REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 156 of 1999

EUNICE MUTUNGA……..PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KAMUTI MUSEMBI ……..…….DEFENDANT/APPLICANT

RULING

1. The Application dated 21.5.2004 seeks substantively an order that "***the exparte judgment delivered on 17th January, 2003 be set aside and the Applicant be allowed to adduce evidence in his defence."*** It is also prayed that costs be provided for. The Application is brought by way of Notice of Motion and order IXB Rules 3 and 8 of the Civil Procedure Rules are invoked.

2. In the grounds in support of the Affidavit and in the Affidavit sworn by Stephen Musembi the Defendant/Applicant, it is his case that his postal address was originally P.O. Box Number 327 Mwingi which address was closed in 2001. That he never informed his advocates of that fact and so whenever the suit was listed for hearing, his advocates would address letters to him but they would be returned with the remarks, "***Return to Sender".*** That therefore, when the suit was listed for hearing on 25.7.2002, he was unaware of the date and subsequent dates given and that it was only on 19.3.2004 when he went to his advocate's offices that he was informed that judgment had been entered against him. He instructed his advocates to take action but the court file could not be traced until May 2004 and that is when he filed the present Application. That he never willfully absented himself from court and that he has a strong defence to the suit and if the suit is heard afresh, no prejudice would be caused to the Respondent because he can be compensated in costs.

3. The Advocate for the Plaintiff/Respondent filed a Replying Affidavit sworn on 14.4.2005 and in it he deponed that he was authorized to swear the Affidavit and that the Application before me was frivolous, vexatious and an abuse of the court process because the Defendant had always been intent on delaying the hearing of this case for the following reasons;

i. On 15.11.2000, he applied for an adjournment which was granted on condition that he pays Kshs. 1000/= before the next hearing date.

ii. On 30.11.2000, when the matter was listed for mention, the adjournment fees had not been paid and the Plaintiff paid it on the Defendant's behalf and the suit was fixed for hearing on 22.11.2001.

iii. On 22.11.2001, the Defendant applied for an adjournment which was granted on condition that he pays Kshs. 1,300/= as court adjournment fees and witness expenses amounting to Kshs. 1,200/= before the next hearing date. He never did so.

iv. On 27.7.2002, the Defendant through his advocate applied for an adjournment which application was rejected on account of the Defendant's past conduct in seeking adjournment and not adhering to the conditions for grant of the adjournment. The advocate for the Defendant then walked out of court and the hearing proceeded in his absence and that of his client.

v. That the Defendant has no valid defence because he was convicted in Mwingi Traffic Case No. 101/1997 for the offence of driving an uninsured, unlicensed and defective motor vehicle and that the Plaintiff was in that motor vehicle at the time of the accident, subject of the suit, and he was fully injured as pleaded in the Plaint.

4. I have taken into account the submissions by advocates for the parties and save for technical issues raised by Miss.Matunda for the Plaintiff/Respondent which I consider as unimportant in determining the Application, my take is as follows:-

5. The Applicant has invoked order IXB Rules 3 and 8 of the Civil Procedure Rules which provides as follows:-

"***(3) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Plaintiff attends, if the court is satisfied-***

a. that notice of hearing was duly served, it may proceed ex-parte;

b. that notice of hearing was not duly served, it shall direct a second notice to be served;

c. that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

(4) ….

(5) ….

(6) ….

(7) ….

(8) 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 are just."

6. The Application of the Rules above is that in this case, the hearing proceeded ex-parte and I note from the judgment of Nambuye, J. dated 17/12/2002, that the Defendant and his advocate were not in court when the hearing commenced and only the Plaintiff was able to testify. The explanation given by the Defendant for his absence is very simple; that his postal address box was closed and his advocates could not reach him whenever the case was listed for hearing and that he was not aware of the date when the suit proceeded to hearing. Can that reason be a sufficient one to warrant grant of orders to set aside the judgment?

7. Madan J.A. in Mburu Kinyua vs Gachini Tuti [1978] KLR 69 at P. 72 stated as follows:-

"**Application to set aside ex-parte judgments are by no means rare. They are of frequent occurrence and they occur due to different reasons in different cases. The aim being to do justice between the parties, the court has been given wide and unfettered discretion, but to be exercised judicially, to set aside or vary such judgment and any consequential decree or order under order IXB, Rule 8 of the Civil procedure Rules…"**

8. If each case should be looked at in its own way as Madan, J.A. opined, what principles should guide the court in the exercise of that unfettered discretion? The question was well answered in Maina vs

Mugiria [1983] KLR 78 where it was held as follows:-

"1**) ….**

2) The principles governing the exercise of the judicial

discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as maybe just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mgogo [1967] E.A. 116 at 123B, Shabir Din vs Ram parkash Anand [1955] 22 EACA 48.

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo vs Shah [1968] E.A.93.

d) The court has no discretion where it appears there has been no proper service (Kanji Naran vs Velji Ramji[1954] EACA 20].

e) ***A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith vs Middleton [1972] SC 30)."***

9. From the submissions before me, I gather that the Respondent is saying that the Defendant is not deserving of judicial discretion because he is only obstructing and/or delaying the course of justice because he previously sought adjournments and then when granted, refused to abide with the conditions for so doing including payment of adjournment fees and costs to the Plaintiff.

10. From the record, on 15.11.2000, the hearing was adjourned at the instance of the Defendant because his previous advocate had died and Mr. Mung'ata, Advocate had just come on record and needed time to take instructions. Mwera, J. granted the adjournment on condition that the Defendant pays Kshs. 1000/=, court adjournment fees and the Plaintiff's costs for the day. The matter was then fixed for mention on 30.11.2000 and the learned judge noted as follows:-

"***C.A.F. ordered on 15.11.2000 not paid. S.O.G."*** – i.e since the court adjournment fees as ordered was not paid, the suit because of the Defendant's failure to comply, was stood over generally.

11. On 22.11.2001, the matter was placed before Nambuye, J. for hearing. Whereas Mr. Omwenga, Advocate for the Plaintiff was present as was his client, Mr. Mung'ata Advocate for the Defendant was absent as was his client but Mr. Mulu held Mr. Mungata's brief and sought an adjournment for reasons that are wholly unclear but that the Defendant was prepared to pay court adjournment fees and the Plaintiff's costs for the day. The adjournment was granted (the third) on condition that the Defendant pays Kshs. 2,500/= to the Plaintiff and his witnesses and court adjournment fees.

12. Although the matter was fixed for hearing on 10.4.2002, the matter was not placed before the judge but advocates by consent at the registry fixed it for hearing on 25.7.2002. On that day, Mr. Omwenga for the Plaintiff indicated that he was ready to proceed. Mr. Mung'atta indicated on the other hand that he had written to his client on 26.4.2002 to inform him of the hearing dates through the address given as P.O. Box 327 Mwingi but the letter was returned to him and he was unable to proceed without the Defendant being present in court. Mr. Omwenga opposed the application for an adjournment and gave the history of past adjournments and failure to comply with the court orders, regarding payment of costs. The judge

ruled that the Defendant could not be heard and the matter proceeded to trial in the absence of the Defendant and judgment was thereafter rendered.

13. It should be noted that Mr. Mung'ata was present in court when the judge declined to grant an adjournment and it is untruthful for the Applicant to state at paragraph 10 of his Affidavit that;

"***I am informed by my advocates which information I believe to be true that as they did not participate in the hearing they were not aware of the judgment date and were not served with any notice after judgment."***

14. I say that the statement was an untruth because, with respect, soon after PW1, the Plaintiff testified, the judge reserved judgment for 4.9.2002 and in that day adjourned it to 31.10.2002 although it was eventually only delivered on 17.1.2003. A diligent advocate and litigant would have kept an eye on the matter and clearly neither the Defendant nor his advocate were interested in the matter and that is why the present Application was only filed on 26.5.2004, one year and three months after judgment and close to two years after it was heard. Even if the Defendant's postal address had been closed, why would it take him more than four (4) years to contact his advocates. I say this because since 15.11.2000, there is no record until 2004 that he ever had any contact with his advocates. What I am saying is that the Defendant's conduct throughout the proceedings was that of an indolent litigant and discretion cannot favour him. I do not see any "***accident, inadvertence or excusable mistake or error"*** on his part because I see that in a letter dated 1.4.2004, his advocates used "***P.O. Box 196 Mwingi***" as the Defendant's address and so he had an alternative address. Why did he not in 4 years indicate that his address had changed and why was he completely uninterested in pursuing a case in which he stood to and stands to suffer lawful loss when and if the decree against him is executed?

15. There is one more matter which sways my mind away from any exercise of discretion in favour of the Defendant; in his statement of defence dated 8.6.1999, the Defendant admitted that the accident involving motor vehicle KYK 350 happened on 12.4.1999 but denied that the Plaintiff was in that accident or that he suffered injury and loss. However in Mwingi Traffic case No. 101 of 1997 [P. Exhibit 1(b)] which the Plaintiff produced in her evidence, the Defendant was charged with offences elsewhere above set out but of importance is that the offences were committed on 12.4.1997 at 7.30 pm along Kitui-Mwingi Road and the Defendant admitted all the offences when the prosecutor read out the facts of offence and glaring was the statement that during the accident, "***there were 18 passengers in the vehicle and they were all seriously injured***." The Police Abstract produced had the Plaintiff as one of those passengers. The Defendant cannot in one court admit the accident and in another deny it.

16. In any event, I am not satisfied that there is any purpose in setting aside the judgment of Nambuye, J. in the circumstances of this case and I have shown why.

17. That application dated 21.5.2004 is hereby dismissed with costs to the Plaintiff.

18. Orders accordingly.

Dated and delivered at Machakos this **10th** day of **June, 2008**

Isaac Lenaola

Judge

In the presence of: Mr. Mungata for Applicant

No appearance for Respondent

Isaac Lenaola

Judge