Onyango v Techspa General Supplies & 2 others (Civil Suit 386 of 2016)
[2021] KEHC 5 (KLR) (Commercial and Tax) (2 September 2021) (Ruling)

Neutral citation: [2021] KEHC 5 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 386 OF 2016

A MABEYA, J

SEPTEMBER 2, 2021

BETWEEN

STEVE ONYANGO ..... APPLICANT

AND

TECHSPA GENERAL SUPPLIES ..... 1ST DEFENDANT

WILLIAM KURIAH JOSIAH ..... 2ND DEFENDANT

JENNIFER NJERI KURIA ..... 3RD DEFENDANT

RULING

1. Before me is a Notice of Motion by the defendants dated 8/3/2021. The same was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 50 Rule 6 of the Civil Procedure Rules.

2. The applicants sought inter-alia for an order to set aside the ex-parte proceedings, consequential judgment and the amended decree herein. They also sought for an order to reopen the case and to be granted the opportunity to present their case and evidence in support thereof.

3. The grounds for the Motion were set out in the body of the application and the supporting affidavit of William Kuria Josiah, the 2nd defendant. These were that; the defendants are facing a real and imminent attachment emanating from the decree issued in this matter; that judgment was entered on 28/4/2020 without their notice or knowledge. That it was not until 3/3/2021 when they were called by an auctioneer and informed of an imminent execution of the decree.

4. They immediately instructed the firm of Okwatch & Company Advocates to find out the status of the suit. It is only then that they discovered about the entry of judgment. Previously, they were being represented by the firm of Messrs. Righa & Mburu Advocates who had failed to inform them of the

progress of the suit. That they did not participate in the trial and that in the premises, their right to fair trial had been infringed.

5. They pleaded that the mistake and inadvertence of their counsel ought not to be visited upon them and sought an opportunity of presenting their case and evidence.

6. In opposition, the plaintiff swore a replying affidavit dated 24/3/2021. He contended that the application was an abuse of the court process and did not disclose any reasonable grounds to warrant the prayers sough as it was based on falsehood and misrepresentation of facts.

7. That the defendants were served with summons and pleadings on 17/10/2016 after which they entered appearance on 1/11/2016 and filed their defence on 17/11/2016. They participated fully during the pretrial stage and had no solid defense to put forward. They continuously sought adjournments during the hearing of the suit. All parties filed their submissions, with the defendants filing theirs on the 30/10/2019.

8. That on 28/4/2020, judgment was delivered with the defendants failing to attend or make any effort to find out the outcome of the suit. They were also served with the taxation notice on 5/11/2020 but made no attempt to challenge the judgment.

9. In the premises, the defendants had all along been aware of these proceedings but failed to be vigilant and were are only seeking to blame their former advocates to delay the case.

10. The Court has carefully considered the record. The main issue for determination in this matter is whether the judgement delivered on 28/4/2020 should be set aside.

11. The impugned judgment is a regular judgment. The defendants were represented throughout by a firm of advocates who participated during pre-trial as well as the trial itself. They entered appearance, filed a defense on 17/11/2016, sought various adjournments during the trial and filed final submissions on 30/10/2019.

12. At the trial however, the defendants did not produce evidence to support their defence. They were given an opportunity to do so but failed to. Their advocate sought two adjournments whereby the Court allowed one but declined the second for reasons on record. There was no application that was made immediately thereafter to arrest the judgment and offer evidence in support of their defence.

13. The defendants' main ground for seeking the setting aside of the judgment is that their previous advocates did not inform them of the proceedings and that they failed to properly represent them during the trial. With greatest respect, that is an issue as between the defendants and their advocates. It has nothing to do with either the Court or the vigilant plaintiff who successfully prosecuted his case.

14. The record shows that the trial of this case was adjourned on numerous occasions at the instance of the defendants' previous advocates. Those advocates were not served with the present application to explain their actions.

15. In the view of this Court, it is not enough for a party to just blame his erstwhile advocate, for either negligence or inadvertent mistake. That advocate should be served with those allegations to enable him swear an affidavit to explain the position before a Court can be called upon to change a course. The days of leisurely litigations are long gone and the limited judicial time must be utilized efficiently. The overriding objective is that justice should be expeditiously undertaken.

16. Setting aside an ex-parte judgment is a matter of discretion for the court to promote justice. In *Esther Wamaitha Njihia & two others v Safaricom Ltd* [2014] eKLR, the court held: -

> " The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd*. The discretion 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 a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*. It also goes without saying that the reason for failure to attend should be considered".

17. In the present case, the defendants had the opportunity to present their case but decided not to. The judgment was lawfully entered and there are no valid reasons to interfere with the same.

18. Accordingly, the application is without merit. The same is dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 2nd day of September, 2021.

A. MABEYA, FCI Arb

JUDGE