



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1830 OF 2001

GATHENGE ENGINEERS & ELECTRICAL LTD...PLAINTIFF/RESPONDENT

-VERSUS-

POSTAL CORPORATION OF KENYA.....DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 6th October 2017, brought under the provisions of Section 3A of the Civil Procedure Act, Order 45 Rule 1 of the Civil procedure Rules and any other enabling provisions of the law.

2. The Applicant is seeking for orders as here below stated;-

- a) *That there be a stay of taxation of the Plaintiff's Bill of costs pending inters parties hearing and determination of this application.*
- b) *That the Judgment in this matter delivered on 31st July 2015 by Honourable Justice Eric Ogola be set aside and the suit set down for hearing of the Defence case.*
- c) *That costs be provided for.*

3. The Application is supported by an affidavit dated 6th October 2017, sworn by Samuel Mburu, the Legal Manager of the Applicant's Company. He deposed that the Plaintiff filed the Plaintiff in this suit on 28th November 2001 and the Defendant filed a statement of Defence on 11th January 2002. The plaintiff then applied for summary Judgment against the Defendant via a Notice of Motion Application dated 30th August 2002. By a ruling delivered on 24th October 2003, by Justice Mohamed Ibrahim (as he then was), the Application was allowed and summary Judgment entered against the Defendant (herein "the Applicant".)

4. The Applicant successfully appealed against the decision vide *Civil Appeal No. 319 of 2003 postal Corporation of Kenya –vs- Gathenge Engineers & Electrical Ltd* and O'kubasu, Githinji Onyango Otieno JJ.A.(as they then were) set aside the decision and granted the Applicant unconditional leave to defend the suit.

5. However, since the setting aside of ruling, the Plaintiff did not take any step to prosecute the case or fix the same for hearing, so much so that the Applicant filed an Application on 3rd July 2014, for the dismissal of the suit for want of prosecution. The Application has never been heard as the Court file was always reported to be missing.

6. Be that as it were, the Applicant was recently served with a copy of the Plaintiff's Bill of costs and upon making enquiries it learnt that the suit was purportedly heard by Honourable Justice Eric Ogola by way of formal proof on 21st April 2015 and Judgment delivered on 31st July 2015. The Applicant avers that it has never been served with a hearing notice or any other notice by the Plaintiff after the Judgment of the Court of Appeal, that set aside decision for Summary Judgment. As such it was not aware of and did not participate in the purported hearing or proceedings in the matter. Yet the Court indicates at paragraph 7 of the Judgment that the Applicant's Defence was struck out on 17th February 2015, because Applicant allegedly failed to provide particulars of its Defence. But it has never been served with a request for particulars or any other pleadings by the Plaintiff after the Court of Appeal set aside the ruling for summary Judgment.

7. The Applicant avers that the Plaintiff's Bill of costs is fixed for hearing on 10th October 2017, and it stands to suffer a gross injustice prejudice and loss in the event of taxation of Bill of Costs and execution. Therefore it is imperative that the Judgment in this matter be set

aside and the suit fixed for hearing of the Defence case.

8. However the Application was opposed by the Plaintiff vide a Replying Affidavit dated 30th October 2017, sworn by Joseph Warari Gathoga, a Director of the Plaintiff's Company. He averred that, he is aware that the Defendant's said statement of Defence was filed on 11th January 2002 by the Defendant's Advocate on record, Messrs Wachakana and Company. That at the time of the filing of the Defence the Plaintiff's Company was represented by Messrs Muriu Mungai & Co. Advocates.

After the Court of Appeal Judgment, the Plaintiff Company changed its Advocates on record to the current Advocates. Subsequently the Applicant's Notice of Motion Application filed on 3rd July 2014 seeking the dismissal of the suit for want of prosecution was duly objected to by the Plaintiff's Advocates, who filed the requisite Notice of Preliminary Objection on 12th June 2014, premised on the fact that the Application had been filed by the firm of Messrs' Okoth & Kiplagat Advocates who were not on record for the Applicant. The Application came up for hearing inter parties on 19th June 2014, before Honourable Justice Mr. Ogola. The issue of the Applicant's legal representation was raised through the Plaintiff's Preliminary Objection, whereupon the case stood over on 24th June 2014, to enable the Applicant sorted out the issue of representation.

9. On 24th June 2014, Mr. Ogembo Advocates from Okoth & Kiplagat Advocates confirmed that the Firm had inadvertently omitted to file the requisite Notice of Change of Advocates, prior to filing the Application which was accordingly withdrawn with no orders as to costs.

10. Thereafter the Applicant's Advocates were served with the requisite request for Particulars of the Defence dated 12th April 2013, but failed to supply the same. Pursuant thereto, the Plaintiff Company through its Advocates duly filed and served the requisite Notice of Motion Application dated 16th June 2014, seeking for the Applicant to supply the requested particulars, failing of which the Defence would stand struck out or dismissed with costs. The Application was heard on 22nd September 2014 by Honourable Justice Mr. Ogola and the ruling delivered on 3rd October 2014, whereby the Application was allowed. That the Applicant's Advocates duly notified of the Ruling for purposes of compliance with the same but neither the Applicant Company nor the Advocates complied therewith.

11. Accordingly, the Plaintiff's Advocates duly requested for Judgment to be entered against the Applicant's Company. The case came up before the Honourable Justice Mr. Ogola, on 17th February 2015, and the Court ordered the defence was struck out with costs and the case accordingly set down for formal proof hearing on 21st April 2015. On that date the suit was duly heard and the matter was set down for highlighting of written submissions on 14th May 2015. The Plaintiff's Advocates subsequently duly prepared and filed the requisite written submissions and the Court delivered Judgment on 31st July 2015.

12. That 13th December 2016, the Plaintiff's Party & Party Bill of Costs dated 8th December 2016 was set down for taxation on 10th July 2017 and the requisite Notice of Taxation dated 12th June 2017, obtained from the Honourable Court and copies thereof served the Applicant's Advocates. On 10th July 2017, when the Bill of Costs came up for taxation, the firm of Okoth & Kiplagat Advocates, were granted leave to regularize their being on record for the Applicant with the taxation of the Bill of Costs, set down for hearing on 3rd August 2017, and on 1st August 2017 the firm filed their Notice of Appointment of Advocates dated 25th July 2017, and served the same upon the Plaintiff's Advocates during the taxation on 3rd August 2017. The Respondent argues that the Applicant was duly notified and served with all the requisite hearing notices, Application (s), Request for Particulars and other pleadings and/or correspondence as required by law through its lawyers.

13. The parties agreed to dispose of the Application by filing written submissions which they did and subsequently highlighted on 29th May 2018. I have considered the same herein. The Applicants submitted that a litigant should not be blamed or punished for the mistake of their Advocate. That the law provides that no one should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them that is the rule of *Audi alteram partem*.

14. The Applicants relied on the cases of; *Belinda Murai & Others –vs- Amos Wainaina [1979]eKLR*, *Edney Adaka Ismail –vs- Equity Bank Limited [2014] eKLR*, *Paul Asin t/a Asin Supermarket –vs- peter Mukembi [2013] eKLR*, where the Court held that the door of justice should not be closed because a mistake has been made by a person of experience who ought to have known better. That mistakes, error and blunders of an Advocate should not be visited on the client. As such the Applicant should not be made to suffer. That it is only just unfair that the Applicant be judged on basis of evidence.

15. That the principle "*Audi alteram partem*" requires that no person should be judged without a fair hearing and this principles finds Constitutional footing under Article 50, the Constitution of Kenya which states that;

"Every person has the right to have any dispute that can be resolved by the Application of law in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body"

16. The Applicants relied on the cases of; *Sceneries Limited –vs- National Land Commission [2017]eKLR*, and argued that if the case is not reopened there will be miscarriage of justice and departure from these principles. Further reference was made to the case of *Richard Ncharpi Leiyagu –vs- Independent Electoral Boundaries Commission & 2 others [2013] eKLR*, where it was held that if the Courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality.

17. Finally the Applicant relied on the case of *J M K –vs- MWM & Another [2015] eKLR*; wher the Court has held that ;

"The Courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a

person who is likely to be adversely affected by a decision before the decision is made”

18. In response the Plaintiff's filed its submissions were filed in Court on 24th May 2016, where it is submitted that the firm of, Okoth & Kiplagat Advocates are not properly on record in the suit. Reference was made to the provision of Order 9 Rule 5 of the Civil Procedure Rules 2010, which provides that unless and until a Notice of Change of Advocates is filed, the Advocates on record remain until the final conclusion of the cause or matter including review or appeal. That the said firm filed their Notice of Appointment of Advocates on 1st August 2017, two (2) years after the Court delivered its final judgment in the suit herein on 31st July 2015. In that case it should have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules which requires that a law firm which is coming on record after judgment must obtain a Court order to that effect. Yet no such order has been issued by court in this matter. As such the law firm of Okoth & Kiplagat Advocates is not properly on record as acting for the Applicant or at all.

19. As a result whereof the Application herein has not been properly brought or filed in Court. Reference was made to the cases of; Jane Awino Onyango –vs- Norah Adongo Onyango & 2 Others [2018] eKLR, Antony Mutura Njau –vs- Samson Njau & Another [2007] eKLR, where the Courts have held that Application filed in violation of the provision of Order 9 Rule 9 of the Civil Procedure Rules would not be properly on record and would be incompetent

20. It was argued that even then, the Application has no merit in that; it is brought under the provision of Order 45 Rule of the Civil Procedure Rules, which deals with review of Court orders and/or decrees and requires a copy of the decree to be reviewed in this Application be removed that has not been done.

21. Further that the said Order 45 provided grounds for review namely;

- a) *discovery of new and important matter or evidence which, after the exercise of due diligence, was not with the knowledge or could not have been produced by the Applicant at the time when the decree was passed or;*
- b) *on account of some mistake or error apparent on the face of the record or*
- c) *Any other sufficient reason.*

22. That the Applicant has not presented any such grounds on the face of the Application and or in the supporting Affidavit and or at all. Reliance was placed on the cases of; Pancras T. Swai –vs- Kenya Breweries limited [2014] eKLR, Dubai Bank Kenya Limited –vs- Kwanza Estates Limited [2015] eKLR.

23. The Respondents further argued that the Application was filed on 6th October 2017, over two years and two months after the judgment being sought to be reviewed was delivered on 31st July 2015, and yet no explanation has been given by the Applicant's Advocates in demonstrating the exercise of any due diligence and expediency in ensuring that the Application was brought before Honourable Court without any delay. That the burden of proving that it has moved with all due diligence and expediency lies on the Applicant and/or the Advocates.

24. Reference was made to the cases of; Stephen Gathua Kimani –vs- Nancy Wanjiru Waruingu t/a Providence Auctioneers [2016] eKLR, Salama Mohmound Saad –VS- Kikas Investments Limited & Another [2014] eKLR.

25. I have considered the Application in total, the prayers and the issues raised in submissions. The first issue to consider is whether the firm of Okoth & Kiplagat Advocates was properly on record on 6th October 2017, when the subject Application was filed and after judgment was delivered in this matter on 31st July 2015. I find that it was not on record, and yet there is no evidence that the said law firm complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules and on that ground alone the Application would be incompetent.

26. However the Applicants argued that when the Bill of Costs came before the Taxing master, the parties agreed by consent to regularize the appearance of the said firm. This is supported by paragraph 11 (iii) of the Replying Affidavit where it is deposed that on 10th July 2017, the firm of Okoth and Kiplagat Advocates were granted leave to regularize their being on record. As such on 6th October 2017, when the Application was filed the Applicant's Advocate had regularized their appearance on record. The Plaintiff cannot now be heard to raise the issue at this stage. Even then they have allowed the Application to be fully canvassed and therefore they are estopped from raising the issue.

27. The next issue to consider is the merit of the Application, the Applicant sought that there be a stay of Taxation of the Bill of Costs. However I note that, that prayer was sought for, pending inter parties hearing and determination of this Application. Consequently the parties agreed to wait the decision of this Court and therefore that prayer is spent.

28. That leaves only the prayer of setting aside the judgment and the case for hearing of the defence in the argument made that the reasons advanced by the Applicant are that they were not aware of the hearing of the Plaintiff's case as they were never served with any hearing notices or any other notices whatsoever. Further they were never served with a request of particulars by the Plaintiff which is the basis upon which the defence was struck out. They became aware of the matter when they were served with the Plaintiff's Bill of Costs.

29. On the contrary the Plaintiff/Respondents argue that the Applicants have always been represented by the firm of Messrs Wachakana and Co. Advocates since 11th January 2002 after entering appearance for the Defendant and filing a defence and as stated herein throughout the proceedings the firm on record was duly served with requisite mention and or hearing notices but for unknown reason they never attended the mention or hearing of the matter.

30. Further the firm of Okoth & Kiplagat Advocates came into the matter on 3rd July 2014, when they filed an Application to have this

matter dismissed. On 19th June 2014, they were given time to regularize their representation and by 24th July 2014; they had not done so and only filed their notice of Appointment on 1st August 2017.

31. I have gone through the court record and I note that annexed to the Replying Affidavit sworn by Joseph Warari Gathoga and I find Affidavits of service annexed as evidence of service served upon the Applicant's Lawyer of the mention & hearing notices. The Affidavit of service filed on 19th August 2014, was in relation to the hearing of Notice of Motion Application dated 16th June 2016 and scheduled for 22nd September 2014. The Application was seeking that the Court to order the Applicant to supply particulars of statement of defence. The Affidavit filed on 7th November 2014, was evidence of delivery of three letters to the Applicants Counsel on record to bring to their knowledge the ruling of the Court delivered on 3rd October 2014.

32. On 21st January 2015, an Affidavit of service was filed in Court as evidence that the Applicant's Counsel was served with a mention date for the matter to be heard on 17th February 2015. A further Affidavit dated 25th February 2015, indicates that the Applicants counsel was served with a hearing notice for the formal proof of the matter on 21st April 2015. Similarly the Counsel was also served with a mention notice of 14th May 2015, when the matter was mentioned for highlighting of submissions. Further notices were served on 18th May 2015 and 2nd June 2015, which notified the Applicant of the date of delivery of judgment being the 27th May 2015. All these notices show that they were received and stamped by the Applicant's law firm on record.

33. The Applicants lay blame squarely on the law firm on record. It's noteworthy that the said law firm has not responded to this Application. In the same vein the Applicant has submitted at length that the mistake of an Advocate should not be visited on a Client and that the client should be given an opportunity to be heard. But even then, the firm of Okoth & Kiplagat that has filed this Application came into this matter in the year 2014 and even filed an Application for dismissal of the suit. There is no reason given why they did not pursue the matter thereafter and or regularize their presence therein.

34. In consideration the interest of the Applicant, the interest of the Plaintiff must also be taken into account. This matter was filed in court in the year 2001 and it's been in Court for a period of about 17 years. The history of the matter is already explained herein. It should be dealt with expeditiously.

35. I also note that, the Application is brought under the provisions of Order 45 of the Civil Procedure Rules and as rightfully submitted by the Plaintiff/Respondent, the said Order deals with the setting aside of the decree or an order of the Court. The prayer herein is not for review or setting aside of the judgment and therefore that order is completely inapplicable. But if the Court were to set aside the judgment in the interest of justice, and with a view to uphold substantive justice under Article 159 and the right of a party to be heard under Article 48 of the Constitution, in the light of the rules of Natural justice, the Court must also be consider the Respondents plight.

36. Generally speaking this Application lack merit on the reasons advanced but to accord the Defendant an opportunity to be heard at the same time protect the interest of the Plaintiff I order that the judgment herein be and is hereby set aside on the following conditions:-

a. That the Applicant deposits the sum of kshs.2,644,504.75 plus interest as indicated therein plus costs of the suit and this Application in Court within seven (7) days of this order;

b. That the Applicant complies with the pre-trial direction within two (2) weeks of this order in which case the parties should take a mention date before the Hon. Deputy Registrar to confirm compliance with this order.

c. If none of these conditions is complied with, the order setting aside the judgment will stand vacated without further recourse to the Court.

37. It is so ordered;

Dated Delivered, signed on this 12th day of July 2018 at Nairobi.

HON. G. L. NZIOKA

JUDGE

in the presence of;

Mr. Kibanya..... for Plaintiff/Respondent

Mr. Akelo.....for Defendant/Applicant

Langat.....Court Assistant