



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 032 OF 2019

DAYTON VALUERS LIMITED PLAINTIFF

VERSUS

JOHN NGUGIDEFENDANT

RULING

1. **DAYTON VALUERS LIMITED** (the plaintiff) filed this case against its former employee **JOHN NGUGI** (the defendant) on 14th March 2019. The Defendant failed to file his defence within the requisite period and interlocutory judgment was entered in default of defence against him. The case came up on 3rd October 2019 for formal proof. On that day an advocate called Mr. Njenga appeared for the defendant and requested the court for an opportunity to file, on behalf of the defendant, an application to set aside interlocutory judgment. This is what the court ordered on that date:

“since the defendant is now represented and counsel for the defendant seeks to file application to set aside interlocutory judgment this matter will be adjourned to 25th November 2019. If [the] defendant does not file an application before then the case will proceed for hearing.”

2. On 25th November 2019 there being no application filed on behalf of the defendant to set aside interlocutory judgment and because the defendant did not attend court on that date the case proceeded by formal proof. Judgment was delivered in favour of the plaintiff on 12th March 2020.

3. The defendant filed a Notice of Motion application dated 28th May 2020 seeking that the judgment of 12th March 2020 of this court be reviewed and set aside and on being set aside the defendant be granted leave to file a memorandum of appearance and defence.

4. The defendant supported that application by his affidavit dated 28th May 2020. He deponed that on being served with the pleadings in this case he instructed the law firm of K.K. Njenga & Associates to represent him. That the defendant made inquiries from that law firm on the progress of his case through phone calls and visiting their chambers. The defendant was shown memorandum of appearance a defence filed on his behalf but that it was only on 21st May 2020 he was shocked and dumbfounded to be informed by his colleague that judgment in this matter had been entered against him. That he has been unsuccessful in obtaining information about this case from the said law firm.

5. The plaintiff opposed the application through the replying affidavit of its director Justus Munene Munyi. By that affidavit the plaintiff stated that the defendant’s application was made on the basis of blatant falsehoods and is therefore mischievous and an abuse of the court process. Further that the said application was filed on behalf of the defendant by an advocate who does not hold a current practicing certificate which fact was confirmed through the law society of Kenya website.

6. When the defendant’s advocate was confronted with that replying affidavit he sought time to file a supplementary to respond to matters raised by the plaintiff. He however failed to file that supplementary affidavit. At the hearing of the application the defendant’s counsel failed to attend court.

ANALYSIS AND DETERMINATION

7. The plaintiff was correct in its assessment of the defendant’s application. The defendant’s statements of the chronology of this case is not correct. The record of this file shows that when the defendant was served with the summons and plaint he filed a memorandum of appearance, on 12th April 2019. By that memorandum of appearance, the defendant indicated that he would, in this case, act in person. He

gave his address of service as Spring Land Consultant Limited, Uniafric House 3rd Floor Room 359 Nairobi. It is therefore not correct as deponed by the defendant that on being served with the pleadings he instructed the law firm of K.K. Njenga & Associates to represent him in the suit. Rather that law firm filed their Notice of Appointment much later on 24th September 2019, the eve of the formal proof. On 25th September 2019 at the request of Mr. Njenga the defendant was granted time to file an application to set aside interlocutory judgment entered in favour of the plaintiff. The defendant did not file that application and this case proceeded with formal proof on 25th November 2019 which date Mr. Njenga advocate had been notified by the court.

8. The defendant was less than candid in stating that when the case proceeded for hearing he was denied the right to be heard. He was not denied right to be heard. He by choice refused to attend the hearing of this case.

9. In my view it is rather lame for the defendant to seek to blame his advocate, K.K. Njenga & Associates. If indeed that law firm failed to represent the defendant, as the defendant alleges, then it is open to the defendant to take action against that advocate. What I however find is that the defendant is indolent and has been indolent throughout this matter and it would be unjust to expect the court and the plaintiff to put their "breaks on" whenever the defendant awakens from his slumber. The defendant needs to be reminded that this case belongs to him and he bears a responsibility to ensure it is prosecuted as he requires. A case in point is **Edney Adaka Ismail v Equity Bank Limited (2014) eKLR** thus:

"However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J** expressed himself as follows:-

"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)

12. I fully agree with the above holding. It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter."

10. The defendant cannot excuse himself from the responsibility that he has to ensure his case is prosecuted as it ought to be. On that ground the application fails. There is no sufficient ground to set aside this court's judgment.

11. The plaintiff erred to argue that the application also fails because it was filed by an advocate not holding a current practicing certificate from the Law Society of Kenya. The application filed by such an advocate remains valid but such an advocate would not be permitted to appear and represent a client in the absence of having a valid practicing certificate. Section 34B of the Advocates Act provides:

1. A practicing advocate who is not exempt under Section 10 and who fails to take out a practicing certificate in any year, commits an act of professional misconduct.

2. Notwithstanding any other provision of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.

3. For the purpose of this section "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.

12. From the provisions of that section it will be noted that application before court although filed by an advocate, Chuma Mburu & Co. Advocates, who does not hold a current practicing certificate that failure does not affect the validity of the application.

13. Having, however, already found that there is no merit to the application the **Notice of Motion dated 28th May 2020 is dismissed with costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this 7th day of **October, 2020**.

MARY KASANGO

JUDGE