



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CASE NO. 138 OF 2016

MARY NDUTA NGUGI.....PLAINTIFF

VERSU

BEATRICE NGELESA.....1ST DEFENDANT

JUDY CHELONGEI.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated **11/1/2019** brought under **Order 12 Rule 7 of the Civil Procure Rules of 2010, Section 1A, 1B & 3A of the Civil Procedure Act** and any other provisions of the law, the Applicant Beatrice Ngelesa is seeking the following orders:

- a) Spent...
- b) Spent...
- c) **That the judgement entered herein on 20/9/2018 be set aside and the 1st Defendant be given leave to defend the suit at a fresh hearing.**
- d) **That costs be in cause**

2. The application is based on the grounds on the face of the motion namely:-

- i. **The failure of the 1st Defendant and her advocate to attend court for hearing on 30/7/2018 was as a result of an inadvertent error on the part of the advocate to enter the hearing date in his diary and to inform the 1st Defendant accordingly.**
- ii. **The inadvertent error of the Advocate should not be visited upon the 1st Defendant.**
- iii. **The 1st Defendant has a good defence that should not be condemned unheard.**
- iv. **The instant application has been brought without undue delay.**
- v. **Any prejudice caused to the Plaintiff can be compensated by costs.**
- vi. **This Honourable Court has jurisdiction to exercise its discretion in favour of the 1st Defendant so as to promote the fair administration of justice.**

3. The application is supported by the affidavit of the Applicant's advocate sworn on 11/1/2019 in which he depones that his firm is in conduct of this matter on behalf of the 1st Defendant; that on 23/3/2018 he was served with a hearing notice which was to the effect that the matter had been fixed for hearing on 30/7/2018; that upon service his court clerk inadvertently forgot to enter the hearing date in the counsel's diary; that as a result of the inadvertent error, nobody attended court for the hearing on 30/7/2018 and the matter proceeded ex parte; that he only came to realize that the matter had proceeded for hearing after he was served with a party and party bill of costs and taxation notice on 10/12/2018 indicating that the bill was coming up for taxation **on 17/1/2019**

4. It is the further deposition of Mr. Wena, Counsel for the applicant that the mistake of the advocate should not be visited on the 1st Defendant who was unaware that the matter was coming up for hearing on 30/7/2018.

5. It is further deponed that the 1st defendant has a good defence to the suit as demonstrated by the Statement of Defence, witness statement and list of documents which were filed on 4/11/2016 and 20/2/2018 and are part of the court record.

6. The plaintiff opposed the application and filed a replying affidavit sworn by herself on 7/2/2019 in which she contends that service was properly effected upon the defence counsel four months before the hearing date.

7. According to the plaintiff, it is inconceivable that from March to when this application was filed, the defendants have never followed up with their advocates to check on the position of this case. Further, the plaintiff has contended that all along the defendants have never attended court over this suit and they have never been keen to have the case prosecuted.

8. The plaintiff has stated that she and two witnesses testified and that she will be greatly prejudiced if the judgement is set aside.

9. She has deponed that she should not be made to suffer by reason of mistakes on the part of the Defendants or their counsel and that going by the past conduct of the applicants, this court should not grant the orders sought in the application.

10. The court gave directions that the application be canvassed by way of written submissions which were duly filed by the applicant and the respondent.

11. The applicant in her submission dated 7/2/2019 submitted inter alia, that the failure of her advocate to attend court was not deliberate or evasive but an inadvertent error on the part of the law firm by failing to update the court diary.

12. The applicant has further submitted it will not be in the interest of justice for the 1st Defendant to suffer because of such an inadvertent error of their advocate considering that the 1st defendant has a meritorious defence which raises triable issues.

13. The plaintiff on her part vide her submissions filed in court on 22/2/2019 submitted that the judgement sought to be set aside was regular; that the court clerk accused of not diarizing the cause is unnamed and has not filed an affidavit in support of the instant application; that the alleged inadvertence is just an allegation as there is nothing to show for it. The plaintiff has sought that the said application be dismissed with costs.

14. I have carefully considered the application, the affidavits both in support and against, the rival submissions and the authorities cited as well as the pleadings herein. The main issue that I am supposed to determine in my considered view is whether I should set aside the ex parte judgment and the 1st Defendant be given leave to defend the suit at a fresh hearing.

15. **Order 10 Rule 11** of the **Civil Procedure Rules** provides as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

16. The applicant’s counsel has blamed his clerk for the applicant’s misfortune and by extension his firm as it is on record for the applicant. The issue of whether mistake of counsel should be visited upon a client was discussed in the Court of Appeal case in **Tana And Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** where the court cited the case of **Ketteman & Others Vs Hansel Properties Ltd [1988] 1 ALL ER 38** in which Lord Griffith stated that ;

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”

17. The court thus held that:-

“To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent”. (See Ahmed v. Highway Carriers [1986] LLR 258 (CAK) and also (Myers v. Elman [1939] 4ALL E.R 484) as stated by Viscount Maughan in the Myer’s case,

“...the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable.... My conclusion is that Elman (the solicitor) cannot dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal.”

The court concluded by finding that **“...hence, the mistakes of Mr. Mouko’s clerk became the mistakes of Mr. Mouko.....”**

18. In the case of **Three Ways Shipping Services (Group) Ltd V Mitchell Cotts Freighters (K) Ltd [2005] eKLR** the court held as follows:

“The question of advocate’s mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in “The Due Process of Law” London Butterworths at p. 93 said:-

“Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done.”

19. In the instant suit, the applicant alleges that the court clerk’s in her counsel’s firm inadvertently forgot to diarise the hearing date and as a result of the inadvertent error, nobody attended court for the hearing on 30/7/2018 and the matter proceeded exparte.

20. It is worth noting that the clerk who failed to diarize the hearing date did not swear an affidavit explaining what happened. The plaintiff submits that the she should not be made to suffer by reason of mistakes of the 1st defendant’s counsel.

21. However, I take notice of the fact that a party should not be punished for his Counsels mistakes. In stating this I recall the words of A. B. Shah, JA in the case of *Joseph Mweteri Igweta -vs- Mukira M’Ethare & Attorney General 2002 [Eklr]* where the court stated as follows:

“True Mr. M’Inoti has pointed out that so far the applicant has committed a “litany of blunders”. For that reason he submitted I ought not exercise my discretion in favour of the applicant. He further urged that enough is enough and the applicant must bear the burden of his advocates’ many blunders. Here I must bear in mind the fact that the applicant is not the architect of the “litany of blunders’. Do I punish him by dismissing the application?

“If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice in our courts. Whilst I do not condone errors on the part of counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeals take. He has no other forum to go to if he is shut out here”.

22. In the case of *Patel -vs- E A Cargo Handling Service Ltd [1974] EA 75 at 76C and E*, the court stated as follows:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does so on such terms as are 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 to it by the rules. Secondly as *Harris J said in Shah -vs- Mbogo, 1967 EA 116 at 123B*, “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. That judgement was approved by the Court of Appeal in *Mbogo -vs- Shah [1986] EA 93*. And in *Shabir Din -vs- Ram Parkash Anand [1955] 22 EACA 48 Briggs JA* said at 51:-

“I consider that under Order IX Rule 20 the discretion of the court is perfectly free, and the only question is whether upon the facts of a particular case it should be exercised. In particular mistake or misunderstanding of the appellants legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

23. Bearing this in mind and the fact that a man should not be condemned unheard, I exercise my unfettered discretion and allow the application and set aside the ex parte judgment delivered by this Court on 20/9/2018 in the following terms:-

- (a) The judgement entered herein on 20/9/2018 and all other consequential orders are set aside.
- (b) The suit shall be set down for hearing within 14 days from the date hereof.
- (c) The 1st defendant shall pay the plaintiff costs of this application.

Dated, signed and delivered at Kitale on this 8th day of April, 2019.

MWANGI NJOROGE

JUDGE

8/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/respondent

N/A for the defendants

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

8/04/2019