



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CIVIL SUIT NO. 119 OF 2013

LILIAN WAITHERA GACHUHI.....PLAINTIFF/RESPONDENT

VERSUS

DAVID SHIKUKU MZEE.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 16th July 2018 brought by way of notice of motion by the defendant applicant for orders:

- a. That the proceedings of 5th July, 2018 be set aside.
- b. That the defendant be afforded a chance to be heard.
- c. Costs of the application be catered for.

Counsel agreed to canvass the application by way of written submissions which were duly filed.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant gave a brief background of the case and stated that the defendant was sued by the plaintiff as per the plaint and filed a defence and thereafter the suit was set down for hearing. Counsel stated that the case was set down for hearing on 5th July 2018 and that the defendant was however not notified of the hearing date and he was unaware of the same.

Mr. Momanyi submitted that owing to lack of instructions, he had filed an application to cease acting which has not been canvassed and that Miss Ruto advocate who held brief for Mr. Momanyi failed to notify him of the directions taken to have the case proceed to hearing on 5/7/2018. The case therefore proceeded to hearing in the absence of the defendant and his advocate.

Counsel therefore submitted that for the application to succeed the applicant/defendant has to demonstrate that:

- i. He was not blameworthy for the failure to attend court on 5/7/2018
- ii. The mistake or failure is excusable

Counsel submitted that the defendant has demonstrated that he was not to blame for his failure to attend court on 5/7/2018 as he was not notified of the hearing date and he was unaware the case was to be heard on 5/7/2018. Counsel submitted that the mistake was for the advocate for failure to notify the defendant of the hearing date. He therefore urged the court to allow the application as prayed.

PLAINTIFF/ RESPONDENT'S SUBMISSIONS

The plaintiff opposed the defendant's application which is supported by the annexed affidavits of Elijah Momanyi Mogona and David Shikuku Mzee. Counsel for the plaintiff submitted that the issues for determination are as to whether the proceedings of 5th July, 2018 should be set aside and whether the defendant was not afforded a chance to be heard?

On the first issue as to **whether the proceedings of 5th July 2018 should be set aside**, Counsel submitted that advocates for both parties were present in court on 15th March 2018 when the Court gave a hearing date for 5th July 2018. Further that the defendant/applicant

acknowledged in paragraph 5 of his supporting affidavit as follows;

‘That through inadvertence I did not notify the defendant of the hearing of the case set for 5/7/2018.’

Counsel therefore submitted that no valid reason has been advanced for non-attendance by the defendant/applicant as such there was no violation on the rights of the defendant/applicant as they knew the same was coming up for hearing.

Miss Cheso relied on the case of **Julius Wahinya Kange'the & another Vs Muhia Muchiri Nganga (2018)Eklr** where it was stated that,

“It is true that excusable mistakes of counsel should not be visited on their clients who have not participated in making the mistake who stand to suffer if the mistake is not excused.....Mr. Kahari did not explain in any way or any satisfactory manner how a matter that he had handled all along for the appellants had escaped his attention to the extent that the hearing of the case had proceeded in his absence and judgement entered against his clients, that mistake cannot be excusable. The lawyer should have given reasonable grounds for failure to attend court, failure of which he could fall foul of the law.”

Counsel further relied on the case of **Omwoyo vs African Highlands & Produce Co. Limited (2002) KLR 698 where Ringera J** observed;

“That time had come for legal practioners to shoulder the consequences of their negligent acts of omissions like other professionals did in their fields of endeavour.”

Miss Cheso Counsel for the plaintiff/respondent submitted that in the current case no reasonable explanation was placed before the court why the advocate failed to attend court on a hearing date taken by advocates by consent.

On the second issue as to whether the defendant was not afforded a chance to be heard, Counsel submitted that the defendant/applicant was not denied a chance to be heard. Counsel stated that the general rule is that errors of a Counsel should not be visited upon an innocent litigant, but there are exceptions to this rule, that a litigant will be bound by the errors and omissions of a Counsel if the litigant participated or remained indifferent over the errors and omissions of his counsel. (See **Rukenya Buuri Vs M'arimi Minyora & 2 Others (2018) eklr**).

Counsel stated that this was evident in the supporting affidavit where the applicant stated as follows in paragraph 2, 3, 4 and 9 as follows respectively;

That I have had issues with the defendant over payment of fees

That the defendant had on 11/4/2018 promised to clear the outstanding fees as he had previously done.

That I did not meet the defendant between 11/4/2018 and 5/7/2018

That owing the said omission I did not attended court for the hearing set for 5/7/2018 and the matter proceeded to hearing in my absence and the absence of the defendant.

Counsel therefore submitted that the defendant was the author of his own misfortunes as illustrated in the affidavit of his advocate hence the applicant cannot use this established principle as a shield.

Further Counsel submitted that it is important to note that the defendant applicant was represented in court and the said advocate holding brief for the applicant was advised that the matter shall be heard at Eleven O'clock. Miss Cheso stated that a litigant must be diligent enough to follow up how his case is being handled by his advocate. She therefore urged the court to dismiss the application with costs and if the court is inclined to allow the application then the plaintiff should be paid Kshs. 50,000/ as thrown away costs before further steps are taken.

Analysis and determination

This is an application for setting aside proceedings of 5th July 2018 by the defendant/applicant. The application is opposed by the plaintiff/respondent. It should be noted that Counsel for the defendant was present when the date for the hearing was given by the court.

The court has noted with concern that there are advocates' firms who are an impediment to access to justice. They try to use certain delaying tactics to stand in the way of access to justice and then claim that mistake of advocates should not be visited upon the parties. I note that these mistakes are becoming too many to the detriment of parties. Advocates should be more diligent when handling matters for their clients. If they are not able to handle matters then they should not take them in the first place.

The court has further observed that when advocates are not ready to proceed, and an adjournment has been declined by the court, they file applications to cease acting and later file a notice of appointment of advocates to defeat administration of justice. Advocates are officers of the court and should not be allowed to be an impediment to expeditious justice delivery which is in the interest of all parties.

Coming back to this case the above is what happened, where the date was taken by consent, Counsel for the defendant Mr. Momanyi asked Miss Ruto to hold brief and apply for adjournment on the grounds that he had filed an application to cease acting on the day of the hearing. It is strange that the same advocate who had made an application to cease acting is the one who swore and affidavit together with the defendant's whom he had wanted to cease acting for. Counsel is now not talking about ceasing acting but trying to set aside the proceedings

that he and his client did not attend to.

The defendant has not also annexed an affidavit of Counsel who held brief to explain what transpired after holding brief and whether she informed Mr. Momanyi that the court had ordered that the matter would proceed. The court is not going to allow abuse of the court process and impunity in the administration of justice. The justice sector should work together to ensure that services are delivered to parties fairly without delay.

In the case of **Julius Wahinya Kang'ethe & another v Muhia Muchiri Ng'ang'a[2018] eKLR the Court of Appeal** stated thus:

“We have considered all the grounds of appeal within the record of appeal and did not find any merit in the same. There was no error on the part of the learned Judge in exercising his discretion and setting aside the judgment with conditions. No appeal was filed to challenge the judgment of the trial court. We agree with learned counsel for the respondent that the appellants are trying to set aside a judgment that was not appealed through this appeal which is not against the judgment but is against certain orders in the ruling as we have shown. The appellants had breached legal procedures by absenting themselves from a hearing on a date taken by consent. They have not lost the Motion – What the learned Judge held was that the appellants and other defendants be entitled to a hearing subject to meeting some conditions.”

As stated above the defendant breached the legal procedures by absenting himself from the hearing which date was taken by consent. The defendant has further not explained satisfactorily to the court why he absented himself from the hearing. So many things are not adding up in this case as earlier highlighted that Counsel had applied to cease acting and he is not talking about that but swearing an affidavit together with defendant to set aside the proceedings.

I have considered the affidavits, submissions by both Counsel and find that this application has no merit but in the interest of justice I will exercise my discretion and allow it partially with conditions which have to be met failure of which the order lapses. The defendant to pay thrown away of Kshs. 25,000/ within 14 days, defendant allowed to cross examine the plaintiff and her witness, matter to be fixed for hearing within 30 days.

DATED and delivered at Eldoret this 1st day of April, 2019

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT in the presence of:

Mr. Momanyi for Defendant/Applicant and Miss.Kiptoo holding brief for Miss.cheso for the Plaintiff/Respondent.

Mr. Koech - Court Assistant