



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 472 OF 2012

DR. ERNEST MUINDE KIOKO.....PLAINTIFF/RESPONDENT

VERSUS

DAVID MUNIU RUINGE.....1ST DEFENDANT/APPLICANT

INSIGHT COMMUNICATIONS LIMITED.....2ND DEFENDANT

EDWARD NJENGA MUCHAI, ADVOCATE.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 25th June 2020 seeks the setting aside of this Court's Judgment of 24th January 2020 and that the Applicant be granted leave to file a Defence and Counterclaim.

2. The Applicant is the 1st Defendant in this matter. In an affidavit sworn on 25th June 2020, in support of the application, he states that he learnt of this suit in July 2012. This is how he deposes to that:-

“...sometimes in July 2012, I was shockingly made aware of this suit by the 3rd Defendant. The Plaintiff claimed payment out of an alleged non-existence contract between the Plaintiff and the 2nd Defendant, an entity unknown to me.”

3. He deposes that he agreed with the 3rd Defendant that the 3rd Defendant would represent him in the suit since he was aware of the circumstances around it and that, in any event, 3rd Defendant thought the suit to be a non-starter. That, sometime in 2104, he inquired about the status of the suit and the 3rd Defendant informed him that the Plaintiff had lost interest in it and there was little development in its prosecution.

4. That sometimes in March 2020, he learnt of the impugned Judgment and upon perusal of the file he was shocked to learn that a firm of Messrs. Kimani Kahiro & Associates had filed a Notice of Change of Advocates on 27th August 2012 to come on record for all the Defendants including himself. He states that he has never met any advocate from that firm nor seen any pleadings drawn on his behalf or written any statement in regard to the suit. Further, that he has not been kept posted on the status of this suit.

5. He makes heavy weather of the fact that the Notice of Change of Advocates was filed on 27th August 2012 but is dated 31st August 2012.

6. The Application is opposed.

7. The written submissions filed by the parties have been considered by Court.

8. This suit was presented by way of a Plaint dated 6th July 2012 and filed on 24th July 2012. On his admission, the Applicant learnt of the suit in July 2012 and he instructed the 3rd Defendant one Edward Njenga Muchai, an advocate, to represent him. The record shows that a firm known as Njenga Muchai Advocate then entered appearance on his behalf and on behalf of the other two Defendants. This was on 16th August 2012.

9. The Court record further shows that the firm of Kimani Kahiro & Associates filed a Notice of Change to act for the three Defendants on

27th August 2012. This Notice of Change is criticized by the Applicant as being invalid because, although filed on 27th August 2012, it is dated 31st August 2012. Indeed, even the Defendants' list of witnesses and list of documents filed by the same firm on 27th August 2012 are dated 31st August 2012. However, not much should be made of that argument because the Plaintiff, who ought to have been concerned, does not complain that the Notice of Change is dated on a later date than when it was supposedly signed.

10. The more serious issue that attracts the Court's attention is the Applicant's contention that he did not instruct the firm of Kimani Kahiro & Associates to act for him. What is the Court to make of this?

11. The Applicant admits duly instructing the 3rd Defendant. The 3rd Defendant, it would seem, knew of the change of representation from himself to Kimani Kahiro & Associates because he signed a witness statement drawn by the said firm. It is curious however that the Applicant has not obtained an affidavit from the 3rd Defendant in respect to the circumstances of the change of advocates. He does not say why he could not procure an affidavit from the lawyer he says he had instructed. In addition, he does not make a challenge on Kimani Kahiro & Associates on the question of instructions. The Applicant seeks to place much capital on the fact that, unlike the 3rd Defendant, the said firm did not file his witness statement. This, in my view, is not sufficient to demonstrate that he did not instruct the firm of Kimani Kahiro Associate.

12. Something else does not favour the Applicant. He says that he inquired about the status of the suit in 2014 whereupon he was informed by the 3rd Defendant that there was little development in its prosecution. How this inquiry was made is not elaborated. If in writing, then nothing is shown to Court to prove it. If oral, then no affidavit of the 3rd Defendant has been forthcoming to corroborate it. This information would have been of some importance because, as of 2014, Kimani Kahiro & Associates had been on record for all the Defendants (including the Applicant) as the firm came on record in 2012.

13. Then again there is nothing placed before this Court to show that the Applicant made inquiries about the case from 2014 up to March 2020 when he learnt of Judgment. It does not help his cause when he deposes (see supplementary affidavit);

“THAT I appointed the 3rd Respondent to act for me in this matter. He was obliged in law to update me on the progress of the matter”.

14. I would think that the Applicant misconstrued his responsibility as a litigant. A diligent litigant is expected to make reasonable follow up on the status of a suit filed against him/her.

15. This Court is not persuaded that the Applicant did not instruct Kimani Kahiro & Associates to act for him. This Court finds that, on his own evidence, the Applicant comes across as an inattentive litigant. Up to that point there should be no reason to exercise discretion in his favour.

16. However, if this Court was to nevertheless set aside the Judgment it would be on condition that the Applicant provides security for the due performance of the decree that may be ultimately obtained against him. He cannot seek to turn back the clock without assuring the Plaintiff that whatever decree he may eventually obtain will be met timeously.

17. I allow the application dated 25th June 2020 only so as to give the Applicant his day in Court but on the following terms:-

17.1 The Applicant shall within 60 days hereof provide a Bank Guarantee, from a reputable Bank, equivalent to the decretal sum in the judgment that Court has just set aside herein as security for the performance of the decree that he could be called upon to meet.

17.2 Each party to bear its own costs on the application.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 8TH DAY OF MARCH 2021.

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court assistant

Makokha for 1st Defendant/Applicant

Munikah for Plaintiff