REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 610 of 2004

LEONARD NJOROGE KARIUKI ……..……..PLAINTIFF

VERSUS

FUELEX KENYA LIMITED …....…..……....……DEFENDANT

RULING

Before me is an application by the plaintiff dated 19th April, 2012 made under Order 12 Rule 7 for the setting aside of the order made on 9th February, 2012 dismissing the suit and reinstating the same for hearing on merit. The application also seeks to set aside the judgment entered herein on 7th March, 2012(sic).

The application was supported by the Affidavit of the Plaintiff sworn on 19th April, 2012. The Plaintiff contended that his erstwhile Advocates, Ms Kewengu and Company did not inform him of the hearing date of 9th February, 2012, that the said Advocates had informed him in January, 2012 that this case did not have a date, that he was only advised of the dismissal by a call by the said Advocates in the evening of 10/2/2012.

The Plaintiff contended that he has been following up this case and has been attending court since he filed the suit save for the 9th February, 2012, that he has always been ready in this case. The Plaintiff indicated that by an Affidavit sworn by one Nicholas Kanyeke on 8.5.2006 the amount he owed was Kshs.13,551,252/- less Kshs.5,500,000/- yet the amount claimed in the counterclaim for which judgment was entered is more, that he needs accounts to be taken and that he needed to put his side of the argument.

Mr. Kioko, learned Counsel for the Plaintiff submitted that the main issue in this case is the question of accounts and that the Plaintiff needed to be afforded an opportunity of being heard. Counsel urged the court to allow the application on just terms.

Mrs. Shaw, learned Counsel for the Defendant opposed the application relying on the pleadings on record. She contended that in paragraph (c) of the Plaint the Plaintiff had offered to pay Kshs.100,000/- per month to settle the reconciled figure, that from the proceedings of 9/2/12 the averments of the Plaintiff were not what Counsel then on record told the court, that the Plaintiff has been frustrating the suit from the first day, and that there was no material produced to warrant the court to exercise its discretion in favour of the Plaintiff. Counsel urged the court to dismiss the suit.

I have carefully considered the application, Affidavits on record and submissions of Counsel.

This is an application to set aside an order made pursuant to Order 12 Rule 3 as well as judgment entered on the Defendant's counterclaim. The principles applicable in applications under Order 12 Rule 7 are well known. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & others –vs- David Njeru Karingi CA No. 181 of 1994 (UR)** the Court of Appeal held:-

"In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

……..

However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice." (Emphasis mine)

From the foregoing, it is clear that in considering the present application the court has a wide discretion which however has to be exercised on the basis of the evidence and sound legal principles. That this court has to exercise its discretion in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.

I have considered the reasons advanced for the Plaintiff's non-attendance on 9th February, 2012. That his former Advocates did not advise him of the hearing date and that he was not within Nairobi on the material day. The order sought to be impugned was made on 9th February, 2012, the Plaintiff was advised of this fact on the evening of 10/2/12, judgment on the counterclaim was entered on 6th March, 2012, the present application was filed on 23rd April, 2012 over two months from the date the order was made and the Plaintiff was told of the same and over 6 weeks after the judgment was entered. That in my view is in-ordinate delay. A litigant who approaches the court to exercise its discretion under Order 12 Rule 7 to set aside an order under Rule 3 of that order must make such an application expeditiously as a sign of bona fides. In this case, two months is too long a period for the court to consider exercising its discretion in favour of the Plaintiff. The delay in making the application fits well with Mrs. Shaw's complaint that the Plaintiff has been frustrating the suit for a long time and that this application may be one of such tactics.

I have considered the Plaintiff's assertion that he was not informed by his previous Advocates of the hearing date of 9th February, 2012. My view is the Plaintiff should have produced an affidavit by his said former Advocate explaining what is asserted by the Plaintiff in his Supporting Affidavit. Failure to do so does not reflect well on the Plaintiff.

Be that as it may, I am alive to the fact that the Plaintiff was condemned unheard though lawfully, I am also alive to the fact that a litigant should not be punished for the mistakes of his Advocate. Taking all the circumstances of this case into consideration, I am inclined to allow the application in order to give the applicant an opportunity to put his case across. Having in mind that the Plaintiff's contention is accounts I will allow the application, set aside the order of 9/2/12 dismissing the suit and also set aside the judgment of 6/3/12 on the condition that the Plaintiff does deposit in an interest bearing account in the joint names of the Advocates in this matter a sum of Kshs.16,711,590/- within 14 days of the date hereof. I am alive that the judgment was for Kshs.24,053,472/-, but for the interests of justice I ordered for the sum of Kshs.16,711,590/- because that sum does not seem to be so much contested if one takes into consideration the Prayer No. C in the Plaint. I have also been guided by the Court of Appeal's pronouncement in the case of **E. Muiru Kamau and Another –vs- National Bank of Kenya Ltd (2009) e KLR,** observed as

under:-

"The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing." (Emphasis supplied)

If the said sum of Kshs.16,711,590/- is not deposited within the 14 days ordered, the application shall stand dismissed with costs and the order of 9/2/12 and judgment of 6/3/12 shall be reinstated without any further order whatsoever. I award the costs of the application to the Defendant in any event.

Orders accordingly.

DATED and Delivered at Nairobi this 6th day of July, 2012.

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A. MABEYA
JUDGE