



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.474 OF 2017

SAMUEL NJEHIA GITAU.....PLAINTIFF/RESPONDENT

-VERSUS-

JOYCE WANJIKU.....DEFENDANT/ APPLICANT

AND

NYAKINYUA INVESTMENT COMPANY LTD....THIRD PARTY

RULING

This is an application dated **23rd August 2014** brought under Sections 3, 3A of the Civil Procedure Act, Order 12 Rules 2 and 7, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions. The Defendant/Applicant has sought for these orders:-

- 1) That the court proceedings, orders and directions issued by this court on the 20th July 2017, be and are hereby set aside, the matter be re-instated for hearing and the Plaintiff recalled for examination in chief and or cross-examination.**
- 2) That the Defendant be allowed to call her witnesses to testify.**
- 3) That costs of the application be in the cause.**

The application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit** of **Edwin Simiyu Wabuge advocate**.

Among the grounds in support of the application are:

- 1) That the Plaintiff's advocate unilaterally set the suit for hearing on the 20th July 2017 ex-parte.**
- 2) That the Firm of Lubulellah & Associates Advocates which is on record for the Defendant currently has only 4 qualified practicing advocates in its engagement.**
- 3) That on the day this matter came up for hearing, the advocate having personal conduct of the matter, Edwin Simiyu Wabuge, was away on sick leave.**
- 4) That the same day, 2 of the 4 advocates in the Firm of Lubulellah & Associates, namely A.M. Lubulellah & W. A. Mutubwa, were in South Africa for a pre-scheduled International Conference, while the only attendant Advocate Eugene Lubale Lubulellah had the following matters to attend to or cause representation in addition to the present suit:-**
 - a) Public Procurement Administrative Review Board Application No.63 of 2017 – Transcend Media Group Ltd..Vs.IEBC & Another (Hearing)**
 - b) Industrial Cause NO.2104 fo 2011 – John Ochieng Auma..Vs..Kenyatta National Hospital Board (Hearing)**
 - c) HCCC No.304 of 2014 – Transcend Media Group Ltd..Vs..IEBC (Hearing)**

d) HCCC No.163 of 2014 - Konnexion Systems Ltd...Vs...IEBC (Mention)

e) CMCC No.605 of 2015 – Young & Rubicam BrandsLtd..Vs..Kwa Waiaia Ltd (Hearing)

f) ELC Petition No.3 of 2017 (Busia) – Busia Sugar Industries Ltd..Vs..Kenya Sugar Board & Others (Hearing).

5) That notwithstanding the above, the firm on record for the Defendant requested an external advocate to hold brief for the advocate having personal conduct of this matter and seek an adjournment for reasons given.

6) That despite an adjournment being sought, the same was not granted and the Plaintiff proceeded to be examined in chief ex-parte and directions given that the Plaintiff's advocate file the Plaintiff's submissions within 14 days.

7) That the Applicant was not given an opportunity to test the evidence of the Plaintiff's witnesses in cross examination.

8) That the Applicant is ready and willing to compensate the Defendant with costs for the 20th July 2017.

9) That unless the orders sought herein are granted, the Applicant stands to suffer grave injustice.

10) That it is just and fair that the Application be allowed and the suit heard and determined on its merits.

In his **Supporting Affidavit, Edwin Simiyu Wabuge**, the advocate who was in conduct of this matter reiterated the contents of the grounds in support of the application and further averred that it is only proper that the suit be heard on merit and all sides be heard and the evidence tested since the issues raised in the pleadings are weighty as fraud has been alleged and pleaded.

The application is opposed by the Plaintiff/Respondent who averred that this application is only meant to delay and obstruct the course of justice and that Defendant has been indolent.

The application was canvassed by way of **written submissions** wherein the **Law Firm of Lubulellah & Associates** filed their written submissions on **7th November 2017**, and urged the Court to exercise its discretion and set aside the said proceedings in favour of the Applicant. The applicant relied on various decided cases among them the case of **Philip Chemwolo & Another...Vs...Augustine Kubende (1982-88) KAR 103**, where the Court of Appeal held that:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of determining the rights of the parties and not the purpose of imposing discipline”.

Further, the Applicant relied on the case of **Richard Nchaipi...Vs...IEBC & 2 Others (2013) eKLR**, where the Court held that:-

“Nowadays, the pendulum has swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities”.

The Applicant further submitted that there would be no prejudice suffered by the Plaintiff as he will also be accorded an opportunity to be heard, to test the evidence of the Defendant and prove his case on the required standard.

On the part of the Plaintiff/Respondent, the **Law Firm of Wachira Ndungu & Co. Advocates**, filed the written submissions on **30th November 2017** and urged the Court to dismiss the instant application.

The Plaintiff submitted that though the court has jurisdiction under **Order 12 Rule 7** to set aside or vary the Order of the Court as it deems fit, the said Order is only applicable where Judgement has been entered. Therefore the said Order is not applicable herein as no Judgement has yet

been entered. Further, the Court has discretion to set aside Order but such Orders must be exercised judiciously upon principles applicable and the law. The Plaintiff relied on the case of **Maina...Vs...Mugira (1983) KLR 78**, where the Court of Appeal held that:-

“The principles governing the exercise of the judicial discretion to set aside an ex-parte Judgement obtained in default of either party to attend the hearing are:-

a) Firstly, there are no limits or restrictions on the Judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

Again the Plaintiff quoted the case of Jesse Kimani...Vs...McConnel (1996) EA 574, where the Court held that:-

“In exercise of such discretion, the court should consider:-

‘among other matters, the facts and circumstances, both prior and subsequent and all the respective merits of the parties together with any material facts which may have entered into the passing of the Judgement’

Further, it was submitted that the Court of Appeal in the case of Merema Nyangombe...Vs...Chacha Mwita, Civil App No.79 of 1983(Kisumu) set out the principles applicable as follows:-

“First was there a Defence on merit? Secondly, would there be any prejudice. Thirdly, what was the explanation for any delay.”

The Plaintiff also submitted that he will suffer prejudice as he has

waited for over 5 years to litigate this matter and the main concern of the court is to do justice to the parties and granting this application would only act to obstruct and/or delay the court of justice. The Plaintiff urged the Court to disallow this application.

The Court has now carefully considered the instant **Notice of Motion** application and the entire proceedings. This is a matter that was filed in court in the **year 2012**. It is a matter that is **over 5 years** and should be **concluded** by **31st December 2018**.

As the court embarks on whether to allow or disallow this application, it will take into account that it has a duty of ensuring that this matter which is **over 5 years old** should be concluded by **31st December 2018** as a means of clearing backlog of cases that being one of the **agenda** in **Sustaining Judiciary Transformation (SJT)**.

Further, the Court will also take into account that the matters before it are decided fairly and as provided by the law so that justice can be seen to be done.

The application is anchored under **Section 3 and 3A** of the Civil Procedure Act which donate to this Court the inherent power to make or issue orders that are necessary in ensuring that end of justice is met and prevent abuse of the court process.

Further, the application is anchored under Order 12 Rule 7 of the Civil Procedure Rules.

The Court has noted that when the matter was set down for hearing, the Defendant’s advocate was duly served with a hearing Notice on **7th June 2017** as per the Affidavit of Dickson Musyimi, Process Server. However, on the date of the hearing, a **M/S Atiya** held brief for **Mr. Simiyu** and alleged that **Mr. Simiyu** was away on sick off. However, **Mr. Nganga** submitted that **Mr. Simiyu** had no courtesy of informing **Mr. Nganga** that he was unwell and thus not available for hearing. **Mr. Nganga** also submitted that **Mr. Simiyu** was not the only advocate in the **Law Firm of Lubulellah & Associates** and there was no evidence of **Mr. Simiyu’s** sickness.

The Court found no good reasons to adjourn the matter and directed the same to proceed at 11.00am. At 11.00am, there was no representation for the Defendant and the Defendant was absent too. The matter proceeded exparte wherein the Plaintiff gave evidence and closed his case.

The Court directed the Plaintiff to file written submissions and come back for mention on **5th October 2017** for a Judgement date. However, before **5th October 2017**, this instant application was filed and it is thus contested.

As the Court observed earlier, this application is anchored under **Order 12 Rule 7** of the **Civil Procedure Rules** which grants the court discretion to set aside any exparte proceedings upon such terms. The said Order reads as follows:-

“Where under this Order Judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

From the above provisions of law, it is evident that court has discretion to set aside any exparte proceedings or orders but as usual the said discretion must be exercised judiciously. See the case of CMC Holdings Ltd...Vs...

Nzioki (2004) (CAK) 1 KLR 173, where the Court of Appeal held that:-

“In an application for setting aside exparte Judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously”.

Further in the case of Sametract...Vs...Maqs Motors Ltd, Kisumu HCCC No.45 of 1996, the Court held that:-

“It is trite law that the court is vested with unfettered discretion in dealing with application for setting aside Judgement. It is also a well-known rule that the discretion must be exercised judiciously”.

The above cases deal with setting aside *ex parte* Judgements but the rationale is similar in the instant application of setting aside *ex parte* proceedings.

In deciding whether to set aside the said proceedings, the Court will be guided by the following principles;

1) Whether there is sufficient reasons or explanation for non-attendance.

2) Whether there was unreasonable delay in filing the application.

3) Whether there will be any prejudice.

The Defendant/Applicant has alleged that he was on sick leave and that is why he did not attend court. Further that the other two advocates were out of the country attending a prior scheduled conference in **South Africa** and the remaining advocate was engaged in other matters. However, it is noted that the Defendant was absent and so the Defence was hell bend in ensuring that the matter was adjourned on the material day.

However, the Court notes that this is a matter filed by the Defendant who is seeking for justice from this Court and a mistake of his advocate should not be visited upon her. See the case of **Murai...Vs...Wainaina (No.4) 1982 KLR 38**, where the Court stated that:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of a junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of Justice”.

The Court has considered the explanation given by the Defence advocate and finds it sufficient to cover for the Defendant who has filed a Defence in this claim and the Court cannot dismiss the said Defence at this juncture as unmeritorious. See the case of **Ahmed...Vs...Highway Carriers (1986) LLR 258 (CAK)**, where the Court of Appeal held that:

“...a litigant should not suffer for his advocate’s mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant’s rights”.

As the Court indicated earlier, it will ensure that justice is seen to be done while determining this matter. See the case of **Muthaiga Road Trust Company Ltd...Vs...Five Continents Stationers Ltd & 25 Others (2003) KLR 714**, where the Court of Appeal held that:-

“In an application for setting aside, 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”.

Though the proceedings for the Plaintiff were closed on **20th July 2017**, and the matter was slotted for mention on **5th October 2017**, for taking of a hearing date, the Court finds that the Defendant/Applicant filed this application dated **23rd August 2017** on **7th September 2017**, during the **Court’s Vacation**. Therefore, there was no undue delay in filing of this application. The Court finds that it was filed within a reasonable time.

On whether there will be prejudice caused, it is indeed correct that this matter is **over 5 years old** and further delay of the same would indeed prejudice the Plaintiff/Respondent herein. However, deciding the matter

without having heard the side of the Defendant or giving her an opportunity to be heard will be going against the rule of natural justice where it states that; **‘No one should be condemned unheard’**.

By failing to allow the application, more prejudice will be occasioned to the Defendant than the Plaintiff. However, the Court still emphasizes that this is an old matter which is **over 5 years** and should be heard and

concluded by **31st December 2018**.

For the above reasons, the **Court finds that the Applicant’s application is merited only to the extent of;**

a) Staying any further mention date for taking of a Judgement date.

b) However, the Court will set aside the Order of close of the case

and will allow the recall of the Plaintiff for cross-examination by the Defendant’s advocate on the evidence already adduced in court by him.

c) *The court will therefore not set aside the proceedings of 20th July 2017, and order the matter to start afresh but will allow cross-examination of the Plaintiff by the Defence.*

d) *Further, the Defendant is allowed to tender her evidence in*

support of her case and the same should be done before 31st

December 2018.

e) *The Defendant to pay a throw away cost of Kshs.20,000/= to the*

Plaintiff herein.

f) *Costs of this application shall be in the cause.*

It is so ordered.

Dated, Signed and Delivered at Thika this 28th day of September 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Nganga for Plaintiff/Respondent

Mr. Waweru holding brief for Mutubwa for Defendant/Applicant

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court

L. GACHERU

JUDGE

28/9/2018