



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 85 OF 2011

EDWIN WAFULA BARASA.....PLAINTIFF

VERSUS

MORRIS ONZEE.....DEFENDANT

R U L I N G

On 23rd September 2015 and in the presence of counsel for both parties herein, **MUKUNYA J**, in his characteristic firmness, made the following clear and un-ambiguous order: -

“The case to be mentioned on 14/10/2015 to confirm compliance with Order 11 and compliance with the rules. If any party does not comply with the rules, the Court on its own motion shall strike out the pleadings of the party not complying.” Emphasis added

Come 14th October 2015 and the defendant had not complied with the rules as earlier directed and on the application of counsel for the plaintiff, the Judge struck out with costs the defendant’s pleadings.

The case came up for formal proof on 6th March 2017 in the presence of both **MR ANWAR** Counsel for the plaintiff and **MR ATEYA** counsel for the defendant. The plaintiff testified and was cross – examined by **MR ATEYA** before he closed his case and Judgment was set down for 30th March 2017.

On 30th March 2017, the Judge delivered his Judgment granting the plaintiff all the prayers sought in his Plaint. Those prayers were: -

- (a) An order compelling the defendant to transfer the land parcel NO WEST BUKUSU/SOUTH MATEKA/2530 to the plaintiff.**
- (b) A permanent injunction restraining the defendant by himself, his agents and/or servants from selling, alienating, cultivating on, and/or in any manner impairing the plaintiff’s use and enjoyment of the land parcel NO WEST BUKUSU/SOUTH MATEKA 2530.**
- (c) Costs.**

The plaintiff’s costs were taxed on 12th October 2017 in the sum of Kshs. 112,190/= and a decree extracted.

On 14th November 2018, the defendant moved this Court by his Notice of Motion premised under the provisions of **Section 3, 3A and 63(e) of the CIVIL PROCEDURE ACT AND ORDER 51 Rule 1 of the CIVIL PROCEDURE RULES** seeking the following orders: -

- 1. Spent**
- 2. Spent**
- 3. Spent**
- 4. That this Honourable Court be pleased to review, vary, discharge and/or set aside the orders made on 14th October 2015 striking out the defendants defence.**
- 5. That the defendant/Applicant be granted leave to file a fresh defence and all necessary pleadings as required by law.**

6. That consequently the Judgment delivered on 30th March 2017 and all consequential orders be set aside or discharged.

7. That costs of this application be provided for.

The application is based on the grounds set out therein and supported by the affidavit of **NICHOLAS O ATEYA** counsel for the defendant/Applicant. In the said affidavit, counsel has deponed, inter alia, that he came on the record when the defendant's defence had been struck out and the matter proceeded ex – parte and therefore the defendant and his witnesses were never heard. That the defendant has a good defence and should not be condemned un – heard as he will be prejudiced.

The application is opposed and by a replying affidavit dated 21st November 2018, **MR OCHARO KEBIRA**, counsel for the plaintiff has deponed, inter alia, that the application is anchored on provisions of law that do not allow this Honourable Court to grant the orders sought and that the orders of 23rd November 2014 (the correct date is infact 23rd September 2015), was a default clause made in the presence of counsel for the parties and was express that any party defaulting would suffer his pleadings being struck out. That the defendant defaulted and on 14th October 2015 his pleadings suffered the aforesated consequence and there was no application for review. That the case was heard on 6th March 2017 and the defendant has not explained his in-action for over one year. That Judgment was delivered on 30th march 2017 and this application for review is being made one and a half years later and this application is suspicious coming after the demise of **MUKUNYA J** who made the orders striking out the defendant's pleadings. That the defendant is guilty of laches and is equating this Court to an appellate Court.

In a reply however, counsel for the defendant deponed that he was not on record when the defendant's defence was struck out and further, that the timing of this application should not be treated with suspicion because it has come after the demise of **MUKUNYA J** but it should be treated on it's own merits.

The application was canvassed by way of written submissions which have been filed both by **MR ATEYA** instructed by **ATEYA & CO ADVOCATES** and **MR KEBIRA** instructed by **OCHARO KEBIRA ADVOCATES**.

I have considered the application, the rival affidavits and the submissions by counsel.

It is common ground that indeed on 23rd September 2015, **MUKUNYA J** made clear directions that any party that fails to comply with the provisions of **Order 11 CIVIL PROCEDURE RULES** would have his pleadings struck out. The record shows that the order was made in the presence of both **MR ATEYA** counsel for the defendant and **MR ONGANGI** holding brief for **MR OCHARO** for the plaintiff. And although **MR ATEYA** has deponed in his supporting affidavit that he came on record when the defendant's defence had been struck out, the record shows that he filed the defendant's statements and list of documents on 3rd September 2015 having filed a notice to act for the defendant in place of the firm of **J. O. MAKALI ADVOCATE** on 4th April 2014. And although **MR ATEYA** later filed a notice to cease acting for the defendant on 12th October 2015, he never obtained an order to cease acting in terms of the provisions of **Order 9** of the **CIVIL PROCEDURE RULES**. Not only did **MR ATEYA** appear in Court on 23rd September 2015 when **MUKUNYA J** made the orders that the parties comply with the provisions of **Order 11** of the **CIVIL PROCEDURE RULES**, but he was also present in Court when the trial proceeded on 6th March 2017 and also on 30th March 2017 when the Judgment was delivered as is clear from the Coram of those days. It is therefore not factually correct for **MR ATEYA** to depone, as he has done in paragraph 3 of his supporting affidavit: -

3: *“That I came on record when the defendant/Applicant's defence had been struck out and the matter proceeded exparte.”*

The defendant seeks the following substantive orders: -

(4) **Review, vary, discharge or set aside the orders made on 14th October 2015 striking out his defence.**

(5) **The defendant be given leave to file a fresh defence and all necessary pleadings.**

(6) **The Judgment delivered on 30th March 2017 and all consequential orders be set aside and/or discharged.**

I shall consider prayers (4) and (5) together. As counsel for the plaintiff has rightly submitted, the defendant has not cited the correct provisions of the law upon which the orders sought can be hinged. But that alone is not fatal. The Court's jurisdiction to review it's orders is donated by **Order 45 Rule 1(1)** of the **CIVIL PROCEDURE RULES** as follows: -

“Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the orders without unreasonable delay.” Emphasis added

It is therefore clear from the above that before a Court can review it's Judgment or order, the Applicant must prove: -

- (a) Discovery of new and important matter or evidence that was not within his knowledge or could not be produced even with due diligence at the time the decree or order was made; or
- (b) A mistake or error apparent on the face of the record; or
- (c) Any other sufficient reason; and
- (d) The application must be made without unreasonable delay.

The defendant has not demonstrated what new and important matter or evidence has now come to light or any mistake or error apparent on the face of the record nor any other sufficient reason to warrant a review of the order dated 14th October 2015 which struck out his defence. The defendant had been warned, way back on 23rd September 2015, that his defence would be struck out if he failed to comply with the provisions of **Order 11 CIVIL PROCEDURE RULES**. Notwithstanding that clear order, the defendant failed to comply with the rules and I have not heard him, or his counsel, say that in fact they complied as directed. The order to comply with the rules was a procedural order which the Judge was entitled to make and the consequences of any default were made clear to all the parties. The defendant and his Advocate ignored those directives yet **Section 1A (3)** of the **CIVIL PROCEDURE RULES** imposed the following duty on him: -

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” Emphasis added

Having failed to comply with the orders of the Court issued on 23rd September 2015, the defendant cannot now be heard to seek the Court’s indulgence in reviewing the orders of 14th October 2015 striking out his defence when the consequences for default were made clear and no explanation is forthcoming from him as to why he did not comply. He had a window which is now closed.

The defendant was also under a duty to file his application for review, without unreasonable delay. The order striking out his defence was made on 14th October 2015 and this application was filed three (3) years later on 14th November 2018. That delay is clearly inordinate and has not been explained. In **FRANCIS ORIGO & ANOTHER V JACOB KUMALI MUNGALA C.A CIVIL APPEAL NO 149 OF 2001 [2005 2 KLR 307]** the Court of Appeal stated as follows with regard to delay in filing such an application: -

“In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay.” Emphasis added

Prayers (4) and (5) of the defendant’s Notice of Motion dated 14th November 2018 are clearly not available given the above circumstances. I disallow them.

In prayer (6) the defendant seeks the setting aside of the Judgment delivered on 30th March 2017 and all consequential orders. It is his contention that he was condemned un-heard and therefore prejudiced. In his submissions, his counsel has stated as follows in paragraph 4: -

“Both parties should have been heard before Judgment was delivered. This was not the case as the Judgment dated 30th March 2017 was an ex – parte Judgment in which the defendant/Applicant was not given an opportunity to be heard.” Emphasis added.

The defendant cannot really complain that he ***“was not given an opportunity to be heard.”*** The truth is that the opportunity was accorded to him. For reasons best known to himself and his counsel, he did not utilize it. What was so difficult in complying with the simple the directions issued by the Judge? He cannot now complain of having been condemned un-heard. In the case of **THE UNION INSURANCE COMPANY OF KENYA LTD V RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION NO 179 OF 1996**, the Court said: -

“The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.”

That is the scenario in which the defendant finds himself.

No doubt this Court has a wide discretion to set aside any ex parte Judgments in appropriate cases the main focus being to do justice to the parties – see **PATEL V E.A CARGO HANDLING SERVICES LTD 1974 E.A 75** and **SHAH V MBOGO 1976 E.A 116** among other cases.

However, the Judgment dated 30th March 2017 was not an ex – parte one. It was a final Judgment obtained following a full trial in which the defendant was represented by counsel and it cannot therefore be argued that it was a default Judgment as described in **Order 10 Rule 11** of the **CIVIL PROCEDURE RULES**. In the circumstances, the only option left to the defendant was to appeal. This is what the Court of Appeal said in the case of **KENYA POWER & LIGHTING COMPANY LTD V BENZENE HOLDINGS t/a WYCO PAINTS C.A CIVIL APPEAL NO 132 & 133 OF 2014 (2016 eKLR)** with regard to setting aside of a final Judgment: -

“Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default Judgments, the Civil Procedure Rules does not have a provision for setting aside of the final

Judgment. A party aggrieved by a final Judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42.”

As has already now been determined by this Court, the route for review is blocked not only because no new and important matter or evidence, mistake or error apparent on the face of the record now any other sufficient reason has been disclosed but crucially, the application was not filed without unreasonable delay. It is also now clear that during the trial, the defendant was represented by counsel and no application was made to reinstate the defence that had been struck out. Counsel proceeded with the trial no doubt with the authority of the defendant who cannot now claim to have been condemned un–heard. Even assuming (which is not the case) that the Judgment delivered on 30th March 2017 was obtained ex – parte, the defendant has not demonstrated that it was as a result of any accident, inadvertence or excusable mistake or error – **SHAH V MBOGO** (supra). Instead, as is now clear, the defendant deliberately sought to obstruct or delay the course of justice by not complying with the Court’s directions knowing very well the consequences of failure to do so. And worse, he has offered no explanation for that default. He is clearly not deserving of this Court’s exercise of it’s discretion.

The up – shot of the above is that the defendant’s Notice of Motion dated 14th November 2018 is devoid of any merit. It is hereby dismissed with costs.

Boaz N. Olao.

J U D G E

14th November 2019.

Ruling dated, delivered and signed in Open Court this 14th day of November 2019 at Bungoma.

Ms Gatembu for Mr Onkangi for plaintiff present

Plaintiff present

Defendant absent

Joy – Court Assistant

Right of Appeal explained.

Boaz N. Olao.

J U D G E

14th November 2019.