

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 70 OF 2014

RICHARD KIPYEGO SAWE.....PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT

CYRUS KIPLIMO KIPTANUI.....2ND DEFENDANT/RESPONDENT

RULING

The application is dated 7.8.2018 wherein It seeks orders that the plaintiff's suit be reinstated on grounds that the plaintiff was not served with the Notice of Change of Advocates and was not served with the application for dismissal of the suit dated 6.11.2017 and was not served with a hearing notice of 18.6.2018 and therefore, failure to attend court was not deliberate. It is not the mistake of the plaintiff's advocate not attend court on 18.6.2018. The supporting affidavit reiterates the grounds of the application.

In the replying affidavit, Martin Osodo, Advocate for the respondent's states that the application was served by a licenced process server. However, Mr. James Otieno Okudo, the Process Server does not state the name of the clerk served with the Notice of Motion.

In the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Sir Duffus stated as follows:

“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 the 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 court's unfettered discretion to set aside ex-parte judgments was also elaborated in the case of **Pithon Waweru Maina V Thuku Mugira (1983) eKLR**. The principles governing setting aside of ex-parte judgments obtained in the absence of an appearance or defence by the defendant or upon failure by the defendant to attend the hearing were stated as follows:

- a) *Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.*
- b) *Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in **Shah V Mbogo (1967) EA 116 at 123** and **Shabir Din V Ram Parkash Anand (1955) 22 EACA 48***
- c) *Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that as a result there has been injustice.*
- d) *Additionally, the court has no discretion where it appears there has been no proper service (**Kanji Naram V Velji Ramji (1954) 21EACA 20**)*
- e) *It is also important to note that a discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically (**Smith V Middleton (1972) SC 30**)*

In this matter, I am inclined to exercise my discretion by allowing the application to reinstate the suit on the basis that the issue of service is contested and that it is not clear whether the plaintiff was properly served. The right to be heard in a civil matter is so sacrosanct that it cannot be taken away unless it is demonstrated that the plaintiff willfully and intentionally chose not to come to court despite being serve.

The application dated 7.8.2018 is allowed, the suit is hereby reinstated. This being a commercial dispute, the suit is transferred to the High Court for hearing and determination. Costs in the cause.

Dated and delivered at Eldoret this 25th day of April, 2019.

A. OMBWAYO

JUDGE