



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.58 OF 2017

CONSTANCE MOSE GAMBO.....PLAINTIFF

VERSUS

ALEX SADI.....DEFENDANT

RULING

1. I have before me a Notice of Motion application dated and filed herein on 8th November 2018. By the said application Alex Sadi (the Defendant/Applicant) prays for a temporary stay of execution of the Judgment and orders issued herein on 19th July 2018 and ultimately for the said Judgment and orders to be set aside and/or discharged.

2. The application which is supported by two affidavits sworn by the Defendant is premised on the grounds inter alia:-

a) That the matter proceeded for ex-parte hearing in the absence of and without the participation of the Defendant;

b) That the Defendant was not aware of the hearing and was never informed of the hearing dates;

c) That the Defendant was condemned unheard as he was not given a chance to present his defence due to his Advocates who deliberately failed to file a defence and to inform him of the hearing date;

d) That should the execution proceed, the Defendant stands to suffer irreparable loss, injustice, prejudice and miscarriage of justice;

e) That neither the Defendant nor his Advocate participated in fixing a hearing date and the affidavit of service was never served upon the said Advocates as purported; and

f) That it is only in the interest of justice and for justice to be seen to be done that the prayers sought herein above be allowed

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 11th December 2018, Constance Mose Gambo (the Plaintiff/Respondent) strongly objects to the application on account that the same has been overtaken by events as the execution sought to be stayed has already been carried out.

4. I have perused and considered the application and the response thereto. I have equally considered the submissions placed before me by the respective parties herein.

5. Setting aside a Ruling or Judgment of a Court requires the exercise of the Court's discretion. In ***Shah –vs- Mbogo & Another(1967)EA 116***, the Court in discussing the exercise of discretion observed as follows:-

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

6. Accordingly and in a matter such as this where the Applicant seeks to rely on the Court's discretion, it is incumbent upon the Applicant to adduce sufficient and plausible reasons that can be demonstrated and are persuasive to the Court.

7. In the matter before me, it is the Defendant/Applicant's case that he was condemned unheard as he was not given a chance to present his defence due to his Advocates who deliberately failed to file a defence and to inform him of the hearing date. He asserts that he has an inherent right to be heard and an unequivocal right to defend the case. He avers that he stands to suffer irreparable loss, injustice and prejudice unless the orders sought herein are granted.

8. From the record, this suit was filed against the Defendant on 15th April 2015. Upon being served, the Defendant instructed Messrs OM Robinson & Company Advocates who proceeded to file a Memorandum of Appearance on 4th May 2015. Counsel did not however file a Statement of Defence.

9. Subsequently by a Notice of Motion dated 26th October 2015, the Defendant through the said Counsel sought the leave of the Court to defend the suit by filing a defence out of time. For some inexplicable reasons, the said application was abandoned and the Defendant has never filed a Statement of Defence to the Plaintiff's claim to-date.

10. Messrs OM Robinson & Company Advocates remained on record over the years. On 6th December 2017 when the suit came up for hearing the Plaintiff had filed an Affidavit of Service the previous day indicating that they had effected service upon the said Law Firm and on account of the same, this matter proceeded to hearing in the absence of the Defendant.

11. In the present application before me, the Defendant now avers that their relationship with his Advocate became strained to the extent that the Advocate stopped sharing any communication with him. He did not therefore get to know when this matter came up for hearing.

12. As it were, this is indeed the third application filed by the Defendant after this Court delivered its Judgment herein on 19th July 2018. The first application for stay and setting aside of the Judgment was filed herein on 12th September 2018 by Messrs Kenga & Company Advocates. Given that the new Advocates were coming on record after Judgment, they were compelled to serve the said application upon Messrs OM Robinson & Company Advocates.

13. In response to the said application, the Defendant's former Advocate Robinson Onyango Malombo swore a Replying Affidavit on 4th September 2018 in which he avers at paragraphs 4,5, and 6 as follows:-

4. That the Client was to attend my Chambers on several occasions, between 22nd March 2016 and 25th April 2017. We were to agree on the manner of proceeding with the case, the defendant did not show up.

5. That I wrote severally to the Defendant requesting him for meetings and even informing him that the instant matter was scheduled for hearing, he did not show up.

6. That upon getting information that Judgment had been delivered I informed the Defendant and gave him my professional opinion on the way forward. He said he needed time to think about it, he never reverted.

14. While from a perusal of the Replying Affidavit it was evident to me that the Defendant and his Counsel disagreed over the payment of fees, it was clear to me from a perusal of the same and the Defendant's own Supplementary Affidavit filed herein on 12th February 2019 that the Defendant was abreast with what was going on in his case. He has however to-date never filed a Statement of Defence and none was attached to his present application to enable this court understand the nature of his intended Defence.

15. In my view, the discretion of this Court ought not to be exercised to assist a party who seeks to frustrate the other's Party's quest to accessing justice. It was for instance evident that the Plaintiff had initially following the Judgment lodged a Notice of Appeal herein on 20th August 2018. Subsequently on 13th September 2018, he filed an application for stay of execution pending the appeal through his then new Advocate Messrs Kenga & Company Advocates.

16. That application and another one seeking maintenance of status quo filed by the Defendant in person on 31st October 2018 were subsequently withdrawn on 8th November 2018 when the present application before me was filed. The Notice of Appeal as lodged on 20th August 2018 however remains in place.

17. In my humble opinion the conduct of the Defendant clearly fits that of one who deliberately seeks by evasion or otherwise to obstruct or delay the course of justice. His conduct in my view does not warrant the exercise of this Court's discretion in his favour.

18. Accordingly I decline to allow the Defendant's application dated 8th November 2018. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 6th day of February, 2020.

J.O. OLOLA

JUDGE