



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 110 OF 2009

JOHN KARUGA WAHINYA..... PLAINTIFF

=VERSUS=

VIOLET WANJA GATEI.....DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 25th October 2016 brought by the Defendant/ Applicant. The application seeks orders setting aside the Court's orders of 27th September, 2016 which allowed the Plaintiff/ Respondent's application dated 10th June, 2016.
2. The Respondent had filed an application dated 10th June, 2016 in which he sought the Applicant's Advocates compelled to pay an amount of **Kshs; 8,474,546/=** which was held by them. This application was duly served for hearing on 27th September, 2016. On the date of hearing, the Applicant's counsel was not in Court. The Court having been satisfied that there was proper service, proceeded to hear the application ex-parte and granted the orders therein. This is what triggered the current application.
3. The Applicant concedes that indeed there was service of a hearing notice upon the Law firm of Messers C.N. Kihara & Co Advocates which hearing notice was received by the Firm's receptionist who however failed to diarise the date. That the Applicant's advocates were keen on opposing the application but that failure to attend Court was due to a mistake of the receptionist who has apologised for that omission.
4. The Applicants contend that the ex-parte orders are adverse to their client in that an ex-parte order had been made compelling an advocate to release money held on account of the client without there being a professional undertaking with respect the monies held by the firm.
5. The Applicant's application was opposed through a replying affidavit sworn by the Respondent's counsel who took issue with the contents of the receptionist's affidavit and doubted whether the monies the subject of the order of Court given on 27th September, 2016 were actually deposited in CHASE BANK which was under receivership.

However, in subsequent further affidavits, the applicant's counsel admitted that indeed the hearing notice was received by the receptionist who has two different signatures. The Advocate nevertheless took issue with the document filed by the Applicant's counsel showing that money was deposited in CHASE BANK. He contended that what was exhibited was a deposit slip

showing that monies were in the account and that it did not relate to the money which the Applicant's counsel held and was the subject of the ex-parte orders.

The Respondent's counsel further argued that the applicant's counsel was in contempt of a Court order and that he ought not to be given audience until he purges the contempt.

6. I have considered the application by the Applicant and the opposition to the same by the Respondent. This is an application which calls for the exercise of the Court's discretion.

In Shah -vs- Mbogo & Another (1967) EA 116 it was held that in exercising discretion to set aside ex-parte orders like Judgment, such discretion should only be intended to avoid injustice or hardship resulting from inadvertence, excusable mistake or error. It is never intended to assist a party who has deliberately decided to subvert or delay the course of justice.

7. In the instant case, the applicant, has demonstrated that though a hearing notice was received, the receptionist who received it inadvertently omitted to diarise it. There is no way the Advocate handling the case would have known that there was an application coming up for hearing in Court on that day.

An extract from the firm's court diary was exhibited which confirms that the case in issue was not in the diary.

8. In the case of: **Phillip Chemwolo & Another -vs- Augustine Kubende (1982 -88) KAR 103 Apaloo J** as he then was rendered himself thus:

“ Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merits....”

9. In Belinda Murai & Others -vs- Amos Wainaina(1978) KLR 2782 the Court made the following observations:

“A mistake is a mistake regardless of who commits it. The door to Justice is not closed because a mistake has been committed by a lawyer who ought to know better. The court should do whatever is necessary to rectify it.”

10. A mistake was committed by the receptionist of the firm of

C. N. Kihara & Co advocates. Both the advocate and the said receptionist have owned up the mistake and apologised for it. It is clear that the ex-parte orders had far reaching implications. The Applicant ought to be heard on merits before any orders can be given. The mistake by the receptionist of Messers C. N. Kihara & Co advocates was not deliberate. The non-attendance in Court was not deliberate and was not in any way meant to obstruct or delay the Course of Justice. I find that this is a clear case where the orders of 27th September, 2016 should be set aside. I therefore allow the Notice of motion dated 25th October, 2016 with the result that the Court's order of 27th September, 2016 allowing the Notice of motion dated 10th June, 2016 is hereby set aside. The Plaintiff/ Applicant's Notice of Motion dated 10th June, 2016 shall be heard on merits on a date to be given at the delivery of this ruling. The costs of this application shall be borne by the Defendant's Advocates.

It is so ordered.

Dated, signed and delivered at Nairobi on this 22nd day of June, 2017.

E. O. OBAGA

JUDGE

In the absence of advocates who were aware of date of delivery of ruling.

Court Assistant: Hilda