



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Civil Case 49 of 2010

KILONZO & CO. ADVOCATES.....PLAINTIFF

VERSUS

HON JOHN NJENGA MUTUTHO.....DEFENDANT

RULING

By his Notice of Motion dated 11th June 2010 expressed to be brought under the provisions of Order IXA Rule 10 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the defendant seeks the following orders:

- 1. That service of this application be dispensed with in the 1st instance and the same be heard on priority basis.**
- 2. That pending the interparties hearing of this application this honourable court be pleased to stay the execution of the decree and/or judgment herein and all other consequential orders.**
- 3. That this honourable court be pleased to set aside the ex-parte judgment and decree herein and all consequential orders and the defendants be granted leave to file defence.**
- 4. That cost of this application be provided for.**

The application is grounded on the fact that the defendant has an arguable defence with overwhelming chances of success; that the failure to file the defence was a mistake of the counsel not attributable to client who is otherwise innocent; that the plaintiffs are guilty of material non-disclosure; and that it is only fair in the wider interest of justice that the orders sought be granted.

The application is supported by an affidavit sworn by **Solomon Ngetich**, the defendant's advocate on 11th June 2010. According to the said affidavit, the plaintiff acted for the defendant in Nakuru High Court Election No. 2 of 2008 consequent to which the plaintiff filed their bill in Nakuru Miscellaneous Cause No. 204 of 2009, which bill was, on 16th November 2006, according to the deponent taxed ex parte due to lack of notice in the sum of Kshs. 5,253,632.50 and not the sum of Kshs. 5,253,636.50 claimed in the plaint herein. Since by the time the defendant became aware of the said decision the time for lodging the objection thereto had run out, the defendant applied for enlargement of time to do so and by a ruling delivered on 31st March 2010, the Defendant was granted leave so to do. However, as the Taxing Officer failed to supply the reasons for the said taxation, the defendant applied for the striking out of the ruling on taxation which application was still pending on 14th October 2010 though an interim order of stay of

execution was secured. According to the defendant therefore the orders which form the basis of this suit have been stayed which stay was in place as at the time of the institution of these proceedings rendering these proceedings premature. Although instructed by the defendant to appear and defend, it is deposed that due to an inadvertence and/or mistake of the defendant's advocates, only appearance was entered but defence though prepared was not filed and this only came to the knowledge of the defendant's advocates after the learning of the ex parte judgement herein. As the defendant has a strong defence, the deponent avers, it is only fair that he be afforded a chance of being heard since the failure to file the defence was not contributed to by the defendant and hence it would be an injustice if he should suffer. It is further the defendant's position that he was neither served with the notice of entry of judgement nor the decree for approval.

The plaintiffs, in opposition to the application filed a replying affidavit sworn by **Mutula Kilonzo Junior**, the plaintiff's Managing Partner on 6th July 2012. According to him on 5th July 2012 at 4.39 am they were served with certificate of urgency and the subject application. According to the deponent the sequence of events is demonstrated in his affidavit sworn in the said Miscellaneous Cause No. 204 of 2009 a copy which he exhibited. On 2nd December 2009, the plaintiff obtained a certificate of costs against the Defendant for a sum of Kshs. 5,253,632.50 and filed the present suit on 4th February 2010. Although an appearance was entered, no defence was filed within the time required by law prompting the plaintiff to request for judgement which gave rise to the decree on 12th April 2010. This was followed with a notice of judgement which, according to the deponent, was delivered to the defendant's office at Parliament building on 17th May 2010. Subsequently, warrants of attachment were issued. In the meantime the defendant made the application dated 10th December 2009 which led to the ruling dated 31st March 2010. The defendant also secured, vide an application dated 17th May 2010, an order for stay of execution of the ruling on taxation dated 16th November 2009. However, no action was taken pursuant to the said order prompting the plaintiff to fix the application in Miscellaneous Cause No. 204 of 2009 for hearing on 29th February 2010 which application was argued and ruling delivered on 4th May 2012. The defendant, being aggrieved by the said ruling, filed a Notice of Appeal dated 11th May 2012. According to the plaintiff, therefore, the defendant has all along been aware of the decree in this matter but no steps were taken after he was notified of the judgement more than 26 months since. The defendant has, however, after the entry of the judgement paid Kshs. 300,000.00 on 26th October 2010 in partial satisfaction of the said decree. This application, according to the plaintiff, is another attempt to delay the fruits of the plaintiff's judgement. The plaintiff contends that it is the notice to show cause given to the defendant following the dismissal of the said application that has triggered the present application. According to the deponent no explanation has been offered why the defendant was not filed and why it took 26 months to realise that the defence was not filed a clear manifestation that the delay in taking any action in this matter is deliberate and inexcusable, conduct which equity does not assist. The filing of this application after the dismissal of the previous one is, according to the deponent, an abuse of the Court Process and such mischievous conduct ought not to be countenanced by the court. Since the matter involves an advocate/client Bill of Costs which was taxed and the process completed, it is the deponent's view that the certificate of costs cannot be challenged in this suit, hence the defendant has no valid defence which renders the application frivolous, unmerited and for dismissal.

The defendant filed a supplementary affidavit sworn by his advocate **Gordon Ogola**, on 25th July 2012. In the said affidavit, it is deposed that on information received from the defendant, the latter had by 16th October 2008 paid a total of Kshs. 2,970,000.00 and exhibited a list of payments, acknowledgement notes and receipts. Since the basis of this suit was the certificate of costs which was, with the plaintiff's knowledge, under challenge at the time of the institution of this suit the deponent reiterates that the procedures for objection under the Advocates Remuneration Order were yet to be exhausted. Subsequent to the filing of the Notice of Appeal, it is deposed that the defendant has now sought and obtained a stay of execution. Accordingly, it is clear that the question of how much the plaintiff is entitled to, has not yet fully been determined.

In response to the supplementary affidavit, **Mutula Kilonzo Junior** swore an affidavit entitled "Replying Affidavit" on 27th July 2012 in which he deposed that the issue of payment having not been raised before

the taxing officer has been overtaken by events. With respect to the Kshs. 750,000.000 paid on 6th May 2008, it is deposed that the same was payment in respect of stay of execution of an application in the Court of Appeal. It is further deposed that the defendant has with an intention to mislead the Court deliberately mixed the Advocates costs in three matters, being Civil Appeal No. 102 of 2008, Civil Application No. 108 of 2008 and Civil Application No. 88 of 2008. It is further deposed that part of the sum mentioned by the defendant was duly accounted for. According to the correspondence exchanged between the parties, it is the plaintiff's position that the defendant agreed to pay the plaintiff's costs. The mere filing of objection to a certificate of costs, it is deposed does not bar an advocate from filing a suit for recovery under the Civil Procedure Rules and in any case there were no orders staying the execution of the certificate of costs or filing of the suit. As there was no issue raised at the time of the entry of appearance, it is the deponent's view, that the issues raised are merely afterthoughts. As the issues raised in the supplementary affidavit ought to have been raised at the taxation, the defendant cannot litigate in instalments since the court has no jurisdiction to reopen the taxation.

In his submissions, **Mr. Ogola**, learned counsel for the defendant reiterated the contents of the aforesaid affidavits and added that during the pendency of the objection proceedings by the defendant to the taxation, the plaintiff proceeded to obtain a decree before the expiry of the 14 days stipulated by the Advocates Remuneration Order. Learned Counsel further submitted that there are in existence orders of stay in the said proceedings up to now pending inter partes hearing on 20th November 2012. According to learned counsel the substratum of this suit is still under challenge since the certificate of costs has been stayed. Therefore the issue of the amount payable to the plaintiff still remains undetermined and if the figures were to be reviewed the amount payable would not be the same since according to the list supplied the defendant has paid to the tune of Kshs. 2,900,000.00. According to learned counsel, there are issues which are still under dispute which this court cannot dispose of. Relying on the case of **Shah vs. Mbogo [1967] EA 116**, it is submitted that the discretion to be exercised is wide and that the delay which is 4 months is not inordinate. According to counsel there is no evidence of payment of Kshs. 300,000.00 after judgement.

On their part the plaintiffs filed written submissions and highlighted the same. In their submissions made through their learned counsel **Mr. Mutula Kilonzo Junior**, the proceedings herein arise from the taxation of the plaintiff's costs in the sum of Kshs. 5,253,636.50. Apart from reiterating the contents of the affidavits in reply to the application, it is submitted that due to the failure by the defendant to file a defence, a decree was issued together with the certificate of costs which the defendant must have been aware of since a copy of the decree is exhibited to the application dated 14th May 2010. According to counsel following an application made by the defendant in the said Miscellaneous Case, the defendant was given seven days within which to file and serve a Notice of Objection which the defendant failed to do. Upon being served with the notice of judgement the defendant went back to Nakuru and secured orders of stay of execution through the application dated 17th May 2010. As the defendant did not take any steps towards prosecuting the application dated 14th May 2010, the same was fixed for 29th February 2012 on the plaintiff's prompting and a ruling delivered on 4th May 2012 which is the subject of the defendant's Notice of Appeal dated 11th May 2012. Subsequent the entry of judgement the defendant remitted to the plaintiff a sum of Kshs. 300,000.00 on 26th October 2010

According to the plaintiff the 26 months it has taken the defendant's counsel to realise that the defence was not filed is inordinate and there is no explanation proffered for the same. Equity, it is submitted only assist the vigilant and not the indolent. Further although the present application dated 11th June 2010 was filed in June 2010 it was only served on 5th July 2012 more than 2 years without any reason. According to the plaintiff this application has been overtaken by events since the certificate of costs has been translated into a decree and is simply an attempt to scuttle the execution of the decree having failed to file the objection within time and file a defence. It is the plaintiff's submissions that there is no provision in the Civil Procedure Rules for stay of execution of certificate of costs as well as setting aside a ruling on taxation as sought in the application. In support of the submission, counsel relied on **S Musalia Mwenesi Advocates vs. Kan General Supplies Ltd & Others Misc. Application No. 56 of 2006** and **Donholm Rahisi Stores vs. East Africa Portland Cement Limited HCCC No. 18 of 2004** as well as section 48 of

the Advocates Act, Cap 16 Laws of Kenya. In view of the ruling delivered on 4th May 2012, it is submitted that the defendant cannot have a valid defence since the matter involves an Advocate/Client Bill of Costs which was taxed and the process completed in the Miscellaneous Civil Case No. 204 of 2009 and the certificate of costs issued therein cannot be challenged in this suit. On the figure in issue it is submitted that it is clear from the certificate of costs that the amount is Kshs. 5,253,636.50. On the issue of the prematurity of the suit, it is submitted that there is no provision for stay of execution of a certificate of costs or taxation. Relying on **Hasmani vs. Banque Du Congo [1938] EACA 88** and **Twentsche Overseas Trading Company Ltd vs. Bombay Garage Ltd [1958] EA 741**, it is submitted that before leave to appear and defend is granted, the applicant must show that there is a bona fide triable issue of law or fact. On the authority of **Maluku Interglobal Trade Agency Ltd vs. Bank of Uganda [1985] HCB 66**, it is submitted that though the defendant does not have to show a good defence on the merits, he should satisfy the court that there is an issue or question in dispute which ought to be tried and the court should not enter upon the trial of issues at this stage. Though the court has a wide discretion in allowing filing out of time, it is submitted that this discretion should, on the authority of **Ratman vs. Cumarasamy [1964] 3 All ER 933 at 935**, be exercised judicially having regard to the particular circumstances of each case since the rules of the court must, *prima facie*, be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion, otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation. As no good and substantial reasons have been offered to enable the court exercise its discretion, the huge delay in filing a defence which is deliberate and excusable. On the reason for failure to file the defence it is submitted that both the advocate and client ought to be vigilant and the case of **Trust Bank vs. Portway Stores [1997] LLR 1197** is cited in support of the submission that the acts or omissions of agents with actual or ostensible authority are not without consequences on their principals. Counsel further cited **Mbogo vs. Shah [1967] EA 116**; **AG vs. Theuri [1985] LLR 240**; **Ahmed vs. Highway Carriers [1986] LLR** and **Ketterman vs. Hansel Properties [1988] 1 All ER 38**, it is submitted that the discretion ought to be exercised 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 and that there may be cases in which justice will be served better by allowing the consequences of the negligence of lawyers to fall on their own heads. It is submitted that from the defendant's conduct, the application for stay of execution and filing of the defence is wishful and ought to be dismissed. It is also the plaintiff's view that in light of the ruling of **Justice Wendo**, the issues raised by the applicant are *res judicata*.

In a rejoinder, **Mr. Ogola** submitted that the sequence in the receipts issued is the same and that the letter requesting the proceedings is addressed to taxing officer and not the advocates. According to counsel extension of time was given and they were granted 14 days to deposit Kshs. 1,000,000.00 which time has not expired. Since they were engaged in the Nakuru Case, they did not serve the application. Lastly counsel submits that they were dealing not with the amount that had been paid but what was payable.

I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made and authorities cited. The first issue to note is that there is no affidavit sworn by the defendant in support of the application. Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed on are matters of facts which facts are contested or are likely to be contested, the advocate should refrain from the temptation of being the avenue through which such facts are exhibited. In this instance there are several factual issues which have been disputed by the plaintiff and one wonders what the deponent of the supporting affidavits would have said if he had been cross-examined on the same. Advocates should always keep in mind that affidavits have evidential value and the rules relating to evidence under the Evidence Act Cap 80 Laws of Kenya apply with as much force to affidavit evidence as they apply to oral evidence.

Having said that, the law relating to setting aside *ex parte* judgement is now well settled. I can do no better than to cite that case of **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193** in which **Platt, JA** expressed himself as follows:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is

that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised 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 ...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ..It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgement would be set aside in the exercise of the court's inherent jurisdiction".

In the present case it is not contended that the summons were not served. Therefore the *ex parte* judgement that was entered was on the face of the record regular. The issue that falls for determination is whether it is just in the circumstances of this case to set aside the said judgement. In order to determine the same the Court must take into account whether there is a defence on merits, the circumstances of the case including the circumstances under which the applicant found himself in the position of not complying with the procedure. Those circumstances include the applicant's conduct whether the conduct was geared towards the frustration, delaying or obstruction of the expeditious determination of the case. It follows therefore that the time taken before making the application is a relevant factor to be considered.

The first issue for determination is whether this court has jurisdiction to grant the stay as sought in the application. According to the authorities cited by the plaintiff there cannot be a stay of execution of an order for costs. As far as I am aware, there is no common point on this issue. In **Standard Chartered Bank vs. The Law Society of Kenya & the Administrators of The Estate of Maxwell Maurice Ombogo Nairobi (Milimani) HCCC No. 520 of 1997 [2001] 2 EA 550** the Court held that the High Court has the jurisdiction to stay and /or set aside such order made on taxation. In **M M Kioga & Co. Advocates vs. Joseph Mucharia & Another Meru HCMA No. 42 of 1993, Sitati, J** was of the view that authorities abound that the High court is clothed with inherent jurisdiction and power to make orders of stay in all causes regardless of the law governing such causes; including orders of taxation under the Advocates (Remuneration) Order. In **Elkana Mukundi Gatimu & Another vs. John B. Muya & 3 Others Nairobi (Milimani) HCCC Case No. 471 of 2004, Azangalala, J**, while finding himself bound by the decision that execution orders for costs are not amenable to stay expressed his own doubts about the position by stating that the Court

has always entertained the view that the jurisdiction to order a stay of execution with respect to costs is one of discretion and has its foundation in the Court's inherent powers. This is in view of the fact that there are occasions when the costs involved are astronomical normally referred to as manifestly excessive. In his view, the Court should still retain the jurisdiction to stay execution in the interest of justice irrespective of whether or not the execution is being levied to recover costs.

In my view courts of law should not readily give in to challenge on their jurisdiction unless it is clear that

the same has been taken away especially where to accede to such challenge is likely to occasion a miscarriage of justice. The Court when properly moved may in the exercise of its inherent jurisdiction grant stay of execution notwithstanding the fact that the order sought to be stayed arises from taxation.

Even if I were to agree with the school of thought that leans towards the opposite direction, strictly speaking what the defendant seeks in the instant application is not a stay of an order of costs. Where an advocate files a plaint seeking recovery of his costs following a taxation, the proceedings therefrom are to be guided by the provisions of the Civil Procedure Rules and any judgement resulting from the said suit is subject to the provisions of the Civil Procedure Rules which empower the court to grant stay of execution in applications such as the current application. It is therefore my view and I so hold that the Court has jurisdiction to grant the orders of stay of execution sought subject to the merits.

In this case the defendant's case is that due to inadvertence on the part of counsel although an appearance was entered, no defence was filed. Whereas inadvertence on the part of counsel may be a factor to be considered in an application for setting aside the judgement, the court must gauge the quality of the error or omission. In this application apart from making a bare statement that the failure to file the defence was due to inadvertence, the applicant has not expounded on the nature of this inadvertence. Without the same being expounded it is difficult for the court to gauge its quality.

The other important issue for consideration is the nature of the defence that the defendant intends to raise. According to the defendant, he was not aware of the taxation proceedings and only came to know about the same after the time limited for objecting had passed. He then made an application for extension of time to lodge the objection which was allowed. However, his application for reasons to enable him file the objection was not responded to by the taxing officer. In the said objection, he intends to show that a substantial payment had been made by him towards the settlement of the plaintiff's fees and has exhibited documents which according to him prove payment in the sum of Kshs. 2.9 million. It is not in doubt that this suit is an offshoot from the said Miscellaneous Cause No. 204 of 2009. If the said decision is reversed or set aside, it would follow that the foundation of this suit would itself be severely eroded. All things being equal one would in those circumstances be justified to place minimum premium upon the outcome of the said proceedings. As long as the certificate of costs as well as the decree remain undisturbed and as the retainer is not in dispute, it would be an uphill task for the defendant to satisfy the court that the intended defence is prima facie merited since this Court cannot in these proceedings be expected to set aside the judgement arising from the said proceedings. It is therefore my considered view that the defence in so far as it is contingent on the success of the objection proceedings is with due respect stillborn. This is not to say that the said issue may not be arguable. However, at this stage it cannot be considered as a live issue for the purposes of the application under consideration.

With respect to the delay in making the application for setting aside the judgement, it is true that in his application dated 14th May 2010, the defendant annexed a copy of the decree in this case. However, no immediate step was taken to file the present application until 11th June 2012, more than 24 months later. No explanation has been proffered by the defendant why this delay which is obviously inordinate was excusable.

I have considered all the foregoing. I have taken into account the fact that the defendant has not been vigilant in protecting his interests. He has not taken the necessary steps when they ought to be taken and in cases where steps have been taken they have left a lot to be desired. I have also taken into account the fact that the mere fact that there is dearth of plausible reasons for failure to take the necessary steps does not necessarily deprive the court of the wide discretion to set aside an *ex parte* judgement. It is not lost to me that if the application is dismissed and eventually the defendant's objection proceedings are successful, the avenue for review is still open to the defendant. Taking into account all the foregoing relevant factors, it is my view and I so find that the defendant's conduct in this matter coupled with lack of a prima facie arguable defence disentitles me to exercise my discretion in favour of the defendant. It follows that the application dated 11th June 2012 is unmerited and is consequently dismissed with costs to the plaintiff.

Dated at Nairobi this 8th day of October 2012

G V ODUNGA

JUDGE

Delivered in the presence of Mutula Kilonzo Jnr for Plaintiff