



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 689 OF 2001

AZIM SAMEJA Trading as BUSSINES 2000PLAINTIFF/APPLICANT

VERSUS

LAKHAMSHI VIRPAL SHAL

KAMLABEN LAKHAMSHI SHAH

ASHOKKURMAR LAMKAHAMSHI SHAH

HARSHA LAKHAMSHI SHAH

PRITMALAKHA SHAH

Trading as HIGH PARK INVESTMENTS....DEFENDANTS/RESPONDENTS

RULING

There is a judgment in favour of the plaintiff delivered on 6th April, 2016 and reviewed on 28th July, 2016. The plaintiff was heard in the absence of the defendants who did not participate in the trial notwithstanding service upon their advocates who were on record. In essence therefore, the judgment on record was arrived at ex parte.

There is now before me an application dated 24th June, 2016 on behalf of the defendants by way of Notice of Motion under Order 12 Rule 7 of the Civil Procedure Rules, that the judgment dated 6th April, 2016 be set aside and the suit be re-admitted for immediate hearing on priority basis. The grounds upon which the application is based are set out on the face of the application alongside two affidavits sworn by Pritmalakha Shah the 6th defendant and Titus Ochich Advocate respectively.

The application is opposed and both counsel have filed submissions and cited some authorities. The applicant's case is that they were not aware of the proceedings leading to the contested judgment, because neither they nor their advocates on record were notified of the hearing of the suit.

On the other hand, it is the case of the plaintiff that the advocates on record for the defendants were duly served with hearing notices and having failed to present the defendants or appear during the trial should not be held against the plaintiff.

The defendants allege that they instructed the firm of Ochich TLO & Associates to represent them in place of the previous advocate by the name E. Kamuyu & Co. Advocates. The said advocates are said to have filed a Notice of Change of Advocate on 14th January, 2015 and took over the conduct of the case

on behalf of the defendants.

Order 9 Rule 5 of the Civil Procedure Rules reads as follows,

“ A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Order 9 Rule 6 provides as follows,

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

I have seen the Notice of Change of Advocates said to have been filed by Messrs Ochich TLO & Associates. It is dated 14th January, 2015 and there is what appears to be the court stamp of the same date. It is conceded that the said notice was not in the court file but counsel for the defendants also says he is surprised because his firm duly filed the said notice, paid for the same and instructed their clerk to serve all the parties.

One of the copies of that notice now annexed to the supporting affidavit of Mr. Ochich bears the stamp of Kamuyu EW Advocate but not of the plaintiff's advocate. If Mr. Kamuyu was served, the advocates of the plaintiff was not. On reading the material before me in support of the application, as it is my duty so to do, I decided to examine the stamp said to belong to the court and compare the same with previous stamps endorsed on the documents in this file.

Upon examination, and comparing the stamp on the Notice of Change of Advocates to the other court stamps of this Division I noticed some marked differences which led me to consult a member of staff in this Division.

At the risk of entering the arena of conflict, but compelled by the need to do justice to the parties herein, I asked the member of staff one Eric to assist in determining whether or not the two stamps serve the same purpose, of receipt of documents, in the registry. Eric did not have to look at the stamp on the Notice of Change of Advocates twice to declare that it did not belong to the High Court of Kenya and in particular the Civil Division of Milimani Law Courts.

Both Eric and I are not document examiners, however, the observation casts negative aspersions against both the defendants and the advocates now representing them. That alone would mean that the defendants wish to mislead the court by upholding their assertion that they were never served with the hearing notices.

The foregoing notwithstanding, the order sought by the defendants is discretionary but it is now clear in view of what I have observed in relation to the Notice of Change of Advocates, that the defendants deserve no hearing before this court. I am persuaded to hold that the firm of Messrs Kamuyu and Co Advocates was all along on the record, that they were served with hearing notices, that they elected not to appear and that the proceedings leading to the judgment were proper by all standards.

The discretion of the court is intended to be exercised to avoid injustice and hardship resulting from accident or excusable mistake, but not designed to assist any person who has deliberately sought by evasion or otherwise to obstruct or delay the cause of justice – see **Shah Vs. Mbogo (1967) EA 116, Yamko Yadpal Industries Limited Vs. Kalka Flower Limited (2013) Eklr.**

The plaint herein was filed on 27th April, 2001 and amended on 13th November, 2003. This matter has remained undetermined for about 15 years now. One cannot avoid concluding that the defendants have all along been determined to delay this matter to the detriment of the plaintiff.

The judgment in my view followed a proper hearing after service upon the advocate for the defendants on record, but who decided not to attend the proceedings. The order sought cannot be granted without resultant injustice on the part of the plaintiff. I have come to the conclusion that the application is devoid of merit and therefore dismissed with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 14th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE