REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MATRIMONIAL CAUSE NO. 5 OF 2016

MWK...PLAINTIFF/RESPONDENT

VERSUS

JKK...DEFENDANT/APPLICANT

RULING

1. In the application before me dated 30.4.19 (the Application), JKK, the Defendant/Applicant seeks in the main the setting aside or variation of this Court's order of 5.3.19 (the Order) to the effect that the application dated 20.12.18 (the dismissed application) be reinstated for hearing on merit. The dismissed application sought to reopen the Defendant/Applicant's case in the Originating Summons (OS) between the parties herein.

2. The Application is premised on the grounds that the failure on the part of the Defendant/Applicant's counsel to fix a hearing date or to take directions on the dismissed application on 12.2.19 was not deliberate or intentional. The failure was not occasioned by the Defendant/Applicant and is attributed to inadvertence on the part of his counsel. It is alleged that a clerk in counsel's office removed the dismissed application from their file for purposes of serving the same on counsel for MWK, the Plaintiff/Respondent. Service was effected on 11.2.19 but the clerk failed to place a copy of the dismissed the application in their office file. As a result, counsel did not see the dismissed application in the file and therefore failed to take directions on the same when the matter was called out on 12.2.19. The mistake of counsel should not be visited upon the Applicant. It is in the interest of justice that the dismissed application is reinstated for hearing on merit and no prejudice will be suffered by the Respondent.

3. In her replying affidavit sworn on 14.5.19, the Plaintiff/Respondent stated that the OS was concluded on 11.12.19 when the Defendant/Applicant and his counsel failed to attend Court and his case was closed. The matter was fixed for mention on 12.2.19 to confirm the filing of submissions as directed by the Court. The Defendant/Applicant filed the dismissed application seeking to reopen his case which application was served upon her counsel on 11.2.19 a day before the mention date. On 12.2.19, Mr. Ondieki attended Court on behalf of Mr. Shimaka for the Defendant/Applicant but said he did not have instructions on the dismissed application. A further mention was then fixed for 5.3.19. No attempts to fix the dismissed application for hearing were made and the Court did on 5.3.19 dismiss the same and judgment for the OS was fixed for 10.5.19. The Defendant/Applicant then filed the present Application on 30.4.19 which and served it upon the Plaintiff/Respondent on 3.5.19. No reasons have been given for the delay if filing the same. The conduct of the Defendant/Applicant is that of a person who intends to obstruct the course of justice and is not worthy of the Court's discretion.

4. For the Defendant/Applicant, it was submitted that the mistake of an advocate should not be visited upon his client; that the mistake has been admitted and well explained; that the reasons are sufficient to warrant a review and setting aside of the Order. It was also submitted that there was no inordinate delay in filing this Application as counsel had to seek instructions. It was also contended that the Court was on vacation and the Application was filed immediately the Court resumed. The Defendant/Applicant will suffer harm and prejudice as he will be condemned unheard. On the other hand the Plaintiff/Respondent will suffer no prejudice as she will have time to respond.

5. The Plaintiff/Respondent contends that the Defendant/Applicant having filed the dismissed application under certificate of urgency never bothered to fix the same for hearing. No reason has been given for this failure. The delay is therefore inordinate and inexcusable. Further the dismissed application was not served upon the Plaintiff/Respondent until 11.2.19, a date to the mention date of 12.2.19 which was not in good faith. No reason was given for this delay, leading to the conclusion that the Defendant/Applicant was not keen on the quick disposal of the dismissed application.

6. I have carefully considered the Application, the rival affidavits and submissions together with the cited authorities. The record shows that Plaintiff/Respondent's case was closed on 16.7.18 and hearing of the Defendant/Applicant's case was fixed for 11.12.18 in the presence of Counsel for both parties. On 11.12.18 however, neither the Defendant/Applicant nor his counsel attended Court. The Defendant/Applicant's case was therefore marked as closed and parties were directed to file submissions within 21 days. On 12.2.19, the date fixed for mention to confirm filing of submissions, Mr. Ondieki for the Defendant/Applicant sought 14 days to file submissions which the Court granted and the matter was to be mentioned 5.3.19 to confirm and fix the date for ruling. On that date however, Mr. Ondieki stated that submissions had not been filed and that there was a pending application. He stated that Mr. Shimaka had not given him instructions on the said application when he took directions for submissions. His instructions now were that it would be prejudicial to his client if the matter were to proceed to judgment. The Court in its ruling did note the foregoing and further stated that since the dismissed application was filed, no steps had been

taken by the Defendant/Applicant to prosecute the same. Additionally, the Court observed that it was too late for the Defendant/Applicant to seek directions on the said application. Judgment for the OS was therefore fixed for 10.5.19. Almost 2 months after, the Defendant/Applicant did on 30.4.19 file the present Application seeking a review or setting aside of the Order of 5.3.19.

7. The Application has been brought under Order 12 Rule 7 of the Civil Procedure Rules. This provision relates to a matter that has been dismissed for non-attendance which is not the case in the present application. The correct provision in the circumstances of the case is Order 45 Rule 1 (1) of the Civil Procedure Rules which provides:

> ***45(1) Any person considering himself aggrieved—***
>
> ***(1) Application for review of decree or order***
>
> > ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
> >
> > ***(b) by a decree or order from which no appeal is hereby allowed,***
>
> ***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

8. For an applicant to warrant the exercise of a Court's discretion in its favour for review or setting aside of an order, such party must satisfy certain requirements. An applicant must show that there is discovery of new and important evidence or that there is an error on the face of the record. An applicant may also show to the Court any other sufficient reason to warrant the grant of the orders sought. Further such application must be filed without unreasonable delay.

9. The Defendant/Applicant has not demonstrated to the Court that there is discovery of new and important evidence which was not available when the Order was made. He has also not demonstrated that there is a mistake or error apparent on the face of the record. The Defendant/Applicant's explanation that failure to fix a date for the dismissed application was that a clerk in his firm removed the dismissed application from their office file for the purpose of effecting service upon the Plaintiff/Respondent and did not return the same. It was also submitted that the delay in filing this Application was not inordinate as counsel had to seek instructions. It was also contended that the Court was on vacation and the Application was filed immediately the Court resumed.

10. The Court notes that the dismissed application was filed on 20.12.18. The Court resumed sittings on 14.1.19 after the recess. It was however not until 11.2.19 that the dismissed application was served upon the Plaintiff/Respondent. This was just a day before the scheduled mention to confirm filing of submissions on the OS. On that date, the Defendant/Applicant's counsel sought 14 days to file submissions which was granted and mention to confirm compliance was fixed for 5.3.19. At no time did counsel seek directions on the dismissed application. It is only on 5.3.19 that counsel told the Court that there was a pending application and sought directions on the same. At this point the Court observed that it was too late and 10.5.19 was given as the date for judgment on the OS. Thereafter on 30.4.19, almost 2 months later and 10 days to judgment, the Defendant/Applicant filed the present Application.

11. All parties who come to Court must be given an opportunity to be heard and not shut out of the judgment seat due to the mistake of counsel. In the case Burhani Decorators & Contractors v Morning Foods Ltd & another [2014] eKLR, where a party sought reinstatement of a case dismissed for non-attendance, Aburili, J. allowed the application and found that the delay of 3 months to the filing of the application was sufficiently explained by learned counsel for the appellant. To buttress her finding, the learned Judge stated:

> ***In the Court of appeal decision of Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apalloo J (as he then was) and cited with approval in the Nyeri CA 18 of 2013 (Ibid), the learned Judge of Appeal posited as follows:***
>
> > ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."***

12. Whereas this Court appreciates that blunders will and do occur, and a party should not suffer the penalty for a mistake, directions and timelines set by the Court must be adhered to. This was the finding by Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where he stated:

> ***This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.***

13. In the present case, neither the Defendant/Applicant nor his counsel attended Court for the hearing of his case on 11.12.18 though the date was taken in Court, in the presence of both parties' counsel. Thereafter an application to reopen the case was filed on 20.12.18 but not set down for hearing and was served upon the Plaintiff/Respondent on 11.2.19. Directions by the Court to file submissions on the OS were

not complied with. Further, it emerged at the hearing of this application that when Mr. Ondieki attended Court on 12.2.19 to hold brief for Mr. Shimaka, he did not have any instructions take directions on the dismissed application and sought extension of time to file submissions on the OS. The Court granted the extension sought. The Court notes that when the application was dismissed on 5.3.19 and judgment date for the OS fixed, Mr. Ondieki was present in Court. However it was not until 30.4.19 about 25 days later that the present application was filed and notably just 10 days before delivery of the judgment, thereby arresting the delivery of the same. Both the Defendant/Applicant and his counsel failed to give due regard to the directions of this Court. By their conduct, they derogated from the overriding objective of the expeditious, fair, and just proportionate and economic disposal of the matter herein. This Court should therefore not provide succour and cover to the Defendant/Applicant who has exhibited scant respect for rules and timelines which serve to make the process of judicial adjudication and determination fair, just, certain and even-handed.

14. The orders sought by the Defendant/Applicant are discretionary. The conduct of a party is key in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. In **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR, Gikonyo, J stated and I concur:**

> ***We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.***

15. I have considered the circumstances of the case and the general conduct of the Defendant/Applicant in this matter. The filing of the present application just 10 days to the date of judgment raises misgivings. It would appear to me that there is a deliberate attempt to obstruct or delay the course of justice. First the Defendant/Applicant and his counsel fail to attend Court for the hearing of his case resulting in the closure of his case. Then he files an application to reopen his case which application he takes no steps to prosecute. When the Court on 5.3.19 scheduled the judgment for 10.5.19, the Defendant/Applicant waits until just 10 days to the judgment to file this Application. It would not be farfetched for the Court to conclude that the Defendant/Applicant is intent on delaying the delivery of judgment on the OS which was due on 10.5.19. The Respondent/Applicant and his advocate have failed in their duty to assist the Court to further the overriding objective contemplated in Section 1A of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of the dispute herein. To exercise this Court's discretion to allow the Application will in my view militate against the overriding objective and further greatly prejudice the Plaintiff/Respondent.

16. In the Burhani Decorators case(supra) Aburili, J. went on to say:

> ***In this case, the delay of 3 months to the filing of the application was sufficiently explained by learned counsel for the appellant. Nonetheless, the firm acted with alacrity upon discovery of the mistake and sought to correct the mistake by filing the application with speed and securing a hearing under certificate of urgency.***

17. In the present case, when the Defendant/Applicant's case was closed for non-attendance he promptly filed the dismissed application seeking to reopen his case. However, as demonstrated herein the Defendant/Applicant's counsel did not act with alacrity and showed no enthusiasm in setting the dismissed application down for hearing. Again when the application was dismissed, counsel did not act with speed to file the present application.

18. The Court recognises that the mistake of an advocate should not be visited on his client. Indeed as Apalloo J (as he then was) observed in the Phillip Chemwolo case (supra), blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. However it is not in every case that the mistake of counsel would warrant the setting aside of the orders of the Court. The matter herein belongs to the Defendant/Applicant and not his counsel. He was obligated to demonstrate due and reasonable diligence in the pursuit of his case, which he did not. The Court taking into account the indolence and general conduct of the Defendant/Applicant herein cannot exercise its discretion in his favour. In this regard, I fully concur with Kimaru, J. who when faced with a similar application in Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 stated:

> ***"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… 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.***

19. This Court also concludes that the Defendant/Applicant has been indolent and that it would be a travesty of justice for the Court to exercise its discretion in his favour. Accordingly, I find and hold that the Application dated 30.4.19 lacks merit and the same is dismissed. The Plaintiff/Respondent shall have costs.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of September 2019

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M. THANDE

JUDGE

In the presence of: -

.. for the Defendant/Applicant

..for the Plaintiff/Respondent

..Court Assistant