



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 247 OF 2019**

**JENNIFER MAINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**SANJEEVE KHAGRAM.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ROSELYNE NJOROGE.....2<sup>ND</sup> DEFENDANT**

**ISAAC KYALO MUSEMBI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated 27/10/2020 principally seeks orders that;

**The honorable court be pleased review, set aside and/or vary the court order made on the 28<sup>th</sup> of September, 2020.**

2. The application is supported by the grounds set out on the face of the application and in the supporting affidavit. It is essentially grounded on averments that the Applicant was not served with the application dated 20<sup>th</sup> July, 2020 in which the 1<sup>st</sup> Defendant/ Respondent obtained orders to wit;

**1. That the plaintiff do deposit in court security for the 1<sup>st</sup> Defendant's costs in the sum of ksh. 1,500,000.**

**2. That the plaintiff do comply with order no. 1 within sixty days from September 28<sup>th</sup> 2020.**

**3. That in default of compliance of the order herein the suit stands dismissed.**

**4. That costs of the application be and are hereby awarded to the 1<sup>st</sup> Defendant.**

3. The Applicant further deposes that he only came to know of the application on the 26<sup>th</sup> of October, 2020 when the respondent physically served them with a court order made on the 28<sup>th</sup> of September and issued on the 19<sup>th</sup> of October, 2020 which they received under protest. The Applicant is apprehensive of the conduct of 1<sup>st</sup> Defendant/Respondent in the manner in which they acted owing to the fact that a similar application had been filed and later withdrawn by the 1<sup>st</sup> Defendant/Respondent and that the application of 20<sup>th</sup> of July, 2020 was served via email but the resultant order was served physically.

4. The Plaintiff/Applicant further contends that they were not served with application and as such it proceeded *ex-parte*. It is the Applicant's contention that she was condemned unheard and her right to a fair hearing was violated. It is further submitted that the orders obtained are extremely prejudicial to the Applicant.

5. The application is opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The 2<sup>nd</sup> Defendant did not file any response to the application.

6. It is stated in the replying affidavit filed by the 1<sup>st</sup> Defendant that the application was properly served on the Plaintiff vide their known email address obtained from previous correspondences [cmiller@milleradvocates.com](mailto:cmiller@milleradvocates.com) and [akaguri@milleradvocates.com](mailto:akaguri@milleradvocates.com) as captured on the Affidavit of Service. The 1<sup>st</sup> Respondent stated that the Applicant had not indicated its email addresses at the time of filing its pleadings but that they obtained the same from previous correspondence.

7. The 1<sup>st</sup> Defendant also filed the following grounds of objection:

1. **THERE** is no order to stay as there was no execution proceedings.

2. **THE** suit herein is dismissed and hence there is no application on record.

3. **THE** application is bad law.

4. **THE** Plaintiff is seeking an equitable remedy and has not come to Court with clean hands.

5. **THE** Affidavit filed and in particular paragraph 13, 14 and 15 are scurrilous and should be expunged from the record.

6. **THE** Applicant has failed to show any Defence to the First Defendant's application.

8. The 3<sup>rd</sup> Defendant filed the grounds of opposition dated 3/3/2021 which state: -

1. **THAT** the Application is bad in law, abuse of court process and ought to be dismissed forthwith.

2. **THAT** the stay of execution was granted by this Honourable Court for 30 days from 28<sup>th</sup> September 2020. The 30 days have since lapsed.

3. **THAT** the Plaintiff has failed to furnish security for costs within the timeline stipulated by Court.

4. **THAT** the suit herein therefore stands dismissed.

5. **THAT** in her Application dated 27<sup>th</sup> October 2020, the Plaintiff/Applicant has not annexed any Draft Response to the 1<sup>st</sup> Defendant's Application.

6. **THAT** the instant Application is therefore vexatious, frivolous and an abuse of the Court process.

9. The Applicant filed a supplementary affidavit and stated that the email addresses used by the 1<sup>st</sup> Defendant do not belong to the plaintiff's firm of advocates and therefore they did not receive the 1<sup>st</sup> Defendant's application. The Applicant attached a screenshot of the firm's website and further indicated that the firm's addresses are [cmiller@milleradvocates.com](mailto:cmiller@milleradvocates.com) and [akaguri@milleradvocates.com](mailto:akaguri@milleradvocates.com) and not [CMiller@milleradvocates.com](mailto:CMiller@milleradvocates.com) and [akaguril@milleradvocates.com](mailto:akaguril@milleradvocates.com) as erroneously captured by the 1<sup>st</sup> Defendant/Respondent.

10. The application was canvassed by way of written submissions which I have duly considered.

11. In setting aside of judgment or orders, **Order 12 Rule 7 of the Civil Procedure Rules** provides: -

**"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

12. Similarly, **Order 51 Rule 15 of the Civil Procedure Rules** provides **that the court may set aside an order made ex parte"**

13. *The power to allow or deny an order to set aside ex-parte orders is discretionary and the courts must ensure that such power is excised judiciously to cure an injustice and not to prejudice an Applicant for an excusable mistake, error or inadvertence. The Court in **Richard Nchapai Leyangu vs IEBC & 2 others**, stated as follows: -*

***"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"***

14. The main concern in the instant application is that the Applicant was not served. As already espoused, there seems to be an inadvertent error on the part of the 1<sup>st</sup> Defendant in capturing the Applicant's email addresses during service. I am persuaded that the service of the disputed application never reached the Applicant's attention and therefore, the Applicant was condemned unheard. The inalienable right to be heard is well protected in our constitution and is also the cornerstone of the rule of law.

15. With the foregoing, I allow the application and set aside the orders made in 28/9/2020. Costs in cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY, 2021**

**B.THURANIRA JADEN**

**JUDGE**