REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 635 OF 2010

EDWARD NGERA MWANGI.....1ST APPELLANT

PHILLIS ROSE WAMBUI THUO.....2ND APPELLANT

VERSUS

VERONICAH NDIDA KIMENDE.....RESPONDENT

RULING

The application dated 18th August, 2021 is supported by the applicant's affidavit sworn on the same date. It seeks the following orders:-

> **1. THAT the Defendant/Judgment Debtor/Applicant be granted leave to come on record to represent herself.**
>
> **2. THAT the Defendant/Judgment Debtor/Applicant be granted leave to file defence out of time which was also never prosecuted nor dismissed.**
>
> **3. THAT this Honourable Court be pleased to stay the execution of the decree of this Court and the warrants of arrest issued against the Defendant/Judgment Debtor/Applicant dated 12th August, 2021 pending the hearing and determination of this Application.**
>
> **4. THAT the warrants of arrest issued against the Defendant/Judgment Debtor/Applicant be lifted.**
>
> **5. THAT the costs of this application be provided for.**

The respondents filed a replying affidavit sworn by Purity K. Mbabu on 27th August, 2021. Parties determined the application by way of written submissions. The applicant filed her submissions dated 15th September, 2021. The applicant is seeking leave to file her defence out of time. It was submitted that it is a fundamental principle of natural justice that no party should be condemned unheard. The court did not consider her defence for reasons that it had been overtaken by events. Her efforts to make up her case did not succeed as by then she was sick and in critical condition. The applicant filed an application dated 6th April, 2011 seeking leave of the court to file her defence out of time but did not prosecute it as she was undergoing treatment. The applicant urged the court to set aside the judgment and grant her leave to file her defence out of time. The applicant referred to the case of **SHAH –V- MBOGO & ANOTHER (1967) E.A. 116** where it was held:-

> **"The Court has the discretion for setting aside judgment to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the court of justice."**

The applicant further contends that her defence raises triable issues and is not intended to frustrate the respondents. Reference was also made to the case of **CONTINENTAL BUTCHERY LIMITED –V- NTHIWA (1978) KLR** where the court held:

> **"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no *bona fide* triable issue which would entitle a defendant to leave to defend. If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham".**

Further reliance was placed on the case of **PATEL –V- EAST AFRICA CARGO HANDLING SERVICES LTD (1974) E.A 75** where it was held:-

> **"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. I agree that were it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a trible issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication."**

It was additionally submitted that the case has been actively in court between 2011 to 2015. The respondents only started showing interest after being served with a notice to show cause dated 4th February 2019 why the matter should not be dismissed for want of prosecution. No explanation was given by the respondents as to why they were not prosecuting the matter. It is the applicant's contention that she was condemned unheard contrary t the provisions of Article 50(1) of the constitution.

The application is strongly opposed. The respondents do not oppose prayer two (2) which seeks leave of the court for the applicant to come on record and represent herself. It was submitted that the reasons given by the applicant that she was in critical condition and that is why she never fixed her application dated 6th April 2011 for hearing is not plausible. The applicant has been active in the matter and was represented by advocates. The application was fixed for hearing on 5th February 2014 but was adjourned at the instance of her advocates. The applicant subsequently filed applications dated 9th February 2015 and 24th February 2020 which applications were duly heard and dismissed. Leave to file defence was also sought in the application dated 6h April 2011 which is still pending. According to the respondents, the application is an abuse of the court process. Counsel referred to the case of **BENOSI –VS WIYLEY (1973) SA; 721) (SCA) at 734** which decision was adopted in the case of **MUCHANGA INVESTMENTS LTD –V- SAFARIS UNLIMITED (AFRICA)ID & 2 OTHERS (2009) eKLR** where abuse of court process was explained as follows:-

> **"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."**

Counsel for the respondents further argued that the applicant has not sought to set aside the default judgment entered on 21st March 2011 together with all the consequential orders. Summons to enter appearance were duly served. The judgment will be 12 years by next year and setting aside the judgment will cause great damage to the respondents. Reliance was placed on the case of **TANA & ATHI RIVER DEVELOPMENT AUTHORITY –V- JEREMIAH KIMIGHO MWAKIO & 3 OTHERS (2015)eKLR** where the Court of Appeal held:-

> **"In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis a vis* the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit."**

According to the respondents, the applicant is out to frustrate or delay justice. Her own text messages allege that she had tried to reach out to the applicants with a view to settle the matter out of court. The delay has not been explained. The applicant changed advocates several times. The medical condition is a fracture suffered in 2009. It was argued that the applicant should not be allowed to blame her advocates as she was the litigant. Reference was made to the case of **RUGHANI –V- FIFTY INVESTMENTS LIMITED & ANOTHER (2005) eKLR** the court stated as follows:-

> **"Whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel as agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences. (See Bains Constructions Co. Limited -v- John Mzare Ogowe (2011) eKLR). 11. In Gatti - v-Shoosmith (1), [1993] 3 All E.R. 916, it was observed that there is nothing in the nature of mistake to exclude it from being a proper ground for not allowing it as an effective ground to grant leave to appeal. Whether a mistake should be treated as good ground must depend on the facts of each individual case and there may be facts in a case which would make it unjust to allow a party to succeed on the ground of mistake of counsel. (See also Venonah http://www.kenyalaw.org - Page 3/4 Habo Agencies Limited v Wilfred Odhiambo Musingo [2016] eKLR Margaret Bray -v- Raymond Jack Bray, (1957) EA 302). 12. In the instant case, the applicant's submission lays blame on its previous counsel on record; there is nothing on record to show that the applicant was diligent in pursuing its appeal; the applicant has not shown that it was actively taking action to follow its appeal and ensure that it is heard and determined. It is the applicant's submission that the appeal was not heard as a result of mistake on the part of its counsel. As we have stated, there is nothing on record to show that the applicant actively or at all pursued its appeal. In the absence of such evidence, we are not persuaded that the single judge erred in his findings and determination in the ruling dated 16th January 2015."**

Counsel for the respondents also maintain that in her sworn affidavit of 18th August, 2021, the applicant does not deny her indebtedness. The intended defence does not raise any triable issues. The court is yet to issue the warrants of arrest and prayer five (5) of the application cannot be granted. There is an order for the warrants of arrest to be issued. The decree involves payment of money. The applicant was adjudged by the Advocates Disciplinary Committee that she breached her fiduciary duty to the decree holders. The applicant was served with a notice to show cause before the order for warrants of arrest were issued. She appeared through her advocate on 17th June 2021. She made payment proposal and personally attended court on 26th August, 2021. A proposal to pay Kshs.250,000 immediately and monthly instalments of Kshs.100,000 was made on 26th August 2021 but nothing has been paid.

Analysis and determination

The record shows that this suit was filed on 23rd December 2010. The applicant is an advocate who was engaged by the respondents in a transaction involving plot number NRB/BLOCK 112/128. A sale agreement was drawn on 25th February 2009 and the purchase price was Kshs.7,600,000. Between 25th February 2009 and 10th April 2009, the respondents paid the applicant the total sum of Kshs.7,600,000 and later paid Kshs.304,010 for stamp duty. The transaction was not completed and the respondents demanded refund of the money. The dispute was handled by the Advocates Disciplinary Committee and the applicant was found guilty of professional negligence.

The respondents requested for judgment on 7th March, 2011 as the applicant who had been served with summons failed to enter appearance and defence. Interlocutory judgment was entered on 11th March, 2011. In her written witness statement dated 6th April 2011 the applicant at paragraph 4 acknowledges that she was served with the summons on 7th February, 2011 and passed them to her advocates. She suffered a fracture of her right femur on 24th January, 2010. The suit was filed in late December, 2010 and can be presumed that by then the applicant had substantially recovered as per her witness statement she was from hospital for routine medical attention when she was served with the summons. A notice of entry of judgment for Kshs.7,931,410 dated 30th March, 2011 was served on the applicant.

The record also shows that the applicant filed an application dated 6th April 2011 seeking to set aside or review the default judgment. Another application was filed on 28th November 2014 seeking to have the application dated 6th April 2011 heard. The court granted the applicant interim orders of stay of execution. The orders were later vacated and on 9th February 2015 the applicant through the firm of Kiarie Kabita Kihunyu Advocates filed an application seeking to have the interim orders reinstated. There is also on record an application dated 24h February, 2020 by the applicant through the firm of Imbosa & Associates Advocates which seeks to have the same application dated 6th April 2011 heard on priority basis.

On 16th February, 2017 Justice Mbogholi Msagha delivered a ruling dismissing the application dated 9th February 2015. Part of the ruling reads as follows:-

> **"The application upon which the interim orders were first issued in favour of the defendant has never been prosecuted since it was filed on 6th April, 2011. This translates to more than five and half years since. Again, the stay was vacated two years ago yet, notwithstanding the fear of execution, the defendant has not taken any steps to prosecute the application.**
>
> **It will defeat the ends of justice on both sides if the order sought is reinstated. I say so because litigation must come to an end, and I believe it behoves both parties to address the application dated 6th April, 2011 so that the parties may know where they stand. For those reasons, I decline to reinstate the interim orders."**

Similarly, on 16th December, 2020 Justice B. Thuranira Jaden delivered a ruling dismissing the applicant's application dated 16th December 2020. Paragraphs 16,17,18 & 19 of the ruling reads as follows:-

> **a) There is no sufficient explanation from the Defendant why the application dated 6th April, 2011 has taken so long to be prosecuted. There is no explanation why the said application was not fixed for hearing instead of filing the instant application which also seeks the fixing of the application dated 6th April, 2011 for hearing on priority basis.**
>
> **b) This court has been asked to in the alternative grant prayers 3 & 4 of the application dated 6th April, 2011. The said prayer seeks grant of orders of stay of execution and leave to enter appearance and defend the suit. The grant of leave to enter appearance and defend the suit cannot be allowed at his stage while the judgment herein still stands and has not been set aside, varied or reviewed as prayed in prayer No. 2 of the application dated 6th April, 2011.**
>
> **c) The delay in the prosecution of the application dated 6th April, 2011 is inordinate and not sufficiently explained. Although this court empathysis with the Defendant in respect of the issues of health averred in her affidavit, it is noted that the Defendant has all along had an advocate on record. Blame of negligence by the Defendant against her previous advocates ought to be a matter between the Defendant and her Advocates and cannot be visited on the Plaintiffs.**
>
> **d) With the foregoing, this court finds no merits and the application dated 24th February, 2020. Consequently, the same is hereby dismissed with costs.**

The decretal sum has now reached Kshs.18,230,963/50 and the court orders of warrant of arrest were issued against the applicant. The current application seeks leave to file a defence out of time. The judgment was entered way back on 11th march, 2011, a period of over ten (10) years now. The application is also seeking orders staying execution as well as lifting the warrants of arrest. Paragraphs 11 and 12 of the applicant's affidavit in support of the application states as follows:-

> **"THAT I have in no way refused and/or neglected to pay the decretal amount and in fact I have, on my own volition, reached out to the Plaintiffs/Decree Holders /Respondents' Advocate severally with the intent of settling this matter out of court.**
>
> **THAT however, am a single parent, my husband deserted me after I was shot by thugs, I am unemployed having lost my livelihood as an Advocate following my being struck off from the roll of advocates in 2015 in a decision arrived at from the alleged facts of this case, and that I do not have any active income or means at the moment that will enable me dispose of the said amount."**

I have perused the draft statement of defence dated 6th April, 2011. Paragraph 10 thereof states that the dispute between the parties was heard and determined in Disciplinary Case No. 82 of 2010. The rest of the averments in the draft defence are mere denials. The judgment of the Disciplinary Committee was delivered on 6th December, 2010. The committee held that the applicant led to the loss of Kshs.7,800,000 that had been entrusted to her. The committee could not order for compensation as it lacked jurisdiction to make such an order since the amount involved was over Kshs. Five Million (Kshs.5,000,000). The record also shows that there was Criminal Case number 1510 of 2012 where the applicant and one Harji Sigh Alias Osman Mohamed were charged before the Milimani Chief Magistrate's Court.

The parameters for setting aside a default judgment are well established. The applicant has to sufficiently explain why no appearance or defence was filed after summons were duly served. The court will have to consider the reasons given for the default in entering appearance or filing defence, the period of delay, that is, whether the application has been filed without inordinate delay, the content of the proposed defence, that is, whether it raises triable issues or even one issue and the prejudice that may be occasioned to the judgment or decree holder. The overall objective is to do justice to the parties.

In the case of **WAIBOCI & ANOTHER –V- PASHIT HOLDING LTD. & 7 OTHERS [2004] KLR 415**, Justice Ojwang held *inter alia:-*

> **"An entirely regular interlocutory judgment can be set aside where the defendant happens to have and places before the court, a reasonable defence on the merits, and an assessment of such merits may be made on the basis of a draft defence.**
>
> **A defendant who seeks the setting aside of an interlocutory judgment because he had been prevented by some cause from filing and serving his papers as required, has a duty to bring before the Court an explanation of the circumstance in which such hardship had arisen, and it is for the court to assess the merits of the request and to apply its discretion as necessary."**

Further, in the case of **MOHAMED & ANOTHER –V- SHOKA [1990] KLR 463,** the Court of Appeal held:-

> **"The test for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merits, secondly whether there would be any prejudice and thirdly what is the explanation for any delay.**
>
> **Considering the lapse of time and taking into account that the final judgment had been satisfied and in view of the absence of plausible explanation for the inordinate delay, the trial judge could not have exercised his discretion in favour of the appellants without prejudice to the respondent.**

Justice Onyancha in the case of **MACAULEY –V- DE BOER & ANOTHER (2002) 2 KLR 260** summarized the parameters for setting aside a default judgment as follows:-

> **"1. The High Court has inherent power and discretion to set aside an ex parte judgment after deciding that the circumstances of the case before it are such that it would be in the interest of justice that such a judgment should be set aside.**
>
> **2. The court in deciding whether to set aside a judgment will take into consideration the following factors:**
>
> **a) the reasons why the defaulting party failed to file defence within the prescribed time;**
>
> **b) whether or not the applicant's application was filed without delay:**
>
> **c) whether or not the applicant has prima facie a good defence; d) whether or not the applicant has generally acted diligently: e) whether or not the granting of the prayer to set aside would be easily compensated in costs and that it would, considering all circumstances of the case, be to the ends of justice to exercise the court's discretion in favour of the applicant; and**
>
> **f) every case however will be considered in the context of its own circumstances as no two cases may easily be exactly the same.**
>
> **3. Considering among other factors that:**
>
> **a) the granting of the prayer to set aside would be in the interest of justice and that the defendants can be compensated in costs;**
>
> **b) that considering the circumstances of the case, the plaintiff filed this application promptly; and**
>
> **c) that the plaintiff's claim and defendants' counterclaim are indivisible, the court would exercise its discretion in favour of the plaintiff by setting aside the said judgment and deem the plaintiff's reply to defence and defence to the counterclaim to have been filed with the leave of the court."**

The applicant contends that her defence was never prosecuted. As stated hereinabove, I am of the considered view that the draft defence does not raise any triable issue. There is no denial that the applicant received money from the respondents. The money was not put into its intended purpose. Blaming third parties who are unknown to the respondents cannot constitute a plausible defence. The record further

shows that on 12th August, 2021 parties appeared before the Deputy Registrar, Hon Mumassaba. The applicant was present and was represented by Miss Imbosa Advocate. Her advocate informed the court that the applicant was to make an immediate deposit of Kshs.250,000 and another subsequent payment of Kshs.100,000. The matter was placed aside until 10.30a.m. to enable the payment of the deposit but none was forthcoming. Miss Imbosa informed the court that they were not able to raise the money. The court delivered its ruling and committed the applicant to civil jail.

It is evident from the record that the applicant's intended defence cannot stand. Setting aside the default judgment will only serve the applicant's underlying intention of prolonging the matter. The longer the delay, in my view, the more hardship the applicant is making for herself as the interest keeps on accumulating. The decretal sum is not a bank loan and can keep on accumulating interest. The respondents cannot declare the decree as a bad debt.

The delay has also not been explained. The applicant is an advocate. The case was filed over ten (10) months after she sustained the fracture of the femur. As way back as 23rd August, 2010, Dr. Fanuel Muruka of the Aga Khan University Hospital in his report indicated that the fracture alignment was good. The applicant has all along been conscious and has been instructing advocates to act for her. It is now over ten (10) years from the time the default judgment was entered. The decretal sum has more than doubled. There was no critical condition which made the applicant not to pursue her application dated 6th April 2011. Two rulings have been rendered by this court which have made reference to that application. I do find that the current application is nothing but abuse of the court process. The applicant is the author of her own misfortune and the court's inherent discretion to set aside a default judgment cannot be exercised in her favour.

The upshot is that the application dated 18th August, 2021 lacks merit and the same is dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021.

……

S. CHITEMBWE

JUDGE