REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 432 OF 1997

JOHN ONGWANO NYAWAYA.....PLAINTIFF

VERSUS

JOSEPH OWALA.....1ST DEFENDANT
STEPHEN OCHIENG AMOKE.....2ND DEFENDANT

RULING

By a Notice of Motion dated and filed on 18th July 2011, the Applicant, Joseph Owala (1st Defendant in this suit) sought the following orders -
That this honourable court be pleased to certify that this application as urgent and the same be heard ex parte in the first instance.

That this honourable court be pleased to grant leave to M/s B. O. Akang\'o Advocates to take over the conduct of this matter from M/s Kimatta & Co. Advocates for the first defendant/applicant.

That this honourable court be pleased to stay execution of the warrant of arrest issued in this matter against the applicant on 28th October 2010 pending hearing and determination of this application inter partes.

That this honourable court be pleased to review and set aside the order of Justice Muga Apondi issued 21st January 2005.

That cost of this application be provided for and the same be borne by the plaintiff.

Orders 1, 2 and 3 were granted on 15th July 2011. This Ruling therefore concerns prayers 4 and 5 of the Motion. However before, I consider those orders, I will deal with the Respondent\'s contention in the Replying Affidavit worn on 5th August 2011 and filed on 8th August 2011 that this court cannot sit on appeal on this matter as it is functus officio and this court therefore does not have the jurisdiction to deal with this matter through appeal, review or setting aside.

The Application for review herein is brought under Order 45 Rules 1, 2(2) of the Civil Procedure Rules. These rules expressly allow for an application for review to the court which passed the judgment order or decree. If the judge who passed the decree is no longer at the station, then the Judge then at the station has the jurisdiction to review the judgment, order or decree. That is the clear language of Order 45, rule 4(1) and (2) of the Civil Procedure Rules 2010. This court has the necessary jurisdiction, and the only question is how and whether it should be exercised if at all.

The conditions upon a judgment, order or decree may be reviewed are set out in order 45 rule (1)(1) of the Civil Procedure Rules. These conditions are -
discovery of new and important evidence which with due exercise of diligence, could not have been availed by the Applicant;

a mistake or error of law on the face of the record;
any other sufficient cause.

In addition to the Supporting and Replying Affidavit of the Applicant and the Respondent respectively, counsel for the respective parties also filed written submissions with supporting authorities on the principles which a court of law will apply in exercise of its jurisdiction to review and vary or set aside a judgment order, or decree of court. These principles hold that an applicant must strictly prove the grounds for review, except review on the grounds of mistake or error apparent of the record, failing which the application will not be granted.

From the written submissions and arguments advanced for the Applicant, I find no new or important

evidence which with the exercise of due diligence, when the orders were made, the Applicant would not have known or availed. A Hearing Notice dated 1st March 2004 was served upon the Applicant by Registered Post at his last known address to the Respondents Advocates. There was no "Return To Sender" of the Hearing Notice. It means he was duly served.

From the record also, it is clear that the firm of Kimatta & Co. Advocates continued to be on record for the Applicant until the 18th July 2011 when by their consent the firm of Akang\'o & Co. Advocates took over the brief. So the Applicant has had counsel , but chose to keep away. As a result when said counsel appeared before court on 23rd September 2003 he informed the Judge that they were previously acting for the Defendants on instructions of their Insurers, Stallion Insurance Co. Ltd which had been placed under receivership, and that the receiver had yet to give their instructions.

On that date court noted granted Mr. Kimatta time to withdraw formally, and the plaintiff to serve the Defendant directly.

The Plaintiff\'s counsel\'s office consequently took ex parte, on 8th March 2004, a Hearing Date for 8th November 2004, and as noted above, the Applicant was served by way of Registered Post. According to the court records of the matter came up for hearing not on 8th November 2004, but 8th October 2004, in other words the hearing date was brought forward by one month. The Defendant was recorded as present.

At 11.30 a.m. both Mrs Odhiambo, and Mr. Kimatta were marked as present, but only Mrs Odhiambo made submissions.

In her submissions, Mrs Odhiambo informed the court it was a condition of the consent order setting aside the judgment delivered on 29th January 1999, that the Defendant would file his defence within 15 days. The Defence was duly filed, but the thrown away costs of Ksh 10,000/= remain unpaid to date. Counsel consequently asked the court to adopt the judgment of 29th January 1999 which had been set aside.

The Applicant\'s case therefore is, that there was mistake and error on the face of the record. The alleged error is the order of adoption by the learned judge of a previous judgment which judgment had been set aside by consent.

Mr. Akango\'s argument is that an order of consent is like a contract between parties and can only be set aside on the same principles upon which a contract may be set aside, such as fraud, mistake or misrepresentation. Counsel relied upon the case of FLORA WASIKE VS. DESTIMO WAMBOKO [1982-88] 1 KAR 266.

Counsel argued that the judgment of the previous learned judge having been set aside, there was no more judgment to be adopted by the successor judge. Such an order would therefore be a nullity, as nothing can come, except the "universe". Such an order should therefore be set aside on the basis of being an error on the face of the record.

On his part, Mr. Kipkoech learned counsel for the Plaintiff/Respondent, urged to the contrary, that there was no question of setting aside of a consent judgment. The question was one of setting aside, an ex parte judgment, entered in the form, or terms of the judgment previously set aside by consent.

To support his argument counsel referred to several authorities CMC HOLDINGS LTD VS. NZIOKI [2004] K.L.R. -

"that where an application before a Court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reason and judiciously."

In the earlier case of MAINA VS. MUGIRIA [1983] KLR 78, the Court of Appeal laid down the principles upon which the court may set aside an ex parte judgment -

(a) firstly, there are no limits or restrictions on the judge\'s discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing, except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties;

(b) secondly, this discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice – (SHAH VS. MBOGO [1967] E.A. 116 and SHABIR DIN VS. RAM PARKASH ANAND (1955) 22 E.A.C.A. 48).

In this case, the Applicant\'s main contention is that the Judgment of the previous judge having been set aside by consent, there was no judgment which the successor judge or court could adopt. On this submission, I entirely agree with the Applicant\'s counsel. The question however is what did counsel for the plaintiff mean when she asked the court to "adopt the judgment" previously set aside by consent?

Without straining language, and keeping within the narrow path. I think, counsel merely meant to say, "look here Judge, there was a judgment here before. It was given following the plaintiff\'s evidence. The Defendant never gave any evidence. He never attended court. The Plaintiff is entitled to a judgment like that given by your predecessor judge, give judgment in those terms."

Viewed from that aspect, and with respect to the Applicant\'s counsel, that, I think, is not saying "set aside that consent judgment."

In the premises therefore I do not think that principles of setting aside a consent judgment are applicable in this instance. The question therefore is whether there are any valid grounds for setting aside, what is essentially, a judgment in default of attendance on the hearing date by the Defendant.

Under the provisions of Order 12, rule (2) & (4) of the Civil Procedure Rules, the court may proceed ex parte where it is satisfied that the Hearing Notice was duly served, and make such order as may be just. That is what the court did in this case.

That judgment may under rule 7 of the said order be set aside or varied upon such terms as are just.

This is a matter of 1997. Judgment was given after formal proof was set aside by consent. The Applicant filed a defence. The plaintiff took a Hearing Date ex parte. It served the Defendant/Applicant by Registered Post. The Hearing Notice was not Returned to Sender. It was deemed served. After Judgment was entered, the Applicant was served with Notice to Show Cause Why Execution Should Not under Order XXI, rule 19, of the Civil Procedure Rules (then) (now Order 22 rule 18 of the Civil Procedure rules 2010). He ignored that Notice to Show Cause. He only answered to the Warrant of Arrest.

In addition, the discretion conferred upon the court by Order 12, rule 7 is not designed to assist any litigant or person who has deliberately sought, whether evasion or otherwise, to obstruct or delay the cause of justice.

I agree with the averments in paragraphs 13 – 14 and 25 that -
the conduct of the applicant is not only meant to, but is also an abuse of the court process, (para 13),

the applicant has not explained the inertia and lethargy coupled with an inordinate delay attendant to the bringing of this Application, (para 14), and

the Applicant judgment debtor is trivializing the court process and the fruits of judgment which the Respondent should be enjoying.

For those reasons, I find no merit in the Applicant\'s Notice of Motion dated 1st July 2011. It is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Nakuru this 6th day of July 2012

J. ANYARA EMUKULE
JUDGE