



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 567 OF 2012**

**PETER KALUMA.....PLAINTIFF**

**VERSUS**

**CONSTANTINE GEORGE SPHIKAS.....1<sup>ST</sup> DEFENDANT**

**DEBORAH ACHIENG ADUDA.....2<sup>ND</sup> DEFENDANT**

**NICODEMUS GORO KINUTHIA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated 20<sup>th</sup> November, 2020 was filed by the 2<sup>nd</sup> Defendant. It seeks orders that the honourable court be pleased to set aside the proceedings and/or hearing that took place on 1<sup>st</sup> October, 2018 and to replace therewith an order that the hearing of this suit starts afresh.
2. Secondly, that in the alternative, the court be pleased to order that the 2<sup>nd</sup> Defendant be permitted to cross-examine the Plaintiff herein pursuant to his testimony of 1<sup>st</sup> October, 2018.
3. It is stated in the grounds and the affidavit in support of the application that the hearing of the suit herein commenced *ex parte* on 1<sup>st</sup> October, 2018 when the Plaintiff testified in the absence of the Defendants. The non-attendance by the 2<sup>nd</sup> Defendant is blamed on the problem of representation between the Defendants and their advocates. It is averred that the 1<sup>st</sup> Defendant who had been issuing instructions to the firm of Oyombo Mosota & Wamwea Advocates on behalf of all the Defendants failed to do so.
4. It is stated that the 2<sup>nd</sup> Defendant approached the said firm of advocates and gave instructions. That the 1<sup>st</sup> Defendant appointed the firm of L. Ajwang & Associates to act for her in place of Oyomba Mosota & Wamwea Advocates. That the said firm of advocates subsequently filed an application to cease acting for the 3<sup>rd</sup> Defendant which application was allowed. The court was urged to allow the application now that the issue of representation is settled.
5. The 1<sup>st</sup> Defendant is not opposed to the application and did not file any response to the same.
6. The 3<sup>rd</sup> Defendant did not attend court to participate in the application though duly served.
7. The Plaintiff/Respondent opposed the application. It is stated in the replying affidavit that at all material times the Defendants were represented by the firm of Oyoma Mosota & Wamwea Advocates. That the Defendants and their advocates intentionally absented themselves from court and the suit proceeded *ex parte*. It is contended that the instant application is intended to cause delay and is an abuse of the court process.
8. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.
9. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

**“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just..The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. (Patel v EA Cargo Handling Services Ltd [1974] EA 75 at**

*76C and E b). Secondly, this discretion is intended so 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 course of justice. (Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c).*

10. When this case proceeded to hearing on 1<sup>st</sup> October, 2018, the Defendants and their advocates were not present though duly served. Indeed service is not contested. The 2<sup>nd</sup> Defendant has explained the challenges that the Defendants encountered with their advocates. This court accepts that the Defendants made a mistake. However, such a mistake should not warrant the locking of the Defendants out of the hearing of their case on merits.

11. Although the suit herein was instituted in the year 2012, the Plaintiff's case commenced hearing on 1<sup>st</sup> October, 2018. The delay during the said period cannot be attributed to the Defendants. The Plaintiff testified then an application for adjournment was made for purposes of the calling of the witnesses who were not present on that day. Meanwhile, the application dated 30<sup>th</sup> October, 2018 for the firm of Oyamba Mosota & Wamwea to cease acting for the 1<sup>st</sup> & 3<sup>rd</sup> Defendants was filed and allowed. The 1<sup>st</sup> Defendant proceeded to appoint an advocate on 28<sup>th</sup> November, 2018. Subsequently, the current application was filed on 20<sup>th</sup> November, 2019. The delay has been sufficiently explained. No prejudice will be suffered by the Plaintiff that cannot be compensated by an award of costs.

12. With the foregoing, I allow the application in terms of prayer No.2 albeit for cross-examination of the Plaintiff by all the Defendants. Costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH,2021**

**B. THURANIRA JADEN**

**JUDGE**