REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 85 of 1992

GEORGE ORARO……..…….…….……PLAINTIFF/RESPONDENT

VERSUS

BARAK ESTON MBAJA…….DEFENDANT/APPLICANT

RULING

The genesis of this suit is the murder of the former Minister for Foreign Affairs and International Cooperation the late **DR. JOHN ROBER OUKO** which took place in February 1990.

The murder was so brutal and mysterious that every Kenyan including the Government was anxious to know who was involved in the murder of Dr. Ouko. The Government sought assistance from New Scotland Yard in Britain to help in the investigations of the murder. A team from New Scotland Yard under the command Det. Supt. Troon was invited by the Kenya Police to assist it in investigating the murder. There was fear and anxiety especially among the immediate members of the late Minister. This led to the defendant fleeing the country into exile and settled at Washington DC in U.S.A.

After prolonged investigations Mr. Troon prepared his report and submitted it to the Attorney General of Kenya. Subsequently H.E. the President appointed the Ouko Murder of Enquiry to investigate the murder of the late minister.

The plaintiff claims that while in Washington DC the defendant on or about 23rd September 1991 falsely and maliciously wrote and published of the plaintiff by way of his conduct and profession as an advocate by an affidavit written and signed by the defendant before a Notary in USA and thereafter forwarded to one Joseph Shamalla Advocate, Paul Muite the then Chairman Law Society of Kenya and to the Nation Newspaper among others and even to the wife of the plaintiff. The defendant instructed Mr. Shamalla to forward the publication to the Ouko Murder of Inquiry.

The plaintiff claims that the contents of the said affidavit were meant and were understood to mean that he the plaintiff with 3 other persons named were involved in the disappearance and subsequently murder of Dr. Ouko, that the plaintiff was unethical, and unscrupulous lawyer and had knowledge of the circumstances leading to the death of Dr. Ouko which he had failed to reveal to Kenyans and the world at large.

The plaintiff felt defamed and filed this suit against the defendant for damages. The defendant was served and he instructed Mr. Kajwang to enter appearance and file defence on his behalf. A hearing date was taken and the matter was confirmed during the call over. It came up for hearing on the previous occasions but was adjourned on application by Mr. Kajwang on the grounds that the defendant was not in the country. He was indulged.

The 3rd time when the suit came up for hearing was on 28th September 1992 when Mr. Kajwang applied for adjournment, he was refused. The proceedings of that day went on as follows:

Mr. Kajwang: I apply to be allowed to be absent.

Judge: Mr. Kajwang may be absent if he so wishes.

Mr. Kajwang then walked out of the court and went away. The hearing proceeded. After recording the evidence of PW1 the court adjourned and the Judge ordered that fresh hearing dates be taken in the registry. The hearing dates were taken in the registry and the hearing was concluded and judgment was delivered on 29th April 1993. Subsequently execution process was set in place.

The defendant by way of this Chamber of Summons dated 6th August 2004 and expressed to be brought under Order III Rule 9A, Order IXB Rule 8 and Order XXI Rule 22 seeks orders as prayed in prayer 4 and 5.

"4" That all orders and processes issued in execution proceedings in this suit be and are hereby set aside.

"5" That decree issued in this suit dated 29th April 1993 be and is hereby set aside and the suit shall proceed to full hearing on merit.

The application is premised on the grounds:

"**(1) That the execution proceedings commenced by the plaintiff are incurably defective and incompetent. All orders issued in execution therefore are irregular and unlawful.**

(2) That the defendant was not properly served with a notice for the hearing of the suit which culminated in the decree.

(3) That the defendant has placed sufficient material before the court to warrant the exercise of its discretion in defendant's favour.

The application is supported by a length affidavit in which the defendant affirms the facts in his defence and the proceedings in court that culminated to the judgment and decree sought to be set aside. That sometime in April 1990, he was compelled by circumstances beyond his control to flee from Kenya to seek political asylum to reside in the United States of America. And for 14 years which followed, he lived as a political refugee in Washington DC.

That when the plaintiff sued him in January 1992, he was already away from this country as political state of affairs then prevailing here could not allow him to re-enter the country. He therefore gave instructions by way of phone to his Advocate Hon. Otieno Kajwang to file a statement of defence on his behalf hoping that he would return soon to defend himself.

That the proceedings proceeded exparte after his lawyer had withdrawn and he was not served. There was no proper service for the proceedings of 1st December 1992. That on 28th November 2002, he received news with great relief and glee that NARC team had won the General Elections and would form a new Government in Kenya.

That he hurriedly made travel arrangements to return to his beloved country and on 10th January 2003 he flew back.

That he first heard about this suit on the media upon his return into the country.

In this ruling I will refer to two Kajwang's who are counsels and are brothers. To avoid confusion I would refer to Kajwang (S) (meaning Senior) counsel who conducted this suit and who attended the proceedings of 28th September 1992 and Kajwang (J) (meaning junior) as counsel who prosecuted this application. Mr. Kajwang (J) submitted that the execution process was invariably defective in that the same was engineered by a letter by John Ougo who had written a letter to the registry requesting for execution before he came on record which contravened the provisions of Order III Rule 9A to effect charge of advocate while he moved the court for change on 13th September 2004 after the execution process was in place. Further he submitted that the execution of decree before taxation was null and void.

The second ground of the application was that the proceedings which led to this judgment were exparte. He urged the court to set aside the decree dated 29th April 1993. He submitted that the provisions of Order IXB applied and cited the following authorities: ***PATEL VS. EA CARGO HANDLING SERVICES LTD [1974] EA 75, MBOGO VS. SHAH [1968] EA 93, PITHON WAWERU MAINA VS. THUKU MUGIRIA [1982-1988] I KLR 171, KANJI NARAN VS. VELJI RAMJI [1954] 21 EACA 20.***

The principle in the above cited authorities is that, there are no limits on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Mr. Kajwang (J) maintains that the judgment in the instance case was irregular because when Mr.Kajwang (S) applied for adjournment as per record of 28th September 1992, the judge refused to grant the adjournment and proceeded with the hearing after counsel had left the court room. He went on to submit that the judge in refusing to grant adjournment had turned a blind eye on the defendant's special circumstances in that the defendant could not attend court due to the political climate which was very hostile for him and thus he had gone into exile in Washington.

The defendant had shown sufficient cause why he could not attend the proceedings and the court should have granted the adjournment. Mr. Kajwang (J) further submitted that after Mr. Kajwang (S) applied for adjournment and left the court, the judge proceeded and after taking the evidence of PW1 he adjourned and ordered that the dates for further hearing be taken in the registry. On 2nd October 1992 the plaintiff was given hearing dates exparte for 1st, 2nd and 3rd December 1992 but there was no service on the defendant which the plaintiff ought to have done.

Mr. Ougo for the respondent in reply submitted that according to the defendant's application what he wants set aside is the decree and not the judgment so that the rule quoted Order IX Rule 8 does not give the court the discretion to set aside the decree as opposed to the judgment. He went on to submit that in a proper application seeking to set aside a judgment the fundamental function for the court is to do justice to both parties. The court must consider all the circumstances of the case. The discretion of the court to set aside a judgment 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. See **SHAH VS. MBOGO AND ANOTHER 1967 EA 116.** Mr. Ougo further submitted that the proceedings of 28th September 1992 were not exparte following the events of that day. The record shows that Mr. Kajwang (S) applied for adjournment which was rejected because the judge was not satisfied with the grounds given for application for adjournment having given two previous adjournments on the same grounds. Mr. Kajwang's (S) application for adjournment and the subsequent proceedings went like this.

Mr. Kajwang (S): I apply to be allowed to be absent to which the judge resorted "Mr. Kajwang may be absent if he so wishes"

Then Mr. Kajwang (S) left the court and the hearing proceeded. Mr. Ougo referred the court to the case

of **DIN MOHAMED VS. LALJI VISRAM & CO. 1937 EACA** 1 in which the facts were exactly the same. Such proceedings are not exparte. In that case counsel for the defendant applied for adjournment which was refused by the court. Counsel then withdrew from the suit and the hearing proceeded and judgment was delivered. Subsequently the defendant by Notice of Motion sought to set aside the judgment under Order IX Rule 14 on the ground that it was a judgment entered exparte. "It was held that if counsel duly instructed, on being refused an adjournment, elects to leave the court and takes no further part in the case, that fact does not constitute proceedings exparte.

Mr. Ougo lastly submitted that there was inordinate delay in bringing this application 12 years after the judgment was entered. He submitted that a party seeking the exercise of the discretion of the court in its favour must be candid. He submitted that the conduct of the defendant and his counsel do not deserve a favourable exercise of the discretion to seta side the judgment.

The first point raised in this application is whether this application seeking to set aside a decree could include judgment. I would refer to the proviso to Section 2 of the Civil procedure Act Cap 21 which provides:-

"For the purpose of appeal decree includes judgment. It could rightly be presumed that an application to set aside a decree includes judgment and therefore I hold that this application is properly before this court.

The second point is whether the execution process engineered by Mr. Ougo before he came on record under Order III Rule 9A while he moved the court for change of advocate on 13th September 2004 after the execution process was in place rendered the process defective. Execution had not taken place. This is a curable defect and it was cured when Mr. Ougo filed Notice of Change of Advocate.

The third point is whether or not there was proper service. From the submissions and the authorities cited, it is clear that the proceedings of 28th September 1992 were not exparte as defence counsel was properly served and attended the proceedings of that day. What is in issue is the subsequent proceedings. Since Mr. Kajwang had requested to be allowed to be absent and the judge in reply remarked that he could be absent if he so wishes, but had not ceased to act for the defendant, the plaintiff had no obligation legal or otherwise to serve him for the subsequent hearings. Since Mr. Kajwang had elected to be absent it was his duty to come back and inform the judge that he was now willing to take part in the proceedings. It is after that return to court to take part in the proceedings that the plaintiff would have an obligation to serve him for the subsequent proceedings. This was a judgment regularly entered.

Otherwise there was no way the plaintiff would know when Mr. Kajwang had had change of mind and that he was now ready and willing to take part in the proceedings.

The fourth point is inordinate delay in bringing this application which was 12 years after the judgment was delivered. Mr. Kajwang submitted that the delay was because the defendant was in exile and that he could not come back to Kenya because of hostile political climate. There was no evidence to support the allegation that the Government was after the defendant. Moreover for an application to set aside a judgment the presence of the defendant was not required.

For the reasons stated above the defendants' application is dismissed with costs to the plaintiff.

Delivered and dated this 6th day of July 2005.

J.L.A. OSIEMO

JUDGE