



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 404 OF 2016

PETER WAHOME KAMWENGA.....PLAINTIFF

-VS-

THOMAS AMANI KALAMA.....1ST DEFENDANT

HENRY PAUL MAGANGA.....2ND DEFENDANT

RULING

1. The application for determination is the notice of motion dated 16th October, 2019 in which the 1st defendant/applicant is seeking to have the proceedings of 23rd September, 2019 and the consequent orders closing the plaintiff's and the defendants' cases set aside and the suit to be reinstated for hearing de novo. In the alternative, the applicant wants those proceedings set aside and the applicant to be allowed to cross-examine the plaintiff and the 2nd defendant. The application is brought under Section 1A, 1B, 3A and 63 (e) of the civil procedure act, and order 12 rule 7 and Order 51 Rule 1 of the Civil Procedure Rules.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Kongere Billy the applicant's counsel sworn on 16th October, 2019. The main ground and reason advanced by the applicant's counsel is that though he was informed of the hearing date of 23rd September 2019, he inadvertently failed to diarize the hearing date in his diary and therefore failed to attend court on the hearing date as scheduled. Mr. Kongere has deposed that he was in Nairobi for other official matters from 2nd to 23rd September 2019 and would therefore not have stumbled upon the matter while perusing the cause list as he usually does. He has annexed copies of his air ticket, boarding pass for 2nd September, 2019 and a letter dated 5th September, 2019 intimating his absence from 2nd September 2019. He stated that he only became aware of the matter on 15th October, 2019 when Jane Kagu Advocate on whose behalf he was conducting the matter, was served with a mention notice on 15th October, 2019.

3. The applicant contends that the application for setting aside was presented without undue delay and that he has always been ready, able and willing to prosecute the suit save for the single mistake of his advocates on 23rd September, 2019. The applicant states that in fact, he has been the one fixing the matter and serving the other parties with mention and hearing notices. The applicant's counsel averred that his non-attendance on 23rd September, 2019 was an oversight, an honest mistake and was not in any way meant to delay the course of justice or to abuse the court process, adding that the mistake is excusable. The applicant's counsel states that it is in the interests of justice that the application herein be allowed to give the 1st defendant. An opportunity to have his case heard on merits and to cross examine the plaintiff and the 2nd defendant.

4. The applicant's counsel submitted that the court should exercise its discretion to remedy the situation by allowing the application. Counsel submitted that in exercising that discretion, the court is required to consider the explanation given for the default and whether justice can still be achieved despite the default or whether prejudice will be suffered by setting aside the proceedings. The applicant's counsel relied on the case of **Philip Keipto Chemwolo & Another –v- Augustine Kubende (1986)JKLR** and **Republic 3 Others –v- Joseph Mburu Gitau & 635 Others (2015)JKLR**.

5. In opposing the application, the plaintiff filed a replying affidavit sworn by Peter Wahome Kamwenga on 12th November, 2019. The plaintiff has deposed that the advocate for the 1st defendant has not exhibited the page of his diary showing that indeed he did not diarize the date as he claims. That the actions of the 1st defendant's advocate cannot be termed as an innocent mistake but pure carelessness. The plaintiff avers that the matter has proceeded to conclusion and that he has filed his written submission and that the application is an abuse of the court's process to unwind the wheels of justice and to continue to delay the hearing of the suit. It is the contention of the plaintiff that the actions of the 1st defendant's advocate of failing to diarize and attend court is not excusable and prayed that the application be dismissed for lacking in merit. The plaintiff pointed out that he 2nd defendant has since passed on.

6. Counsel for the plaintiff submitted that the application is a waste of judicial time as what is left in the matter is the delivery of judgment in the suit. Counsel further submitted that the 1st defendant has not specifically prayed to the court to be allowed to open proceedings which were closed and to be allowed to give evidence in support of his case. The plaintiff's counsel further submitted that the proceedings in respect of the 2nd defendant cannot be opened at this juncture since the 2nd defendant has passed on and cannot now participate in the proceedings. He submitted that the application has no merit and the same ought to be dismissed.

7. I have considered the applicaitn, the affidavits in support and against as well as the submissions made. This suit was before court on 21st March 2019 when Mr. Okanga advocate appeared for the plaintiff and Mr. Mugambi advocate was present holding brief for Mr. Kongere for the 1st defendant. The 2nd defendant was not in attendance. The matter was then fixed for hearing on 23rd September 2019 when only the plaintiff and 2nd defendant attended. There was no appearance on the part of the 1st defendant. Nonetheless, the suit proceeded because the date was taken in the presence of the Mr. Mugambi who was holding brief for Mr. Kongere for 1st defendant.

8. In the affidavit in support of the application, the 1st defendant's counsel has explained why he did not attend court on the material day. He states that he forgot to diarize the matter for that day. I have perused the court record and note that the advocate for the 1st defendant always attended court save for the material date. The principle guiding the setting aside ex-parte orders are trite that the court has wide powers to set aside such ex-parte orders save that where the discretion is exercised, the court will do so on terms that are just.

9. In the case of **Shah –v- Mbogo (1967)EA 116**, it was stated:

“This discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

10. In this matter, I note that the court is yet to write judgment as the applicaitn herein was filed on 16th October, 2019 when the matter was for mention to confirm filing of submissions. Although the plaintiff has already filed his submissions, from the material before court, I am satisfied that the failure to attend court on the part of the 1st defendant and his advocate was not intentional or deliberate. In my view, the failure to attend court has sufficiently been explained and the same is excusable. No doubt, the overriding objective of the court would also come to the aid of the 1st defendant. The plaintiff has not demonstrated that he will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear all parties and determine the case on merit.

11. In the result, I find merit in the application dated 16th October, 2019 and the same is allowed. The orders closing the plaintiff's and the defendants' respective cases are set aside and the 1st defendant is allowed to cross-examine the witnesses and to tender his evidence in the matters. The 1st defendant will pay thrown away costs to the plaintiff.

12. Orders accordingly.

Dated, signed and delivered electronically by email due to COVID-19 Pandemic at Mombasa this 30th day of July 2020

C.K.YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE