the application for attachment presented on 20th November, 2003 was granted as prayed.

On 21st day of September, 2006 the Plaintiff moved to this Court by way of notice of motion dated the same 21.9.06 and filed on 16th April 2007 brought under section 3A of the Civil Procedure Act and the inherent powers of the court seeking an order that:-

- (1)** That this honourable Court be pleased to vacate and set aside the interim order of stay of execution given on 27th June 2002.
- (2)** Costs of the application be provided for.

The grounds in support are set out in the body of the application supporting affidavit, written skeleton arguments, oral submissions and case law. The major ones are:

- (i)** That the Plaintiff obtained judgment against the 1st and 3rd defendants in default of appearance and defence on 20th May 2002 for the sum of Ksh s2 million.
- (ii)** On 12th June 2002 they 1st and 3rd defendant filed an application for setting aside the said exparte judgment and for leave to defend the suit by allowing them to file a defence.
- (iii)** On 27th June 2002 the court adjourned the said application to be heard on a date to be fixed at the registry, and at the same time extended interim stay till the hearing date to be fixed at the registry.
- (iv)** It is their stand that since 27.6.002 when the said interim orders were made, the 1st and 3rd defendants have not made efforts to list the said application for hearing and disposal.
- (v)** That the 1st and 3rd defendants' failure to prosecute their said application has denied the plaintiff enjoyment of the fruits of a judgment lawfully earned.
- (vi)** They 1st and 3rd defendants have not given any reasonable explanation as to why they have not taken steps to prosecute the said application.
- (vii)** In view of what has been stated in No. (i-vi) above the Court is urged to vacate the said orders of 27.6.02.

The respondents have filed a replying affidavit to that application. In addition they have also put in written skeleton arguments and case law. The major points relied upon by them are:-

- (i) They concede the plaintiff had obtained an *ex parte* judgment against them.
- (ii) It is conceded that indeed they filed an application dated 12.06/02 seeking setting aside of the said *ex parte* judgment and leave to defend. The said application also contained a prayer for stay of execution pending hearing and disposal of the said application.
- (iii) It is conceded that indeed interim stay was granted on 27.6.02 pending hearing of the said application which hearing was to be on a date to be fixed at the Registry.
- (iv) That as they were waiting to fix the said application for hearing and disposal, the plaintiff once again obtained *ex parte* judgment against the second defendant.
- (v) The second defendant then instructed them to apply to have the said *ex parte* judgment against him set aside and for him to be given leave to defend the suit as well.
- (vi) That after filing the application for setting aside the *ex parte* judgment against the 2nd defendant, they concentrated on pursuing this later application and forgot about the earlier application which they assumed had already being disposed off.
- (vii) That the court record will confirm that it has been very active since 2004 in respect of the later application in faovur of the second defendant which application was dismissed by Aluoch J on 27.11.07.
- (viii) It is their stand that while they were busy pursuing the application for setting aside *ex parte* judgment against the 2nd defendant they inadvertently forgot to prosecute the application for setting aside of the *ex parte* judgment against the first and 3rd defendants.
- (ix) They contend the mistake in failing to do so lies with Counsel and as such their client should not be penalized.

On that account the court is urged to be guided by the decision in the case of **GITHIAKA VERSUS NDURIRI [2004] KLR 67** and allow them prosecute the said application which they are already and willing to do so.

This court has considered arguments advanced by both sides, looked at the case law cited, perused the record and makes findings of the under listed points as being undisputed.

- (1) Indeed the application by the 1st and 3rd defendant dated 12.6.02 is still existing on record and it has not been finalized.
- (2) That indeed there were stay orders given to the 1st and 3rd defendants staying the execution of the plaintiffs judgment against them which stay orders were granted on 27.6.02.
- (3) That indeed the said stay orders were open ended in nature in that they were to remain in force till the hearing and determination of the said application.
- (4) It has been conceded by the respondents that indeed this application has never been set down for hearing and disposal.
- (5) It has been conceded by the respondents that before action was taken to fix the application for hearing there was an intervening event where by the plaintiff obtained *ex parte* judgment against the 2nd defendant as well, which second defendant engaged the services of

the same Counsel as that engaged by the 1st and 3rd defendant.

This same Counsel rushed to Court with another application on behalf of the 2nd defendant seeking stay of execution orders and leave to defend on behalf of the second defendant. It has been conceded by the respondents that they turned their attention and concentration in this latter application and came to court severally in pursuit of disposal of the same. It has been deponed by them in the replying affidavit and submitted by them in the written skeleton arguments that the record has been very active in respect of this latter application and that both parties came to Court severally in pursuit of its disposal which ended with its dismissal on 27.11.07.

It is further conceded that they inadvertently forgot to perse the application complained of assuming though that the same had been disposed off. It is their stand that this mistaken assumption is the fault of the Counsel and at no time should it be visited on their client. They have realized the same and are now ready and wiling to make amends by having the said application disposed off speedily.

The applicant/Plaintiff on the other hand says that what has now been put forward is not a reasonable enough cause that can make this court resist granting the said order. The duty of this court is therefore to weigh the competing interests and then determine which side the axe should land. The Court has been asked to be guided by the decision in the case of GITHIAKA VERSUS NDURIRI (supra). The Court has had occasion to peruse the said decision holding number 5 states categorically that “***mistakes by Counsel are not a reason for denying an otherwise deserving applicant of a favourable exercise of discretion***”. This courts understanding of this proposition is that “***mistakes of Counsel are only excusable where there exists a litigant who is deserving of the courts exercise of the courts discretion***.”

The court has therefore to decide whether on the facts demonstrated herein, the 1st and 3rd defendants are deserving of this Courts discretion not to discharge the said interim stay orders. Likewise it has to determine, that on the facts demonstrated herein the plaintiff/applicant is a deserving litigant of this courts discretion to set aside and or discharge the said orders. In order to understand better the competing interests, it is better to turn to the reasoning in the said quoted case that gave birth to that holding.

There is no doubt that the decision is a court of appeal decision by Ringera JA. As he then was. At page 70 paragraph 35-40 it is stated clearly that what was under consideration was the operation of rule 4 of the court of Appeal rules. AT line 5 from the bottom it is stated clearly that “rule 4 of the Court is perfectly invested with a clear and unfettered discretion to extend time limited by the rules or its own decisions. Such a discretion, like all judicial discretions is to be exercised judicially, that is to say on sound reason other than whim,, caprice or sympathy. In exercising the discretion the court's primary concern should be to do justice to parties. In considering which way the scales of justice tilt, the court should among other things consider the length of the delay, in lodging the notice and record of appeal, where applicable the delay in lodging the application for extension of time as well as the explanation therefore.”

The ingredients that this court draws from the foregoing passage are:-

- (1) The court's discretion has to be exercised judicially, that is on sound reason other than whim, caprice or sympathy.
- (2) In exercising the said discretion the court's primary consideration should be to do justice to the parties.
- (3) The Court has to take into account the length of the delay.
- (4) The court also has to take into consideration the explanation given.

The reasoning on mistakes of Counsel not to be visited on the litigant is found at page 71-72 paragraphs 1-25. The relevant particulars of the same are:-

“there is abundant authority of this Court that mistakes by Counsel are not a reason for denying an otherwise deserving applicant of a favourable exercise of discretion” quoting with approval Madan JA as he then was in the case of **MWAI VERSUS WAINAINA (No.2) [1982] KLR 33** thus *“a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior Counsel though in the case of a junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of persons of experience who ought to have known better had made a mistake. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictates. It is known that courts of justice themselves make mistakes which is partially referred to as erring, in their interpretation of law and adoption of legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required (emphasis is added).*

The ingredients gathered from the foregoing passage are:

- (i) A mistake is a mistake
- (ii) A blunder on a point of law can be a mistake
- (iii) The door of justice is not closed just because a person of experience who ought to have known better has made a mistake.
- (iv) The court may not forgive or condone it but ought to do whatever is necessary to rectify it if the interests of justice so dictates.

At paragraph 20 on page 71 the learned judge quoted with approval the decision of Lakha JA as he then was in the case of **GRINDLAYS BANK INTERNATIONAL (K) LTD AND ANOTHER VERSUS BARBOOR** CIVIL APLICACATION No. Nai 257 of 1995) (UR) thus:-

“oversight has been defined to mean the omission or failure to see or notice. It is inadvertence whilst ignorance may not be equated to a mistakemistake may and namely does arise through negligence”.

The ingredient gathered from this passage is that:-

- (i) A mistake or omission is in advertence even if it is founded in negligence.

This court has applied all the ingredients gathered from the foregoing passages as set out above to the facts herein and it makes findings that the respondents excuse is that the later application overshadowed the earlier application. This court is of a contrary view. This is because:-

- (1) The orders sought to be set aside were made on 27.6.02. It was not until 6th June 2003 almost a year later that exparte judgment was entered against the second defendant.
- (2) It is to be noted from the record that in between this period no single attempt was ever made by the 1st and 3rd defendants through their counsel to fix the said application even once.
- (3) The application filed on behalf of the second defendant seeking the setting aside of the exparte judgment against the second defendant is dated 1st day of March and file don 2nd day of March 2004. This was a period of one year and 9 months since the orders of 27.6.02 were

made and 9 months from the date the ex parte judgment was entered against the second defendant.

(4) The respondent has not given an explanation as to what impeded them from fixing this earlier application for disposal even before the latter application was filed. During this one year and 9 months period no attempt was made by them to list this earlier application for disposal.

(5) A perusal of the record reveals that indeed the latter application appeared in court on numerous occasions namely 4.3.04, 5.3.04, 16.3.05, 30.11.04, 18.12.04, 30.11.04, 9.12.04, 24.2.05, 9.12.05 and 27.11.06. Indeed this was a spirited effort to dispose of that latter application. No such efforts were made to move the disposal of the earlier application.

(6) Counsel on record was acting on behalf of a client. There is no affidavit from the 1st and 3rd defendants to show what efforts they made as follow up to prosecution of an application meant to open an avenue for them to ventilate their rights. It is not known whether they are even aware of the current proceedings, whether they are supportive of them.

(7) Indeed mistakes of Counsel should not be visited on a litigant. However, it should be noted that Counsel is a mere servant or agent. The driving force is the litigant. He also has a duty to ensure that his Counsel is kept on his toes as far as the progression of the litigation is concerned. This court has been kept in the dark as to what show of interest the 1st and 3rd defendants had in the matter in so far as the pursuit of their rights is concerned. There is nothing to show that they are still interested in pursuing the defence of the case.

This court is aware that a client takes the risk of the poor or prudent professional workmanship of the Counsel hired. However, that notwithstanding, it is up to the said client to ensure that he makes full use of that workmanship. Where a litigant hires Counsel and then goes to sleep for over 4 years, he will only have himself to blame if he does not ultimately reap the benefits of the services hired from Counsel.

(8) There was mention that the Plaintiff/applicant was aware of the numerous occasions both have been in this court on account of the latter application. Indeed the record speaks for itself on this fact. This however is not a mitigating factor in favour of the 1st and 3rd defendant as the plaintiff was not in any way obligated to dictate to the defendants on how he should be prosecuted. His duty was to obey the summons of the defendants as regards the later application. Their failure to ask for a prosecution of the earlier application is not a waiver of their right to complain about non prosecution. Their duty was limited to responding to the same which they did and to a limited extent fixing it for hearing should they deem it fit to do so. Their failure to deem it fit to fix it for prosecution does not weigh greater than the defendant's own obligations to see to it that it is prosecuted and disposed of speedily. The Plaintiff had to abide by the defendants own choice to pursue the latter application as opposed to the earlier one. It should also be noted that no attempt was even made by the defence to have the two applications consolidated and heard together.

Turning back to the exercise of discretion, the Court notes that it has to call to mind the following ingredients.

1) It has to be exercised judiciously based on sound reason and not on the basis of whim, caprice or sympathy.

Applying that to the facts herein it is clear that the only reason given by the respondents for failure to list the application for disposal was that concentration was turned onto the latter application. But no explanation has been given as to what impeded them from fixing the application for hearing for one year and 9 months before the latter application was filed.

(ii) There is no explanation from the 1st and 3rd defendants as to what efforts they have been making to pursue their rights.

(iii) There is nothing to show that they 1st and 3rd defendants are still interested in pursuing their rights.

2) That where a mistake has occurred, the court may not forgive or pardon it but it has to do whatever is necessary to rectify it if justice so demands. Applying that to the facts herein it is clear that it was an error for the Court to give an open ended stay order. It was likewise an error for the defence to go to sleep after getting the open ended stay order. Complaint has been raised that it is injurious to one side. This court has already ruled, no explanation has been given for in action. It is therefore the finding of this court that justice demands that the said error be rectified by setting aside and or discharging the said order.

3) The court is also called upon to take into consideration the length of time that has lapsed and the reason or explanation given for the delay. This court has taken these into consideration and applied them to the facts herein and finds that a period of 5 years delay as at the time of writing of this ruling is inordinate. Secondly the explanation given for the delay has been ruled not to be reasonable more so when there is nothing to show that the beneficiaries being the 1st and 3rd defendants took any steps to make a follow up with their Counsel in pursuit of their rights. Neither is there any demonstration on their part that they are presently interested in pursuing their rights. All these factors have disentitled the 1st and 3rd defendants the exercise of the courts discretion not to upset the said orders.

For the reasons given there is merit in the Plaintiffs/application dated 21.9.06 and filed on 16.4.07. The same is allowed the orders of stay granted on 27.6.02 be and are hereby ordered to be discharged.

(2). The Plaintiff will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE