



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO 141 OF 1995

GERALD MWITHIA.....PLAINTIFF

VERSUS

MERU COLLEGE OF TECHNOLOGY SUED THROUGH

THE CHAIRMAN BOARD OF GOVERNORS.....DEFENDANT

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY.....APPLICANT

RULING

1. The Notice of Motion dated 9th June, 2008 seeks the following orders:-

1. Spent.

2. That the Honourable Court be pleased to make an order of stay of any further proceedings in this case pending the hearing and determination of this application inter parties.

3. That the Honourable Court be pleased to make an order setting aside the interlocutory Judgment dated 10th April, 2001 and the exparte judgment dated 24th day of September 2001 and any other subsequent orders and grant the applicant/defendant leave to file Memorandum of Appearance and defence out of time.

4. That the annexed memorandum of Appearance and defence be deemed as duly filed.

5. That the Honourable Court be pleased to make any other orders which it may deem just and fit to meet the ends of justice.

6. That costs of this application be provided for.

2. The Application is based on the grounds that:-

1. The defendant was served with summons to enter appearance on the 09:10:1995.

2. Thereafter, the defendant/applicant handed over the said summons to enter appearance to the state counsel one Mr. Mutuku for the purpose of filing the pleadings.

3. The state counsel the said Mr. Mutuku agreed to take over the matter and he informed the defendant/applicant that he had filed memorandum of appearance and defence.

4. Thereafter, the said Mr. Mutuku informed the defendant/applicant that the plaintiff had withdrawn the case against the defendant /applicant for the purpose of settling the suit out of Court. On that belief, the defendant/applicant did not pursue the matter anymore as he waited for further advice from the state Counsel, Mr. Mutuku.

5. The defendant/applicant avers that it was shocked on 3rd June 2008 when it was served with a notice of Taxation in this case at the college.

6. The Principal of the defendant proceeded to the offices of the Attorney General Meru, and upon seeking an explanation over the position of this matter, he was told that the Attorney General's office did not know anything about the matter and that Mr. Mutuku who could be having some information about the matter left the office for a transfer in Nakuru.

7. The defendant /applicant proceeded to Meru High Court Registry and upon perusal of the Court file, he found that the state counsel Mr. Mutuku never filed any Memorandum of Appearance and defence nor was there any indication that the plaintiff had withdrawn his case.

8. The Court record revealed that interlocutory judgment was entered on 10th April, 2001 because no Memorandum of Appearance and Defence were filed and the matter proceeded for formal proof.

9. The state counsel never informed the defendant that he had never filed the memorandum of appearance and defence.

10. No Notice of judgment was ever served to the defendant/applicant as required under order XX1 Rule 6 of the Civil Procedure Rules.

11. The Defendant /applicant should not be punished for the mistake of the learned state counsel for misadvising the applicant/defendant and for failing to file Memorandum of Appearance and Defence on behalf of the defendant/applicant.

12. If the defendant had knowledge of the state counsel's failure, he would have proceed to instruct another Advocate to act for the defendant.

13. It is only just and fair that the applicant /defendant be given a chance to be heard in this case otherwise, applicant stands to suffer irreparable loss.

14. The applicant/defendant contends that it has a good defence and that no prejudice will be occasioned to the Plaintiff if the application is allowed.

3. The Application is supported by the Affidavit of Thiane Simon Kubaison sworn on 9th June, 2008, a principle of the defendant. He has reiterated the grounds brought forth in support of the application. In addition he has given details of the court proceedings from year 2001 to 2007.

4. Applicant has annexed a memorandum of appearance and statement of defence for court's perusal.

5. Plaintiff /Respondent , (Gerald Mwithia) has opposed the application through his Affidavit sworn on 21st July,2008 where he states as follows:-

1. That when Applicant was served with the summons to enter appearance , it chose not to defend the suit and has only rushed to court when execution is imminent.

2, That the Applicants averments are not supported by any tangible evidence in that, there is no evidence of how summons were handed over to the state counsel, no evidence of communication between the state counsel and the applicant to the effect that the state counsel had agreed to take up the matter and defend the suit on their behalf, and there is no evidence to confirm the allegation that

plaintiff had withdrawn the suit.

3. Further, plaintiff contends that Mr. Mutuku who was posted to Nakuru , can easily be traced and can confirm if indeed he had taken over the matter on behalf of the applicant.

4. Plaintiff states that applicant has not given a plausible explanation as to why a suit filed on 9th October, 1995 ,has not been defended at all. He believe that the Applicant is indolent, not diligent and that it slept on its rights and it should shoulder the repercussions silently.

5. Plaintiff also contends that the defence is but a mere denial, and hence plaintiff should not be denied the fruits of his judgment.

6. The Application was canvassed by way of Written Submissions, which submissions have duly been filed.

7. The Applicant has not denied that summons to enter appearance had been served. The Applicants blames the State Counsel for not filing a memorandum of appearance and statement of defence and for informing the Applicant's predecessor that the case had been withdrawn.

8. The Applicant also contends that they were never served with a Notice of entry of judgment.

9. Applicant therefore contends that it should not be punished for the mistake of Mr. Mutuku, the State Counsel,

10. In support of the application, applicant has proffered the following authorities

1. *Kiare vs. Njoroge [1986] KLR 402,*

2. *Pithon Waweru Maina Vs Thuka Migiria [1982-1988] KAR 171,*

3. *Maina vs Muriuki[1984] KLR 407*

4. *Maina vs Mugiria [1983] KLR 78*

5. *Waweru vs Ndiga [1983] KLR 236*

6. *Daniel Murithi Kamonde vs Mary Wanjiku Kamonde(unreported),*

11. Plaintiff on the other hand has submitted that no explanation has been advanced as to why there is a delay of 13 or so years. It is also averred that applicant has not demonstrated that a Mr. Mutuku was the State Counsel at that time.

12. Plaintiff contends that the Court ought not to exercise discretion in favour of the Defendant.

13. In Support of his argument, Respondent has proffered the following authorities:-

1. *In Orion East Africa –Vs- Mugama Farmers Co-operative Union Ltd & Anor [2015] e KLR.*

2. *Savings and Loans Limited Vs. Susan Wanjiru Muritu Nrb (milimani) HCCC NO. 397 of 2002.*

3. *Chandaria Industries Ltd Vs. Sonal Holdings (K) Ltd and Anor [2014] e KLR.*

4. *First American Bank of Kenya Ltd & Anor vs Grandways Venture Ltd Civil Appeal No. 173 of 1999.*

5. Bi-Mach Engineers Ltd Vs James K. Mwangi [2011] e KRL.

14. I have considered all the arguments raised herein along with the submissions. This Court is mandated to exercise its discretion judiciously with the intention of avoiding injustice and hardship resulting from accident, inadvertence or excusable mistake or error.

15. In **Alice Mumbi Nyanga Vs. Danson Chege Nyanga & Another Civil Case No. 394 B of 2001 (2006) e KLR**, the Court had stated that:-

“a Civil case once filed is owned by a Litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court...”

16. The present situation is one where the predecessor of the applicant admits that it was served with summons to enter appearance. The Return of service for summons to enter appearance and plaint is dated 31/10/1995. It is untenable for the applicant to have assumed that all was well simply because they had instructed an advocate to represent them.

17. I note that this is a very old case. Although Respondent has submitted that the cause of action arose in 1992, an agreement in the Court file shows that the Agreement between the parties is dated 21:02: 1983. The original Defendant ceased to exist, and was taken over by the current Defendant while the original Plaintiff is dead. If the cause of action arose in 1992, it means that 26 years have now gone by. Who will be at hand to testify?.

18. Against this background, I find that it is not enough for the applicant to simply heap all the blame on Mr. Mutuku. Applicant ought to have demonstrated that they took tangible steps to follow up this matter. It would be unjust and unfair to have the case start all over again.

19. The other point to note is that the draft defence contains a general denial of the Plaintiff's claims.

20. Finally, I find that no reasonable or any explanation has been advanced as to why the present application has not been prosecuted since 2008 (a period of 10 years).

21. What I can say is that there is prolonged and inexcusable delay in the prosecution of the present application and the suit.

22. I find that **the application of 09:06:08 is unmerited. The same is dismissed with costs to Respondent.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 23th JANUARY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet

Nyamu Nyaga for Defendant Applicant present

Rimita H/B for Mwirigi for Plaintiff/Respondent present

HON. L. N. MBUGUA

ELC JUDGE