



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 137 OF 2015

DANIEL KIPRUTO METTO.....PLAINTIFF

VERSUS

CHASE BANK (KENYA) LIMITED.....DEFENDANT

RULING

This ruling is in respect of an application dated 12th October 2018 brought by way of a notice of motion by the defendant/applicant seeking for the following orders:

1. Spent.
2. THAT pending the hearing and determination of this application inter-partes there be an interim stay of execution of the Judgment delivered on the 2nd October 2018 by this honourable Court.
3. THAT the Judgment entered on the 2nd October 2018 the proceedings preceding the same and all consequential proceedings to the same be set aside ex debito justitiae and the matter be heard on merit.
4. THAT the costs of this application be provided for.

Defendant/Applicant's Submission

Counsel for the applicant submitted that the main issue before this Honourable Court is whether the plaintiff served it with a hearing notice in regards to the prosecution of the main suit on the 30th May 2018. Counsel further submitted that the manner in which the plaintiff served the same upon it was not proper and thus irregular.

It was Counsel's submission that he has demonstrated by way of documentary evidence that it stopped using the postal address 3640-40100 in the month of April 2017 and the same has been confirmed by the Postal Corporation of Kenya vide its letter dated the 8th November 2018. That on previous occasions the plaintiff's advocate always served the defendant with court documents and pleadings vide courier services and the same was promptly acted upon receipt. It is therefore the defendant's submissions that the use of registered post as a mode of service by the plaintiff leaves a question of the same having been done deliberately to bend the traits of justice in favour of the plaintiff albeit in an unjust manner.

Counsel submitted that Courts have previously set aside ex- parte judgments where it is demonstrated that one of the parties was never duly served with a hearing notice. Essentially, setting aside an ex- parte judgment is a matter of the discretion of the court. Counsel cited the case of **Esther Wamaitha Njihia & two others vs. Safaricom Ltd** the court citing relevant cases on the issue held inter alia:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it; the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (It also goes without saying that the reason for failure to attend should be considered'.

Counsel for the defendant therefore submitted that the defendant has demonstrated sufficient cause to move this Court to set aside the ex- parte decree issued in favour of the plaintiff. He further cited the case where Supreme Court of India observed in the case of Parimal vs Veena that:-

"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purposes intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bonafide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

Counsel urged the court to allow the application as prayed.

Plaintiff/Respondent's Submissions.

Counsel for the plaintiff opposed the application and submitted that the hearing notice was properly served and the judgment regularly obtained. Counsel stated that the issues for determination by the court are:

- a. Whether the Defendant/Applicant was duly represented and filed its Memorandum of Appearance and Statement of Defence
- b. Whether 'mode of service' upon the defendant/Applicant since the proceedings started has been in contention/dispute.
- c. Whether the Defendant's Advocates notified the plaintiff Advocates on change of address.
- d. Whether the hearing date was served or service was improper, defective or concealed.
- e. Whether the address of service or (Box office address) has remained the same or deliberately changed to hoodwink the court in granting the orders being sought
- f. What is the purport and import of order 3 rule 1, order 6 rule 6 of the civil procedure rules 2010 and article 159 (2) of the constitution of Kenya 2010?
- g. Whether the defendant/applicant has met the threshold of setting aside the duly entered judgment.
- h. Whether internal wrangles between the partners of the firm is an excuse to set aside the lawfully entered judgement?

Counsel submitted that it is not in dispute that the defendant was duly represented by the law firm of M/S Ogejo Olendo & Co. Advocates who filed their Memorandum of Appearance and Statement of Defence. Further that in their Memorandum of Appearance and Statement of Defence filed in court on the 22nd June 2015 the defendant's law firm indicated their address of service as :-

M/S Ogejo, Olendo & Co Advocates

Reinsurance Plaza, 5th Floor,

Oginga Odinga Street,

P.o Box 3640-40100

Kisumu

Counsel submitted that all along the plaintiff /Respondent has been sending correspondences through courier services and registered post to the above address and as such the defendant were duly served with all the mention notices and hearing notices but opted not to participate and/or attend court. That the defendant was also duly served with the hearing date specifically for 30th May 2018 when the matter was slated for hearing upon its registered mail.

Counsel further submitted that the defendant having failed to attend court, the matter proceeded ex parte and the Court reserved a mention date for submission which was served on the defendant but failed to attend court and a judgment was delivered on 2nd October 2018 .

Miss Kibichy also submitted that the defendant was served with notice of the judgment on the same address which strangely they now 'received' and seems to have been the genesis of the present application.

Counsel for the plaintiff /applicant submitted that the further affidavit sworn by Advocate Ibrahim Stanley Ogejo conceding in paragraph (3) ". . . we inadvertently did not notify the advocate on record for the plaintiff of the said change of postal address as they always served upon us"

It was Counsel's contention that the letter from Postal Corporation of Kenya dated 8th November 2018 confirming that indeed the changes took place on the month of November, 2018 cannot assist the defendant. That the new address has just been introduced in the present application and the defendant/applicant have neither changed the address on record nor notified the plaintiff's Counsel on record hence cannot purport to use an excuse which seems plainly mischievous just for the present application.

Analysis and determination

The issue for determination is whether the defendant was properly served with a hearing notice in this case. Courts have discretion to set aside *ex parte* judgments but the same must be exercised judiciously taking into account sound principles.

In the case of *Shah —vs- Mbogo* (1967) E.A 116 Harris J. the court explained that the discretion to set aside judgment can be exercised in the following circumstances :

'...discretion is intended to be exercised to avoid injustice or 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.'

Further the well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel vs East Africa Cargo Handling Services* where **Duffus,V.P.** stated;

"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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

The discretion of the court should not be used to assist a party who has not shown sufficient cause as to why the judgment should be set aside. The court is alive to the fact that every party is entitled to a hearing and that such party must not derail the administration of justice by failing to attend court and asking for setting aside of the judgment duly entered.

Order 3 (1) of the Civil Procedure Rules 2010 states inter alia that; *'...The Advocates of the defendant shall state in the Memorandum of Appearance the address for service being the place of business within Kenya and postal address.*

Order 6 Rule (6) further reads that:-

... documents may either be delivered by hand or by licensed courier services provider approved by the court to the address for service or may be posted to it.'

(2) *'...where delivery is disputed a certificate of posting or other evidence of delivery shall be filed...'*

Counsel for the defendant/applicant disputed the mode of service by registered post as the plaintiff's Counsel had previously served them by way of courier service. The question is whether service by registered post is provided for under the Civil Procedure Rules. The answer is in the affirmative. This is provided for under Order 5 Rule 3 of the Civil Procedure Rules 2010 hence the Defendant cannot be heard to say that the service was not proper.

Further Counsel for the defendant admitted in his affidavit that they had changed their address but did not notify Counsel for the plaintiff of the changes. Procedure requires that if there is any change of address then the same has to be communicated by updating the same in the court file and served on the other parties. This was not done in this case.

In the case of **Paola Tariazzi (Suing through his Attorney and/or Agent) Carla Taralazzi —vs Robert Clavolella (2016) eKLR** Angote J in dismissing a similar application stated that;

'...in view of the proceedings and pleadings in this matter, the Defendant was not only served with Summons to Enter Appearance but also entered appearance. The Defendant cannot now turn around due to the impending execution of the Judgement and contradict his own Affidavit and documents. . . '

How did the defendant finally become aware of the entry of judgment? It is through the same address that they are disputing that had changed. The applicant should also not abuse the discretion of the court in such applications.

Discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised to do substantive justice to the parties. The defendant having shown that it is desirous of defending the case I will exercise the discretion in its favour with conditions.

In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by both Counsel and the relevant law and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I hereby set aside the *ex parte* judgment delivered on 2nd October 2018 and all the consequential orders and order that this suit proceeds for hearing afresh as a defended case. The defendant to pay thrown away costs of Kshs. 25,000/ before the hearing of this suit failure of which the order lapses.

DATED and delivered at Eldoret this 7th day of February, 2019

M.A. ODENY

JUDGE

Ruling read in open court in the presence of:

Miss Kibichy for Plaintiff

N/A for defendant

Mr. Koech Court Assistant