IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.653 OF 1996

KENYA BROADCASTING CORPORATION ….. PLAINTIFF

VERSUS

PAUL MBURU MUTHUMBI……..…… DEFENDANT

Coram: Mwera J
Orina for plaintiff
Muriuki for Makori for defendant
Njoroge court clerk

RULING

By his chamber summons dated 12.11.10 the defendant sought orders under the repealed Order IXA Rules 3, 5, 11, Order 1XB Rules 1, 3, 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act:

i) that a temporary stay of execution be granted; and

ii) that the *ex parte* ruling entered herein be set aside so that the applicant can defend the suit.

It was stated in the grounds that the defendant had valid reason as to why he did not attend court whereby *ex parte* proceedings went on, ending in the judgement which has given rise to attach his property. If that attachment does not proceed and the judgement is set aside, that will not prejudice the plaintiff and justice will be seen to be done to the applicant who has at no time attempted to willfully delay the disposition of the case.

In the supporting affidavit, the applicant claimed that he never knew the particulars of this case. He was only surprised with the arrival of the auctioneers at his door step to attach his property. Even perusal of the file did not yield a plaint so the applicant's lawyers requested for a copy thereof from the plaintiff's side but that was declined. All proceedings had gone on *ex parte.* Although Ms A. G. N Kamau Advocates were on record for the applicant, they did not attend court and they did not inform him of the hearing dates.

In a rather lengthy replying affidavit sworn by Mr Orina the advocate for the plaintiff, it was deponed that the suit herein arose from a road accident between the plaintiff's motor vehicle registration No. KAB 268 B and the defendant/applicant's motor vehicle registration No. KYU 001 on 31.1.94. The suit was filed on 15/3/1996. The defendant was personally served with summons to enter appearance on 23.10.97. He did not enter appearance and following a request for judgement, one was entered on 17.12.97. A notice of execution of decree was served again personally on the defendant and he signed for it. Twice on 19.2.98 and 2.7.98 the applicant tried to set aside the *ex parte judgement.* It was at last granted and he

filed a defence on 11.8.98. He did not attend the trial neither did his lawyers Ms A. G. N Kamau & Co. who had been served with a hearing notice on15.5.08. Consequently judgement was entered thereafter on 14.11.08. A decree was extracted. Accordingly, the applicant's moves to set aside the judgement, the third time, is simply meant to frustrate the plaintiff's steps to realize the fruits of its litigation. He must pay up now. He had been allowed to defend the suit but he did not show up on the trial date. May it be noted that the defendant did not by way of affidavit rebut what was contained in the replying affidavit. However, asked to submit it was stated that the hearing that culminated in the judgement under review, went on in the absence of the defendant as well as his counsel M/s A. G. N Kamau Advocates who had however been served. That that firm was on record but it declined to attend court even when no notice to withdraw from acting was filed and prosecuted. So the defendant was all the time in the dark. In the light of John Waboro Mungai Vs Lucy Wanjiru Mwaniki [2008] e KLR in such circumstances, the litigant who does not attend court and has a valid reason to put forth must not be punished. The same applies here and the defendant should be accorded opportunity to be heard. The reconstructed file has no detail/particulars of the case and United Insurance Company (which had instructed M/s A. G. N. Kamau & Co. Advocates?) is under receivership.

The plaintiff/respondent's side went over the background of the case more or less as set out in the replying affidavit and came up with the view that this 3rd application to set aside the judgement of 14.11.97 was in bad faith particularly after the earlier attempts and how the applicant went about them all. He should not be allowed to frustrate the court process any longer. The applicant had instructed counsel; whatever the omissions alleged about that counsel, they should not be visited on the plaintiff. And litigation must come to amend.

From the above, this court is satisfied that the applicant had counsel M/s A. G. N. Kamau Advocates acting for him. He got an opportunity granted by this court and he had filed a defence. The plaintiff maintains that that advocate was served with a hearing notice and the defendant confirms it:

"The record though shows that the defendant's advocates were served."

But neither he nor the advocate appeared to wage the meritorious defence on the day of trial and after *ex parte* proceedings, judgement followed in favour of the plaintiff on 14.11.08 for sh. 716,038 plus costs and interest. There has been no appeal.

The applicant has had up to about 3 occasions to stay execution and in the last one he was successful but he did not take up the opportunity to be heard when the case came up for trial. Yes, counsel's omissions, errors or mistakes need not necessarily be visited on his client. But that aspect should not be taken so far as to work injustice to the opponent. After all that the applicant has done since the beginning of this trial, including the proceedings before Patel J wherein he was found to be untruthful when cross – examined on whether he was ever served with the summons to enter appearance, and this has not been denied, this application is dismissed with costs. The applicant may consider to lay a claim/complaint against his lawyers in professional negligence if he is so inclined. But this court will not any more, put on hold the plaintiff's pursuit to realize the fruits of its litigation by way of execution.

The application herein is dismissed with costs.

Delivered on 3/3/11.

J. W. MWERA
JUDGE