



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 241 OF 2017**

**PETER MWENDWA MALONZA**

***t/a MALONZA & CO. ADVOCATES.....PLAINTIFF/RESPONDENT***

**VERSUS**

**STEPHEN NZUKI MWANIA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JAMES NJOROGE MURIGI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOHN MUTUKU MUIINDE.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**AGNES NJERI GICHUKI.....4<sup>TH</sup> DEFENDANT/APPLICANT**

***(Sued as trustees of Mlolongo Brothers Association)***

**RULING**

1. In the Notice of Motion dated 30<sup>th</sup> October, 2019, the Applicants have sought for the following orders:

- a) That this Honourable Court's Order dated 17<sup>th</sup> September, 2019 closing the Defence case and dismissing the Defendants' Counter-Claim with costs be set aside.***
- b) That the Defendants be allowed to prosecute their Defence and Counter-claim herein against the Plaintiff.***
- c) That the Defendants be allowed to cross-examine the Plaintiff on the evidence adduced by him herein.***
- d) That costs of this Application be provided for.***
- e) Any other order that this Honourable Court may deem fit and just to grant.***

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Defendant who deponed that him and his Co-Defendants/Applicants have a Defence and Counter-claim on record; that the Defendants were all along represented by the law firm of Wamahiu Kimeria & Company Advocates and that on 6<sup>th</sup> February, 2019, this suit was certified ready for hearing.

3. It was deponed by the 2<sup>nd</sup> Defendant that this suit was on 28<sup>th</sup> February, 2019 fixed for hearing on 17<sup>th</sup> September, 2019; that the Applicants were not notified of the said hearing date by their advocates and did not attend court on 17<sup>th</sup> September, 2019 for hearing and that on 23<sup>rd</sup> October, 2019, he visited the court registry and was informed what transpired in court on 17<sup>th</sup> September, 2019.

4. It was deponed that on 28<sup>th</sup> October, 2019, the law firm of Nzei & Company Advocates took over the conduct of the matter on behalf of the Defendants and that the record shows that their former Advocate, Wamahiu Kimeria, arrived in court at 10:35a.m on 17<sup>th</sup> September, 2019 after the Plaintiff had testified and closed his case, and after the Defendants' case had been closed and their Counter-claim dismissed with costs.

5. The 2<sup>nd</sup> Defendant deponed that the Defendants should not be punished or made to suffer because of the errors, omissions or mistakes of their said former Advocate; that they have a good Defence and Counter-claim on record and that the Defence and Counter-claim raises triable issues.

6. The Application was opposed by the Plaintiff/Respondent who deponed that the Defendants were served with a hearing notice; that their advocate attended court on the date of the hearing albeit late; that the Defendants' action of changing lawyers was aimed at dragging the matter and that the Defendants owe him legal fees claimed hence their Counter-claim was intended to delay settlement of the said fees.

7. Vide a Further Affidavit deponed by James Njoroge Murigi on 28<sup>th</sup> February, 2020, it was averred that the Plaintiff, who is an advocate, made a claim for payment of legal fees and yet no advocate/client bill of costs had been filed and taxed and that the suit was filed in contravention of the Advocates Act and Rules.

8. The Application was canvassed vide written submissions. Learned counsel for the Applicants cited the provisions of Order 12 Rule 2 of the Civil Procedure Rules which provides as follows:

*“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.*

*b) that notice of hearing was not duly served, it shall direct a second notice to be served.*

*c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.”*

9. It was submitted by counsel that under the Advocates Act and the Advocates Remuneration Order, when an Advocate disagrees with his client on the fees payable to him over any business undertaken by the advocate on behalf of his client, whether that business is contentious or non-contentious, the Advocate shall file in the High Court a bill (*Advocate/client bill of costs*) for taxation of the advocates' costs.

10. Counsel cited Rule 10 of the Advocates Remuneration Order that provides:

*“The taxing officer for the taxation of bills under this order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under schedule IV, the taxing officer shall be the registrar of trademarks or any deputy or assistant registrar of trademarks.”*

11. It was submitted that there is a dispute between the parties herein regarding the amount of legal fees payable to an Advocate, which dispute is one that ought to have been filed in the High Court for taxation of an Advocate/Client Bill of Costs by the Taxing Officer. It was submitted further that this court, the Environment and Land Court, has no Jurisdiction to entertain the present suit.

12. Learned counsel submitted that this court's power to set aside ex-parte and/or default Judgements is discretionary in terms of Order 12 Rule 7 of the Civil Procedure Rules and that the Defendants/Applicants have shown sufficient cause why they did not attend court on 17<sup>th</sup> September, 2019, and why the orders made ex-parte on the said date (*17<sup>th</sup> September, 2019*) should be set aside as prayed in the Application herein.

13. The Defendants' advocate cited the case of *Savings & Loan Kenya Limited vs. Onyancha Bwomote [2014] e KLR*, where the Court of Appeal rendered itself as follows:

*“As for sufficient cause, in our view, sufficient cause means no more than reason enough that explains or excuses the applicant's default....It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”*

14. According to counsel, the Applicants had demonstrated that the suit and counter-claim herein raise weighty matters of both law and fact which can only be determined upon inter-partes hearing of the suit.

15. In response, counsel for the Respondent submitted that the Applicants alleged Defence and Counter-claim is a sham and has no evidential value; that the said Defence and counter claim is only meant to frustrate the Plaintiff's case; that the Plaintiff indeed filed a bill of costs for taxation against the Applicants being HCMA 139 of 2017 in Machakos and that the same was stayed pending the hearing and determining of this suit.

16. The Plaintiff submitted that the existence of the bill of costs is admitted by the Applicants in paragraph 7(b) of the witness statement of the 2<sup>nd</sup> Defendant filed in court on the 5<sup>th</sup> December, 2018; that the court should exercise its powers to avoid causing injustice to an innocent party and that counsel for the Applicants willingly failed to attend court to defend their interests despite having been served.

17. The only issue for determination is whether the court may exercise discretion in favour of the Applicants and set aside the order of 17<sup>th</sup> September, 2019.

18. The Defendants are seeking for an order setting aside the orders of this court of 17<sup>th</sup> September, 2019. In the Application, the Defendants want to be allowed to prosecute their Defence and counter claim and cross examine the Plaintiff.

19. While addressing the issues raised in the Application, I associate myself with the dictum in the case of *Standard Chartered Financial*

*Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited) & 2 Others [2016] eKLR* where the Court stated as follows:

“... this Court is clothed with residual jurisdiction to re-open and rehear a concluded matter where the interest of justice demands but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation.”

20. In the case of *James Kanyita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR*, the court observed that

“The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664*, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

21. In the cases of *Shanti vs. Handocha (1973) EA 207*, *Essaji v Solanki (1968) EA 218*, *Mugo vs. Wanjiru (1970) EA 481* as well as the Ugandan Supreme Court case of *Attorney General vs. Oriental Construction Limited (1991) UGSC 15*, a number of principles were established that would come to the aid of this court in exercising discretion in favour of the Applicants;

22. First, the Applicants must show sufficient reason which relates to the inability or failure to take some particular step within the prescribed time. The general requirement notwithstanding, each case must be decided on its own facts. (see *Mugo vs. Wanjiru (Supra)*).

23. Secondly, the administration of justice normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights. (see *Essaji vs. Solanki (supra)*).

24. Thirdly, where an Applicant instructs a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirement of the law and lastly, a vigilant Applicant should not be penalized for the fault of his counsel on whose actions he has no control.

25. The record shows that despite the Plaintiff's and the Defendants' representatives having fixed this matter in the registry on 28<sup>th</sup> February, 2019, when the matter came up for hearing on 17<sup>th</sup> September, 2019, neither the Defendants nor their advocate was in court.

26. Indeed, it was only after the Plaintiff had testified and closed his case that the Defendants' advocate entered the court room and informed the court that he had been involved in a road accident while on his way to Machakos.

27. The fact that the Defendants' advocate addressed the court a few minutes after the Plaintiff had testified and closed his case is an indication that the Defendants' advocate was absent while the Plaintiff testified for a good course.

28. Indeed, it is unlikely that the Defendants' advocate lied to the court when he informed the court that he had been involved in an accident on his way to court. Having made an effort to attend court, albeit a few minutes late, it is my finding that the said inadvertence or delay was not inordinate and has been explained.

29. As was held in *Essaji vs. Solanki (supra)*, the administration of justice normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights.

30. Having arrived at a finding that the absence of the Defendants' advocate when the Plaintiff's evidence was taken was not deliberate, I shall exercise my discretion in favour of the Defendants.

31. For those reasons, I allow the Defendants' Application dated 30<sup>th</sup> October, 2019 as follows:

**a) The Order of this court of 17<sup>th</sup> September, 2019 closing the Defence case and dismissing the Defendants' Counter-Claim with costs be and is hereby set aside.**

**b) The Defendants be and are hereby allowed to prosecute their Defence and Counter-claim against the Plaintiff.**

**c) The Defendants be and are hereby allowed to cross-examine the Plaintiff on the evidence adduced by him herein.**

**d) Each party to cater for his/her own costs.**

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020.

O. A. ANGOTE

JUDGE