



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 400 OF 2017

AGNES ANDENYI IMBUCHI.....PLAINTIFF/APPLICANT

VERSUS

NANCY WITAMBULA AMBULA

ROSE IKAMBILI AMBULA

(ADMINISTRATORS OF THE ESTATE OF

RICHARD MISE IMBUCHI.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 11th July 2018 and brought under sections 1A, 1B and 3A of the Civil Procedure Act, order 12 rule, order 45 rule 1 (1), order 51 rule 1 of the Civil Procedure Rules seeking the following orders:-

- (i) That the application herein be certified urgent.
- (ii) That there be a stay of further proceedings pending hearing and determination of this application.
- (iii) That there be a review and setting aside of the ruling delivered on 26th June, 2018.
- (iv) That the application dated 12th March, 2018 be set down for hearing.
- (v) That costs of the application be provided for.

The applicant submitted that the firm of M/s. Birech, Ruto & Co. Advocates were never served with any hearing notice accompanying the motion or a separate hearing notice. That the accompanying notice of motion was a letter of invitation to fix a hearing date on 3rd May, 2018 for the application (Attached and marked T.T.2 is a copy of invitation letter). That the advocate for the applicant/defendant took a hearing date – ex parte and had the said application heard in the absence of the plaintiff's advocate. That the firm of M/s. Birech, Ruto & Co. Advocates were served with a notice of ruling of the application to amend defence dated 9th October, 2017 (Attached and marked T.T.3 is a copy of ruling notice). That the firm of M/s. Birech, Ruto & Co. Advocates were therefore misled to believe that the ruling delivered on 26th June, 2018 was in respect of the notice of motion dated 9th October, 2017 in respect of an application to amend the defence. That in the circumstances, it is clear that the plaintiff/respondent was not heard which is against the rules of natural justice. That it is clear there is a mistake apparent on the face of the record in that the plaintiff's advocate was not served with any notice of hearing of the said application. That plaintiff was condemned unheard. That the applicant/plaintiff is prejudiced by the ruling and stands to suffer irreparably as the entire suit was dismissed.

The respondent opposed the application and maintains that the applicant was duly served however they admit that there was an error in the ruling notice.

This court has considered the application and the submissions therein. The application is based on the grounds that the application was heard, determined and ruling was delivered without the applicant/plaintiff being heard. That the hearing date for the application was not served upon the applicant/plaintiff's advocate. There is a mistake occasioned which is apparent in the face of the record. I do accept the applicant's reasons for non attendance. I find that the firm of M/s. Birech, Ruto & Co. Advocates may have been misled to believe that the ruling delivered on 26th June, 2018 was in respect of the notice of motion dated 9th October, 2017 in respect of an application to amend the defence. It is also possible that they may not have been served with the hearing notice.

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application is merited and grant the following orders;

1. That there be a review and setting aside of the ruling delivered on 26th June, 2018.
2. That costs of the application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE