REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 482 OF 2004

STEPHEN OKERO OYUGI.....PLAINTIFF/RESPONDENT

-VERSUS-

LAW SOCIETY OF KENYA.....1ST DEFENDANT/APPLICANT

SANJEEV KHAGRAM.....2ND DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 28th February, 2019 in which the 1st defendant/applicant, *the Law Society of Kenya*, is seeking an order that the interlocutory judgment entered against it on 26th April, 2005 for failure to file its statement of defence be set aside and also, that leave be granted to the applicant to file its statement of defence and accompanying documents out of time and that the same be deemed as having been duly filed and served.

2. The Motion is supported by the grounds presented on its face and the facts deponed in the affidavit of *Mercy Kalondu Wambua* who asserted that the delay in filing the applicant's defence on time was occasioned by mistake on the part of its erstwhile advocates and urged that such mistake should not be extended to the applicant.

3. The deponent stated that upon discovering the inadvertence of its advocate, the applicant took active steps to remedy the same by instructing a different firm of advocates to take over its representation in the suit and by filing an application seeking to have the interlocutory judgment set aside, which application regrettably was dismissed on a technicality.

4. It was the deponent's contention that the applicant has a defence which raises triable issues and it would only be fair and proper for this court to grant it the opportunity of defending the suit lodged against it.

5. The application is opposed. The plaintiff/respondent put in Grounds of Opposition and also swore a replying affidavit to that effect. Therein, he averred firstly that the application is *res judicata* hence this court cannot entertain it.

6. It was also the respondent's averment that the applicant has been indolent in defending the suit and it cannot be heard to cast blame on its former advocates for any inaction on its part. In this respect, the respondent faulted the applicant for bringing similar applications yet failing to prosecute them, resulting in their dismissal.

7. The respondent urged this court to consider the age of the suit coupled with the fact that the applicant has demonstrated a clear unwillingness to participate in the suit, and to dismiss the Motion with costs.

8. The 2nd defendant did not participate at the hearing of the application or file any documents in answer thereto.

9. The application was canvassed through written submissions. On its part, the applicant started by submitting that courts enjoy a wide and unfettered discretion when it comes to the setting aside of default or interlocutory judgments save that such discretion ought to be applied in a just manner, a position which was reiterated by the court in **Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] eKLR.**

10. The applicant stood its ground that it has brought forward sufficient cause to warrant a setting aside of the interlocutory judgment against it by virtue of demonstrating that it was not responsible for the delay in compliance with the timelines for filing a statement of defence and that it has a defence that raises triable issues.

11. It was the applicant's contention that since an interlocutory judgment is regarded as a judgment not entered on merit, the courts are called upon to consider the reasons given in determining whether or not to set aside a judgment of such nature. The applicant drew this court's attention to the case of **Transafrica Assurance Co Ltd v Lincoln Mujuni-Misc App No 789 of 2014** where the High Court in Uganda reasoned that in instances where the interest of justice requires a party to give good reasons for having an interlocutory judgment set aside

and such reasons are given, then the court is duty bound to grant the relevant party an opportunity to be heard.

12. The respondent on his part was sure to submit that following entry of the interlocutory judgment over a decade ago, the applicant has only delayed the suit by filing a myriad of applications which goes to show that it is not keen on assisting in the expedient hearing and determination of the suit.

13. The respondent restated his earlier position that the present application is *res judicata* within the definition portrayed under Section 7 of the Civil Procedure Act and reaffirmed in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** with the Court of Appeal rendering the following:

> ***"In order to rely on the defence of res judicata there must be:***
>
> ***(i.) a previous suit in which the matter was in issue;***
>
> ***(ii.) the parties were the same or litigating under the same title.***
>
> ***(iii.) a competent court heard the matter in issue;***
>
> ***(iv.) the issue has been raised once again in a fresh suit."***

14. In line with the above, it was the respondent's argument that the applicant had filed an application dated 29th April, 2008 seeking similar prayers as those now sought before this court and riding on similar grounds, which application the court dismissed and therefore, the applicant had no legal grounds on which to bring the present application.

15. The respondent concluded with the submission that the applicant should be stopped in its tracks from relying on Article 159(2) (d) of the Constitution which provides for the exercise of substantial justice without undue regard to technicalities.

16. I have carefully considered the grounds on the face of the application, the facts deponed in the supporting and replying affidavits on record, the Grounds of Opposition and the written submissions on record.

17. Before I address my mind on the merits of the application, it is necessary that I first discuss two pertinent issues arising: the first issue concerns the question on whether the current application is *res judicata*.

18. Judging by the record, it is apparent that the applicant previously lodged the application dated 29th April, 2008 by way of Chamber Summons in which it sought prayers identical to those I am now being urged to consider and grant.

19. The record shows that the aforementioned application suffered a dismissal on 2nd March, 2009 for non-attendance on the part of the applicant. Moreover, it is evident from the record that the applicant subsequently filed the application dated 20th April, 2009 seeking an order for reinstatement of the dismissed application but that particular application was also dismissed on 28th September, 2010 for failure to fix a date for the said application within the timelines ordered by the court.

20. From the foregoing, it is clear that the application of 29th April, 2008 was not heard on merit hence the principles attached to the *res judicata* rule have not been fulfilled in the present instance. I therefore respectfully disagree with the respondent's argument that the present application is *res judicata.*

21. The second issue relates to whether the present application is properly before me. As earlier noted, a similar application previously lodged by the applicant suffered a dismissal and the applicant's attempts at seeking a reinstatement of the dismissed application fell through as its application for reinstatement was equally dismissed.

22. It therefore follows that the proper procedure would have been for the applicant to either seek to have the dismissal orders reviewed and set aside or to appeal against the dismissal orders.

23. From the foregoing, I am of the view that the applicant's attempts at now bringing a fresh application seeking orders related to those earlier sought constitutes an abuse of the court process within the following definition set out by the Court of Appeal in the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR**:

> ***"In the Nigerian Case of KARIBU-WHYTIE J SC in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-***
>
> ***"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"***
>
> ***The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-***
>
> ***(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action…" "***

24. Further to the above, I deem it necessary to clarify that the earlier applications were dismissed as opposed to being struck out, which makes the dismissal orders final. I say this in reiteration of my finding that the applicant should have moved the relevant courts by way of a review or an appeal, but not by filing another application of a similar nature.

25. It is also noteworthy that this is quite an old suit and the applicant has not demonstrated any actual seriousness in defending the same, thereby leading me to conclude all the more that the present application is purely intended to frustrate and abuse the court process. In the premises, I find the application to be improper and there is no need for me to consider its merits.

26. The upshot is that the Motion dated 28th February, 2019 is hereby dismissed with costs to the plaintiff/respondent.

Dated, Signed and Delivered at NAIROBI this 13th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the 1st Defendant/Applicant

.....for the 2nd Defendant