



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 258 OF 2015

SOPHIA WAIRIMU NJOROGE.....1ST PLAINTIFF/RESPONDENT

JOSEPH KAHUGU NJOROGE.....2ND PLAINTIFF/RESPONDENT

(Suing as the administrators of the Estates of

SAMUEL MUCHIRI KIGAMBA – Deceased)

VERSUS

GEORGE KARONGO.....1ST DEFENDANT/APPLICANT

WOODMAN AGENCIES LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of three applications.
2. The application dated 17th August, 2017 principally seeks orders that this Honourable Court be pleased to review, vary and/or set aside the decree given herein on the 22nd June, 2017 and the defendants be granted leave to defend this suit.
3. The application is based on the grounds stated therein and is supported by the affidavit of Stephen Kimotho Kabogo, a Director of the 2nd Applicant. It is stated that when the Applicants were served with the summons, they forwarded the same to their insurer, M/s ICEA Lion Insurance Company Ltd. That thereafter the Applicants did not receive any other communication from their insurer and were not aware that the insurer had instructed the firm of Kairu and McCourt Advocates to act for them and never received any communication to that effect.
4. It is further averred that the defence case was closed by their then counsel on record, Kairu & McCourt Advocates without any witnesses being called. That consequently the Defendants were condemned unheard yet they have a good defence including the proceedings in Makadara Cr. Case No. 2195/15. The court was implored not to visit the mistakes of the counsel on the litigant.
5. The application is opposed. It is stated in the replying affidavit that the firm of Kairu and McCourt entered appearance and filed a statement of defence on behalf of the Applicants. That the Applicants' witnesses indicated even at the pre-trial stage that they would not call any witnesses. That the Applicants' counsel had the opportunity to cross-examine the Respondent's witnesses exhaustively and thereafter the Applicants counsel closed their case without the calling of any witnesses.
6. It is further averred that subsequently, both parties filed written submissions and thereafter judgment was delivered. That the judgment was delivered in the presence of counsels for both parties. That a decree was extracted thereafter. The Respondents watered down the evidence that the Applicants state that they have in support of their case and stated that the mistake of the Applicants' counsel should not be visited on the Respondents. That in any event, the Applicants ought to have followed up on their case.
7. In the application dated 23rd October, 2017, the Applicants seek orders, *Inter alia*, that pending the interparties hearing of this application, the Honourable court be pleased to grant a stay of execution of the decree given on the 22nd June 2017. It is stated that auctioneers have proclaimed the Applicants property. That the Applicants appeal stands to be rendered nugatory and an academic exercise and thereby render irreparable loss to the Applicant. It is further averred that the attached goods are the Applicant's tools of trade.

8. In opposition to the application, it is stated in the replying affidavit that the application is made in bad faith and is meant to deny the beneficiaries of the deceased who is subject of this case the fruits of their judgment. It is further stated that this court is now *functus officio* as it has already delivered the judgment.

9. In the application dated 29th October, 2017 the substantive orders sought are that the court do review, and/or vary the orders given on 13th November, 2017. The said orders were for the deposit of half of the decretal sum in a joint interest earning bank account of the counsels for the parties herein or in court as a condition for stay of execution. It is stated that the Applicant is unable to raise the decretal sum or the half thereof. The Applicant has offered an apartment No. C2 on LR No. 1/388 Lenana Road stated to be valued at Ksh.20,000,000/= as security.

10. The application is opposed. It is stated by the Respondent in the replying affidavit and further affidavit that the Applicants obtained interim orders through the concealment of material facts relating to the multiplicity of the Applicants' applications herein; seeking extension of stay of execution order after the stay period had lapsed, failure to disclose that they had closed their defence case without the calling of any witnesses and failure to reflect that the judgment entered was for Ksh.16,843,209/=.

11. The Respondents further deponed that the Applicants have continued to cause delay herein and objected to the deposit of the title deed as security.

12. I have considered the three applications, the responses to the same and the written submissions filed by the respective counsels for the parties herein.

13. On whether the judgment herein should be reviewed, varied or set aside, it is noteworthy that the case proceeded with the participation of both parties throughout. The Defendants entered appearance, filed a defence and participated in the trial and cross examined the Plaintiffs' witnesses. The Defendants chose not to call any witnesses. One cannot separate the Defendants from the steps taken by their duly appointed advocates. The Defendants chose their advocates and are bound by the decision the advocates took when they opted not to call any witnesses.

14. The Defendants say that they forwarded the summons to their insurers and it seems that they then sat back until the day they were informed of the judgment. They did so at their own risk as to the consequences that followed. It was the Defendants' duty to follow up on the progress of their case. As stated in the case of **Savings & Loan Ltd v Susan Wanjiru Muritu Nairobi Milimani HCC 397/02:**

“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.”

15. The Defendants remedy lies in their insurers and their advocates. The application to review, vary or set aside the judgment has no merits. There is no discovery of any new and important matter or evidence which has been demonstrated not to have been within the knowledge of the Defendants. There is no mistake or error apparent on the court record that has been pointed out or any other sufficient reason to warrant reviewing the judgment herein.

16. The application dated 23rd October, 2017 seeks interim orders pending hearing interparties. The application has now been heard interparties. Consequently, the application is now spent.

17. On whether to vary the order dated 13th November, 2017, it is also noted that the orders sought were also interim in nature and the said orders are now spent.

18. In the upshot, all the three applications are hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 5th day of June, 2018

B.THURANIRA JADEN

JUDGE