



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**ELC APPLICATION NO. 92 OF 2017**

**JOSEPH CHEGE GATUA.....1<sup>st</sup> PLAINTIFF/ RESPONDENT**

**ZAKARIA KARIMI GATUA.....2<sup>nd</sup> PLAINTIFF/ RESPONDENT**

**-V E R S U S-**

**CHARLES MWANGI MATHENGE.....DEFENDANT/ APPLICANT**

**RULING**

1. Before me is a Notice of Motion dated the 2<sup>nd</sup> March 2018 and filed on the same day in which the Applicant herein seeks to have the orders issued by this court on the 27<sup>th</sup> February 2018 allowing an ex-parte application dated the 8<sup>th</sup> February 2018 reviewed varied and/or set aside so that parties can be heard inter-parties.
2. The reason giving rise to the above application being that on the 7<sup>th</sup> February 2018, this court struck out an application by the Plaintiff/Respondents herein where they had sought to set aside ex parte orders of taxation of costs dated the 10<sup>th</sup> July 2017 as well as the certificate of costs issued thereafter together with all the other execution proceedings or subsequent orders in respect thereto so as to have the defendant's bill of costs dated the 2<sup>nd</sup> June 2016 be re-taxed afresh in the presence of the plaintiffs as well as their Counsel.
3. Following the striking out of the said application, the Plaintiff/Respondents vide their application dated the 8<sup>th</sup> February 2018 under certificate of urgency sought for orders of enlargement of time so as to give notice of objection to the taxing officer's decision. That the enlargement of time do operate as a stay of execution in respect of the certificate of costs issued on the 14<sup>th</sup> July 2014 until further orders of the court.
4. The matter was placed before the court on the 12<sup>th</sup> February 2018 wherein the court directed for service upon the Defendant/Applicant for inter-parties hearing on the 27<sup>th</sup> February 2018 and parties to maintain the staus quo.
5. On the 27<sup>th</sup> February 2018, the court was informed that despite service there was no response by the Defendant/Applicant, at the same time Counsel for the Applicant was not in court although she had sent a colleague to hold her brief and seek that the file be placed aside up to 9:45 am. At 9:45 am, she there was no appearance for the Defendant /Applicant's counsel and although the court noted that the Applicants had filed their response to the Respondents' application, the Plaintiff/Respondent's counsel submitted that they had not been served. In the absence of counsel for the applicant, and service having not been effected, the court allowed the Application as prayed.
6. Pursuant to these orders the Defendant/Applicant herein filed the present application under certificate of urgency dated the 2<sup>nd</sup> March 2018 seeking to have the said orders (issued by this court on the 27<sup>th</sup> February 2018) allowing the application dated the 8<sup>th</sup> February 2018 reviewed varied and/or set aside so that parties could be heard inter-parties.
7. Parties argued the Application on the 19<sup>th</sup> March 2018 wherein in her Submission, counsel for the defendant/Applicant M/s Wangechi Advocate submitted that their application was premised on their supporting affidavit and the laws applicable therein for review of the orders issued on the on the 27<sup>th</sup> February 2018.
8. Counsel submitted that indeed although she had been ready to proceed with the hearing of the matter, on 27<sup>th</sup> February 2018, she had gone to the Chief Magistrate's court to set aside a matter and that is why when the matter was called out she was not in court. That counsel for the Respondents had mislead the court when he informed it that they had not been served yet service had been effected upon them on the 16<sup>th</sup> February 2018 whereby they had acknowledged it by affixing their stamp on the Applicant's copies. That taking note of the circumstance herein and in the best interest of justice pursuant to Article 159(2) (d) of the Constitution that the court reviews its orders.
9. The application was opposed by the Respondent's Counsel who submitted that indeed the application had been overtaken by events, and it

therefore ought to face the same fate that had befallen their application on the 7<sup>th</sup> February 2018 wherein the court had held that matters relating to taxation ought to be addressed under the Advocate's Remuneration Order and not under any other law. That the orders issued on the 27<sup>th</sup> February 2018 were not merely because there was no replying affidavit but because unlike the court's directions that the matter would proceed at 9:45 am, there was no appearance by the Applicant's Counsel who chose to go to the subordinate court instead and had offered no explanation, in complete disregard to the orders of a superior court.

10. That as per the contents of paragraph 8,11,12,13,14 and 15 of the Applicant's supporting affidavit, Counsel for the Respondent sought to have the same expunged for the court record as these averments were meant to disparage him and put him in bad light.

11. That the court was being asked to sit on an appeal against its own orders. That he came to learn that the replying affidavit to his Application dated the 8<sup>th</sup> February 2018 had been received only after the present application had been served and was thus honest when he had submitted that on the 27<sup>th</sup> February 2018 that he had not been served.

12. That since the application herein had been overtaken by events it would not be prudent to set the same down for hearing as matters arising had already been set down under paragraph 11 of the Advocates Remuneration Order.

13. I have considered the application and submission of counsel herein.

14. The provisions of Order 12, rule 2 of the civil Procedure Rules are clear to the effect that;

*If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—*

*(a) that notice of hearing was duly served, it may proceed ex parte;*

15. The provisions of Order 12, rule 7 of the civil Procedure Rules provide that:

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

16. The power vested in the court to set aside the orders for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules.

17. It follows from the foregoing, that the court is empowered to set aside an order of dismissal of a suit for non-attendance but the discretion of the court, and like all other discretions, must be exercised fairly and in a way that is not going to cause injustice or unnecessary hardship to the parties. In the case of **Chemwolo v Kubede (1982-88) KAR 103**, at 1040, the Court of Appeal stated as follows :-

*"Blunder 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."*

18. I am in full agreement with the above dictum. It is important that parties be given their day in court and be heard on merits. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even 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.

19. I have considered the reasons submissions adduced in court by counsel for the Applicant and although she would want it be construed that the Respondents' application was granted for there having been no response to the same, the fact remains that she was not in court on 27<sup>th</sup> February 2018 to prosecute the Application leading to the said state of affairs.

20. The overriding objective for the courts in dispensing justice is to ensure expeditious, fair, and just proportionate and economic disposal of cases.

21. In the present case the Respondents application was for orders of enlargement of time so as to give notice of objection to the taxing officer's decision, further that the enlargement of time do operate as a stay of execution in respect of the certificate of costs issued on the 14<sup>th</sup> July 2014 until further orders of the court. When the applicant's Counsel failed to turn up in court to prosecute the said application, orders were granted as prayed.

22. I have asked myself whether failure by counsel for the Applicant to attend the superior court on 27<sup>th</sup> February 2018 and choosing instead to go before the subordinate court and there after offering no apology, constituted an excusable mistake, an act of indifference and/or was it meant to deliberately delay the cause of justice.

23. I agree that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In the present case, the Respondents herein have already given the notice of objection, dated the 1<sup>st</sup> March 2018, to the taxing officer as per the prayers they had sought in their application dated the 8<sup>th</sup> February 2018, in essence thereof I find that the present

application that seeks to set aside the orders for expansion of time to the Respondents to issues the said notice has been overtaken by events.

24. Allowing this application herein will not serve any purpose herein and I therefore proceed to dismiss it.

25. Costs be in cause.

**Dated and delivered at Nyahururu this 2<sup>nd</sup> day of July 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**