



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 37 of 1990

FRANCIS KIMANI KARIUKIPLAINTIFF

VERSUS

HUDSON WAMAMBIRI KAMULAMBADEFENDANT

RULING

The defendant, Hudson Wanambisi Kamulamba has made an application under Order 1XB Rule 8 of the Civil Procedure Rules seeking orders to set aside the judgment of this court delivered on the 14th of June 2005 together with all the consequential orders thereto. The defendant has further prayed for an order to have the suit thereafter fixed for hearing *de novo*. The grounds in support of the application are that the defendant complains that the case suit herein was heard *ex-parte* whereas he had neither been served nor informed of the hearing date. He further states that a hearing notice was served upon an advocate who was not on record for him and had never been instructed by the defendant. The defendant craves for the said orders of this court to be set aside as he claims the interest of justice and fairness would be served. He finally states that he has a good and triable defence to the plaintiff's claim which should be heard and determined on merits. The application is supported by the annexed affidavit of the defendant and that of one Kulecho Kwoba.

The application is opposed. The plaintiff, Francis Kimani Kariuki, has sworn a lengthy replying affidavit in opposition to the application. The substance of the said replying affidavit is that the plaintiff depones that the firm of advocates who formerly represented the defendant were served with the hearing notice of the date fixed for the hearing of the case. However when the case was listed for hearing the proprietor of the said firm of advocates Mrs Ruth N. Sitati had been appointed to be a Judge of the High Court of Kenya. Being a sole practitioner, this court inquired from the said learned Judge who was to be served now that her firm was no longer in existence. Upon the advice of the Lady Justice Ruth N. Sitati, this court ordered the plaintiff to serve the firm of Kulecho & Company Advocates. The Lady Justice Ruth N. Sitati had indicated to this court that all the files that she had been dealing with had been taken over by the firm of Kulecho & Company Advocates. The said firm of Advocates were served. They did not attend court. The hearing of the case proceeded *ex-parte* and judgment delivered in favour of the plaintiff. The said firm of Advocates were served with the notice of the delivery of the said judgment. They did not attend court. They were served with the notice of taxation. They did not attend court. The plaintiff deponed that the defendant was moved to make this application at the instigation of Intra-Africa Assurance Co. Ltd, his insurers, who all along had expressed no interest in the case until they were faced with a declaratory suit. The plaintiff deponed that the application was made *mala fides* and ought to be dismissed with costs.

I heard the submissions which were made by Mr Mbigi Njuguna, learned Counsel for the Defendant and

Mr Karanja, learned Counsel for the plaintiff. Having carefully read the pleadings filed by the parties to this application and also considered the rival submissions made, the issue for determination by this court is whether the defendant has established case so to enable this court set aside its judgment delivered on the 14th of June 2005. The principles to be applied by this court when considering whether or not to allow an application to set aside *ex parte* judgment are well settled. In Maina – Vs – Muguria [1983] K.L.R 78 the Court of Appeal held the said principles to be;

- (a) *There no limits or restriction on the Judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties*
- (b) *This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah –Vs- Mbogo [1967] E.A. 116 at Pg 123B, Shabir Din –Vs- Ram Parkash Anand [1955] 22 E.A.C.A 48*
- (c) *A higher court shall not interfere with an exercise of discretion by a Judge unless it is established that the said Judge wrong exercised his discretion (Mbogo –Vs- Shal [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] 21 EACA 20)*
- (e) *The nature of the action should be considered, the defence if one has been brought to the attention of the court and whether the plaintiff can reasonably be compensated by an award of costs should the order of setting aside be granted (Jamnadar Sodha –Vs- Gordandas Hemra) [1952] 7 ULR 7).*

Applying the principles set out above the first issue this court is required to consider is whether the defendant was properly served with the hearing notice on the date that this suit was fixed for hearing. The defendant has submitted that he was not served with the hearing notice. He has further deponed that he had not instructed the firm of Kulecho & Company Advocates who were served with the said hearing notice. The plaintiff on the other hand submitted that the defendant was properly served as directed by this court.

I have carefully considered the said submissions made. There is no doubt that the firm of Kulecho & Company Advocates were served with the hearing notice pursuant to the direction given by this court to the plaintiff. Both the plaintiff and the defendant agree that the firm of R.N. Sitati & Company Advocate, who were on record for the defendant ceased to exist once its proprietor was elevated to the constitutional office of a Puisne Judge. The defendant in his supporting affidavit studiously avoids to mention whether or not he was aware that his advocate ceased to practice upon her elevation to be a Judge of the High Court. From the affidavit deponed by the defendant, it appears that the defendant wants this court to believe that he was not aware that the Lady Justice Ruth N. Sitati had been elevated to the bench. He took no action to secure his interest once he became aware that his advocate was no longer practicing law. Instead the defendant has chosen now to impeach the conduct of this court when it sought information from the Lady Justice Ruth N. Sitati on who the plaintiff was to serve since her firm was no longer in existence.

The defendant has also avoided to tell this court how he came to secure Kulecho Kwoba to swear an affidavit on his behalf. From evaluation of the affidavit evidence placed before me, it is clear that the defendant was aware that the said firm of Kulecho & Co. Advocates represented his interests. The defendant has turned around once he learned that the said firm of Advocates did not attend court inspite of being served with a hearing notice. The explanation offered by Kulecho Kwoba that his firm received the said hearing notice without knowing whether or not it had instructions to act in the present suit does not wash. From the submission made it is clear that the said firm of Advocates took over the conduct of this suit but failed to attend court on a date fixed by this court. The said firm of Advocates were subsequently thereafter twice served to attend court but they failed to do so. It is apparent that they were indolent. In the premises therefore, this court holds that the defendant was properly served.

This court can still exercise its discretion to set aside the ex parte judgment if it is satisfied that the ends of justice will be served. In this case what emerges is that it is not the defendant, but Intra-Africa Insurance company, who had insured the defendant's motor vehicle, which is trying to avoid to settle the decree of this court by instigating the present application. The said insurance company was issued with a statutory notice when the suit herein was filed some fifteen years ago. The said insurance company did nothing apart from applying delaying tactics to either avoid settling the claim or frustrating the plaintiff in his efforts to secure compensation. When the said insurance company was informed of the judgment of this court, it again applied delaying tactics. It failed to settle the claim. It is when the plaintiff filed a declaratory suit against it seeking to enforce the judgment of this court that the said insurance company suddenly pretended to wake up from its deep slumber. It sought the assistance of the defendant.

To cover up its dishonest conduct, it sought to impeach the way this court conducted the hearing of this case. That cannot be. As was stated earlier, this court cannot exercise its discretion to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. In this case, Intra-Africa Insurance Company Ltd, the insurance company who insured the defendant's motor vehicle, by instigating the filing of this application has sought to obstruct the course of justice. The said insurance company's conduct has been less than honest. It has acted *mala fides* in the conduct of this case. The defendant does not deserve the exercise of discretion in his favour by this court. His application to set aside the judgment is dismissed with costs to the plaintiff.

DATED at NAKURU this 25th day of November 2005.

L. KIMARU

JUDGE