Muri Mwaniki & Wamiti Advocates v Gateway Insurance Limited (Miscellaneous Application E136 of 2013) [2024] KEHC 2345 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION E136 OF 2013

FR OLEL, J

MARCH 6, 2024

BETWEEN

MURI MWANIKI & WAMITI ADVOCATES ..... APPLICANT

AND

GATEWAY INSURANCE LIMITED ..... RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 11th March 2023 brought pursuant to provisions of Section 1A, 1B, 3A and Section 80 of the *Civil Procedure Act*, Order 10 Rule 11, Order 51 rule 1& 15, Order 45 of the *Civil Procedure Rules* and Article 50(1) of *the constitution* of Kenya 2010 and all other enabling provision of law. The applicant sought for orders order's that;

    a. Spent

    b. Spent

    c. That this Honourable court be pleased to set aside the ruling and/or order issued on 28th April 2023 and re-admit the instant suit for hearing inter-parties.

    d. That this Honourable court be pleased to review and/or set aside and/or vacate its order or decree and/or ruling dated 28th April 2023

    e. That costs of this Application be provided for.

2. Upon receipt of this application, the Advocate/respondent did file his replying affidavit sworn by one Martin G Mwaniki dated 14th July 2023 and a preliminary objection also similarly dated 14th July 2023 in opposition thereto. With regard to the preliminary objection the grounds raised were that;

a. The application is filed by the firm of G & G Advocates for the respondent in contravention of Order 9 rule 9 of the Civil Procedure Rules without leave of the court nor consent of the firm of Manthi Masika & Company Advcates who are on record and have the conduct of this matter.

b. Indeed, the said firm of G & G Company Advocates un-procedurally filed a notice of Appointment of Advocate as opposed to Notice of change of Advocate in place of the firm of Manthi Masika & Company Advocates already on record.

c. The Application is incompetent, an abuse of this Honourable court's process and ought to be struck out with costs.

B. The Pleadings

3. The application is supported by the grounds on the face of the said application and the supporting affidavit of Joan Oburu dated 11th May 2023. She depones that she is a legal officer of the client/ respondent and was well seized of all the facts raised herein. The instant taxation proceeded ex parte and a decree drawn as against the client/applicant on 28th April 2023. The advocate/respondent had since instructed an auctioneer who had threatened to levy execution through proclamation and attachment of the client's properties to their loss and detriment. There was sufficient reason warranting the review and setting aside of the said ruling as the advocate/respondent was asking for legal fees that had already been settled/paid. The advocate/respondent was therefore in law estopped from claiming additional fees.

4. The client/applicant further faulted the advocate/respondent for failing to accurately disclose to court that his full legal fees had been fully settled and if allowed to execute, the client/respondent would suffer double jeopardy as they shall stand condemned to settle fees that had already be paid and that would immensely prejudice them. The court had wide and unfettered discretion to set aside the ex parte proceedings/ judgment/ decree and the applicant therefore prayed that this court finds merit in the orders sought in the wider interest of Justice and fairness.

5. This application is opposed by the advocate/respondent who filed his replying Affidavit's dated 14th July 2023 sworn by Martin G Mwaniki, wherein he maintained that the application under consideration by court, was fatally defective, as the firm of advocates of G &G Advocates were not properly on record and had filed this application in contravention of Order 9 Rule 9 of the Civil Procedure Rules. They had not sought leave of the court to come on record nor was there any consent from the firm of Manthi Masika & Company Advocates who were previously on record and in conduct of the matter allowing the firm of G & G Advocates to come on record.

6. Further the said firm of G & G Advocates un-procedurally filed their notice of appointment of Advocates as opposed to Notice of change of Advocates in the place of the firm of Manthi Masika & company Advocates, who were already on record and that too was un-procedural. This application was based on spurious and false allegations that the decree issued herein on 28th April 2023 was issued pursuant to ex parte proceedings, while in reality, the same came at the tail end of the taxation process of the advocate/respondent bill of costs, which process/proceedings were fully attended to by the firm of Mathi Masika & co Advocates for the applicant culminating in the judgement being entered for the taxed costs.

7. Before proceeding on 9th November 2021, with their application to enter judgement for the taxed costs, they had served the advocate then on record for the client/applicant and their application was allowed after the honorable court was fully convinced that the firm of Mathi Masika & co Advocates and been duly served with the hearing notice as proved by the return of service filed on 3rd November 2021.

On the client/applicants contention that they had already been paid the sum of Kshs 76,548/=, the respondent stated that the said issue was res judicata since it had been raised by the client/applicant in their objections to the advocate/client bill of costs and the taxing master in his final ruling did factor in the said sum as a credit to the client.

8. Finally, the advocate/respondent deposed that indeed prior to extraction of the decree herein, they against served the firm of Mathi Masika & co Advocates with the draft decree for their approval and they did not register any objection to the same. There was therefore no good grounds which had been raised to support the orders sought of setting aside of the judgement for taxed costs entered on 9th November 2021 and/or the decree issued pursuant thereto dated 28th April 2023. The respondent did pray that the said application be dismissed with costs.

9. The notice of preliminary objection filed by the advocate/respondent did raise grounds that the application as filed was in contravention of Order 9 Rule 9 of the *Civil Procedure Rules* as it was filed without leave of court nor did the firm of Manthi Masika & Company Advocates who were on record and in conduct of the matter, consent and allowed the firm of G and G Advocates to take over. The said firm of G & G company Advocates, had un- procedurally filed a notice of Appointment of Advocates as opposed to Notice of change of Advocates and therefore the application as filed was incompetent, constituted an abuse of the court process and ought to be struck out with costs.

C. Analysis & Determination

10. I have carefully considered the Application under consideration, its Supporting Affidavit, the Respondent's Replying Affidavit, preliminary objection filed and submissions filed by both parties. The issues which arise for determination are ;

    i. Whether the preliminary objection is merited

    ii. Whether the Respondent/client is entitled to the orders sought.

    i. Whether the preliminary objection is merited.

11. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 , Where at page 700 Law JA stated that:

> " A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

12. In the same case, at page 701, Sir Charles Newbold, P. stated:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

13. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 provides for instances where there is a change of Advocate in civil litigation after judgment. It states that: -

> Change to be effected by order of the court or consent of parties
>
> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
>
> a. Upon an application with notice to all the parties; or
>
> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'

14. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 applies to instances where a party opts to change its Advocate after judgment. The provision is clearly meant to safeguards the interest of the outgoing Advocate, in this case the firm of Manthi Masika & Co Advocates who had the conduct of the matter and their interest has to be considered simultaneously with the client/applicant's right to appoint an advocate of their choice to act of them.

15. While it is true that the applicant's action are in breach of the provisions of Order 9 rule 9 of the *Civil Procedure Rules*, it is my finding that it is in the greater interest of both parties that this matter is considered on merit, heard expeditiously, in a just manner, without due regard to technicalities of procedure. The greatest prejudice that can occur is to the firm of Mathi Masika & Company Advocates, who have recourse to file their advocate/client bill of costs if the need arises. At this point the court appreciate the sentiments expressed by the High Court in *John Gachanja Mundia v Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

> " ..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."

16. Further the court is also guided in the discharge of its mandate by the principles donated by the Article 159(2) of *the constitution* of Kenya 2010, which has now been crystallized by case law. I take it from the cases of Jaldesa *Tuke Dabelo v IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others v IEBC & 3 Others* [2013] eKLR; *Lemanken Arata v Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe v IEBC & 4 Others* [2015]eKLR for principles/propositions, inter alia, that; the exercise of the jurisdiction under Article 159 of *the Constitution* 2010 is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural ills.

17. I therefore find that the preliminary objection has no merit and the same is dismissed.

ii. Whether the Respondent/client is entitled to the orders sought.

18. The circumstances under which a court sets aside its default orders were also set out in *Shah v Mbogo* (1967) EA 166 in which the Court stated that;

> " this discretion to set aside an ex-parte judgment is intended 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 cause of justice."

19. In exercise of such powers there can be no straight jacket formulae nor be any fetters to limit the jurisdiction of the Court, which is to ensure no injustice is caused by the rigors of the Law. In relation to framing the guidelines the Court in *Patriotic Guards Ltd v James Kipchirchir Sambu* {2018} eKLR, stated that:

> " It is settled Law that whenever a Court is called upon to exercise its discretion, it must do so judiciously, - judicious because the discretion to be exercised is judicial power derived from the Law and as opposed to Judges private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the Court to do real and substantive justice to the parties to the suit."

20. Finally, the Court's power to set aside judgment is also exercised with a view of doing justice between the parties. This was discussed in the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

21. The client/applicant was well represented during taxation of the advocate/ client bill of costs and not only did their former counsel file submissions to the said bill of costs, the also did urge court to consider the fact that the advocate/respondent had been paid Kshs.76,548/= as fees for representing them in Machakos CMCC No 326 of 2008. This was factored in the ruling of the taxing master dated 27th December 2018, where the costs were taxed down to Ksh.84,657.80/=. A determination having been made on this issue, it cannot be raised afresh by the client/applicant as it falls foul of the doctrine of Res Judicata. The only option available for them was to Appeal/file reference against the said taxation, which they opted not to and must therefore hold their peace.

22. Finally, before the certificate of costs was converted into judgement, the client/applicant's advocate was served with the hearing notice on 10th September 2021, but opted not attend court proceedings on 9th November 2021, when the taxed advocate/client taxed costs were converted into a judgement. The client/applicant cannot be heard to complain about this process as by conduct they acquiesced to the same and are estopped from complaining about the said proceedings. Not only has the client/applicant moved the court with unclean hands in equity, they know too well that the horse has bolted and closing the stable doors will not help their cause. They must hold their peace and settle the decree issued plus interest arising therefrom.

D. Disposition

23. The Upshot is that the Notice of Motion Application dated 11th March 2023 lacks Merit and the same is dismissed with costs to the Advocate/Respondent.

24. The costs are hereby assessed at Kshs.30,000/=, all inclusive.

25. Stay of Execution is granted for 21 days for the client/Applicant to settle the decree herein and attendant costs of this Application as assessed. In default execution to issue.

26. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MARCH, 2024.

In the presence of;

Mrs Lundi for Applicant

No appearance for Respondent

Sam Court Assistant