



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1440 of 2002

STEPHEN KINGANGI MUBIRA.....PLAINTIFF

VERSUS

SHABBIR M. KHATAY.....DEFENDANT

RULING

By this Chamber Summons dated 11th July 2005 and expressed to be brought under Order 1XB Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the defendant is seeking orders that this court do issue stay of execution and that the order granted on 30th June 2005 by which the Application dated 27th April 2005 was dismissed be set aside and the Application dated 27th April 2005 be reinstated.

The defendant was a tenant of the plaintiff in L.R. NO.1870/111301 situate on Muguga Green Westlands Nairobi at a monthly rent of Shs.40,000/-. The tenancy was lawfully terminated on 30th April 2005. At the termination of the tenancy the defendant had a balance of Shs.210,000/= unpaid rent arrears.

On 4th September 2002 the plaintiff filed this suit against the defendant and sought judgment for the said sum of Shs.210,000/= and costs of the suit. The defendant on being served with summons entered appearance and filed a defence on 22nd October 2002.

The plaintiff filed an application by way of Notice of Motion under Order XXXV Rule 1 Order VI Rule 9, 13 and 16 and Order XII Rule 6 of the Civil Procedure Rules seeking orders that the defendant's defence dated 22nd October 2002 and filed on 25th October 2002 be struck out. A hearing date was fixed for 29th May 2005 by consent but when the matter came up for hearing the defendant did not avail himself nor his counsel.

The matter proceeded ex parte and the plaintiff's application was granted. The defendant's defence was struck out and judgment was entered in favour of the plaintiff for Shs.210,000/= with cost as prayed in the plaint. The bill of costs was taxed by the Deputy Registrar on 28th April 2005. On 27th April 2005, the defendant by way of Notice of Motion expressed to be brought under Order L Rule 1 and 17 sought orders to set aside the judgment entered herein on 29th May 2003. The defendant's Notice of Motion dated 27th April 2005 came up for hearing on 30th June 2005.

Though the date was given in court in the presence of both counsels, counsel for the defendant was again absent and he did not appear to prosecute his application.

Mr. Khamala counsel for the plaintiff applied that the defendant's application be dismissed with costs

and the application was dismissed accordingly.

On 11th July 2005 the defendant filed this application for orders as prayed therein.

The application is based on the ground that on 30th June 2005 when this application came up for hearing, counsel for the defendant had traveled to Machakos to attend to CMCC NO.347 OF 2005. That he was delayed in Machakos and on his way back he was caught up in a traffic jam and upon reaching Nairobi it was too late to attend the High Court session.

The application is opposed on the ground that the hearing date was given in court in the presence of both counsels. That when an advocate has a matter before the subordinate court and another before the High Court, the High court has a priority so that it is not proper for counsel to have gone before a magistrate while he knew well that he had a matter before the Judge. Further that the defendant has no defence on the merits.

In an application brought under Order IXB Rule 8 or Rule 10 of the Civil Procedure Rules, the court exercises its discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The courts discretion is wide provided it is exercised judiciously. See **PITHON WAWERU MAINA V. THUKU MUGIRIA (CIVIL APPEAL NO. 27 OF 1982)** (unreported) **PATEL VS. E.A. CARGO HANDLING SERVICES LTD 1974 EA 75.**

The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged before coming to a decision whether or not to vacate the judgment. The conduct of the applicant in bringing the application should be taken into account. Another factor to be considered is whether the applicant has a defence on the merits. In this case a hearing date was taken by consent for 29th May 2003. When the matter came up for hearing, counsel for the applicant was absent. The hearing proceeded ex parte and judgment was entered in favour of the plaintiff.

The defendant waited until 27th April 2005 when he applied to set aside that judgment. The application dated 27th May 2005 was fixed for hearing for 30th June 2005 when that application came up for hearing on 30th June 2005 the applicants counsel was again absent and the application was on application by the plaintiff's counsel dismissed. On 11th July 2005 the defendant filed yet another application to set aside the dismissal order issued on 30th June 2005 dismissing the defendants' application dated 27th April 2005.

The altitude of this court has been all along that each litigant should be given the full opportunity to put forward his case before the decision. However it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

The defendant's defence was struck out on the ground that the same did not raise any triable issues and judgment was entered in favour of the plaintiff. It took the defendant over 2 years to file an application to set aside that judgment. And yet when it came up for hearing he was absent and the application was dismissed.

The materials before we clearly show that the applicant is undeserving of the exercise of the discretion in favour of setting aside. The applicant and his counsel are not diligent enough in this matter and I find no basis in exercising my discretion to set aside this court's orders of 29th May 2003 and 30th June 2005. Application is dismissed with costs.

Dated and delivered at Nairobi this 9th day of June 2006.

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J.L.A. OSIEMO

JUDGE