



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 136 OF 2000

MWONGELI NTHIANIPLAINTIFF

VERSUS

EVEREST ENTERPRISES]

ROBERT JOSIA MWANGI]DEFENDANTS

R U L I N G

The plaintiff Mwongeli Nthiani filed this case against the defendants Everest Enterprises and Robert Josia Mwangi seeking both special and general damages arising from a fatal accident on behalf of the deceaseds Estate. The case was heard exparte and judgement was given in favour of the plaintiff to the tune of Kshs.367,100.00.

The defendants have filed an application by way of chamber summons under order 9 of rule 10 and 11 order 211 rule 22x7 of the CPR and section 3A of the CPA and all other enabling provision of the law seeking order that the exparte judgement entered on 28.6.2001 against the defendants be set aside plus all other consequential orders, that execution of the decree be stayed pending hearing of this application, that they be allowed to file their defence within a reasonable time, that the process server be called for cross examination and that costs be provided for. The grounds are set out in the body of the application, supporting affidavit and oral submission in court.

The major grounds are that the summons were not served onto the defendant because the person allegedly served a miscarriage does not exist in their company which is a small company and does not require the service of a legal officer, that the process server contradicted himself in his explanation on how the summons were served onto the defendant that the foregoing not with standing this court has an in faulted discretion to set aside the exparte orders and allow the defendant to defend the suit, that they have a Defence and they should be heard on it as per the corrected draft copy, that they should not be condemned un heard as they intend to challenge liability.

The plaintiff respondents counsel has opposed the application on the grounds set out in the replying affidavit and oral submission in court and they maintain that service was proper, that the process server has shown in his cross examination by the applicants counsel that he had no reason to fabricate service on a company he had no other interest in it other than service, that the process server has proved that he effected service which was good service, but the defendants were ignorant and they sat on their rights and were only woken up by the process of execution on that basis counsel for the respondent has urged this court not to allow the application as the applicants do not deserve the courts discretion in the circumstances displayed herein.

I have taken an overall picture of the whole circumstances surrendering the application and I find that the ordinal principles that this court has to take into consideration are:

1. Setting a side of an *ex parte* order or judgement is a matter of discretion for the court seized of the matter.
2. The courts discretion is to be executed in favour of a party who through in a defence or excusable mistake or error failed to take a procedural step leading to the *ex parte* orders being entered against him but, it is never excused in favour of a party who has chosen to deliberately delay the cause of Justice.
3. A party who wishes to have the proceedings reopened for him has to show that he has a good defence which raises liable issues.

I have applied the above principles to the facts of this application as well as the principles in the cases cited to me namely the case of Joseph Njuguna Muniu versus Medicino Giovanni Nairobi CA 2167/97 where it was held by the learned Judges of appeal at page 3 of that judgement that order 21 rule 22 only applies where a decree has been sent to another court for execution other than the court which passed the decree. I agree with the contention of counsel for the respondents that citation of that provision is misplaced since the decree sought to be stayed was the one passed by this court. However as submitted by applicants counsel they cited the provisions in order to obtain stay pending the hearing of the application. I do agree that provision does not apply here.

However, that notwithstanding the application will be dealt with on merit on the other aspects of setting aside of the *ex parte* judgement as that was the prayer in the application.

As regards the discretion for setting aside I was referred to the case of Philip Kiptoo Chepmwolo and Mumias Sugar Co. Ltd. versus Augustine Kibenale (1982 – 88) 1 KAR 1036 where it was held *inter alia* that the court has un limited discretion to set aside a vering a judgement entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both proper and subsequent and of respective merits of the parties.

The case of Joseph Ngunje Waweru versus Joel Wilfred Ndiga (1982 – 88) 1KAR 210 where it was held *inter alia* that consequently there was un filtered discretion to set aside or not and it was a misdirection to say that sufficient cause had to be shown.

I agree with the principles on the two cited cases that setting a side of an *ex parte* judgement is a matter of discretion on the part of the court which discretion has to be excused judicially., As mentioned earlier on the plea put forward in one of failure to serve. I have had consideration of the evidence of the process server and I agree with the contention of the respondents counsel that the process server had no reason to imagine a name, he was not part of the organization in that company and so he had no way of knowing who was who or to fell whether the name he had been given was a true one or not. There was contradiction between his evidence and the return of service filed but as explained by him it was long time a go and one was bound to forget some details.

That aside the court is enjoined to have a look at the annexed defence and decide whether the same raises triable issues or not.

I have looked at it and I find that they intend to raise the issue of contribution against the deceased and I find that that is a triable issue.

I find that the defendants have a good defence and the matter should be reopened for them to be heard on merit such reopening may be conditional or without conditions. In the circumstances of this case it is the considered opinion of this court that a conditional reopening of the matter will serve ends of justice to both parties. I therefore make the following orders.

1. The ex parte judgement entered herein, on 5.7.2001 be and is hereby set aside plus all other consequential orders emanating there from on condition that the judgement amount of Kshs.367,1000/= be deposited in an interest earning account in the joint names of counsels of both parties in any sound financial institution within 60 days from the date of the reading of this ruling.

2. After complying with no. 1 above the defendant will be at liberty to file and serve his defence within 14 days from the date of the making of the deposit.

3. The plaintiff will have 14 days from the date of service upon him of the defence to file a reply to the defence if any and thereafter the parties will proceed..... to law.

4. The respondent will have costs of the application.

5. The applicant will pay throw away costs of the ex parte proceedings to be agreed or taxed.

Dated, read and delivered at Machakos this 17th day of January 2003.

R. NAMBUYE

JUDGE