



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 489 OF 2013 (O.S)

LAZARUS KIBUI NDEGWA..... PLAINTIFF

VERSUS

LABULE OKELLO LUTWA DEFENDANT

R U L I N G

This court fixed this matter for mention for further directions on 23rd September 2014 during a mention of the matter on 26th June 2014 at which only **Mr. Parekh Advocate** for **Henry Oryem Okello**, one of the Respondents was in attendance. Following representations by Mr. Parekh Advocate the court ordered that the matter be fixed for mention for further directions on 23rd September 2014 and directed service on the Applicant and the 2nd Respondent.

On 23rd September 2014 only **Mr. Parekh Advocate** for **Henry Oryem Okello** was present and he invited the court to give directions on the hearing of the originating summons. The court ordered that the originating summons be heard by way of affidavit evidence and directed that the parties do file their written submissions and the originating summons to be heard on 12th November 2014 by way of the parties highlighting the submissions. **Mr. Parekh Advocate** was to extract the order and to serve the other parties.

On 13th October 2014 the Applicant filed a Chamber Summons dated on the same date expressed to be brought under sections 1A, 1B & 3A Civil Procedure Act and Article 159(2) of the Constitution. The summons seeks inter alia the following orders:-

1. That this Honourable court be pleased to stay the orders made on 23rd September 2014 until the hearing of this application. (The applicant on 19/1/2015 made an oral application to be allowed to amend the application to include an order to set aside the order which application was objected to by **Mr. Parekh Advocate**).
2. That the Plaintiff/Applicant be granted leave to file a further affidavit in response to the affidavit of the Respondent dated 27th June 2013.
3. That the court be pleased to issue fresh directions on the originating summons dated 22nd April 2013.

4. That the suit be heard by way of Viva Voce evidence.
5. That costs be in the cause.

The application is supported on the annexed affidavit of **Lazarus Kibui Ndegwa** the Plaintiff/applicant and **Nyambura Kinyanjui Advocate** for the Applicant both sworn on 13th October 2014. The basis of the application is that the Applicant's advocate, **Mrs. Kinyanjui** was late in arriving at the court having been caught up by traffic. **Mrs. Kinyanjui** in her affidavit states that she met **Mr. Parekh Advocate** outside the court premises who informed her that directions had just been given and it is her averment that it was not her intention to attend the court late but for the traffic.

The Respondent, **Mr. Henry Oryem Okello** filed grounds of opposition to the application dated 24th October 2014 and **Mr. Kasmukhra Manilal Parekh Advocate** for the Respondent swore an affidavit dated 23rd October 2014 in opposition to the application by the Plaintiff/Applicant. The Respondent in the grounds of opposition states that the Plaintiff/Applicant was duly served with the mention notice on 9th July 2014 which clearly notified that in default of appearance on the mention date the court would proceed to issue directions as it saw fit such absence notwithstanding and hence maintains that the court properly issued directions on 23rd September 2014 as it was entitled to do.

The Respondent asserts that the Applicant's Advocate has not given any explanation and/or reasonable explanation for non appearance on the day in question. The Respondent further avers that in spite of the matter having come for mention on previous occasions the Applicant had not applied to the court to be granted leave to file further affidavit or have other directions given. The Respondent views the Applicant's instant application as an attempt to further delay the final determination of the matter and prays for the dismissal of the application.

The parties filed written submissions to ventilate their respective positions in regard to the plaintiff/Applicant's application. He filed his submissions on 12th November 2014 while the Respondent filed his submissions on 20th November 2014. The plaintiff/Applicants submissions reiterate the facts of the affidavits in support of the application. As I understand it, the counsel for the applicant admits having been served with the mention notice for 23rd September 2014 and avers that she appropriately diarised to attend court on the day at the appointed time but was caught up in traffic and could not reach the court in time. The fact that she in fact came to court albeit late is not disputed by the counsel for the Respondent who she states she actually met outside the court room immediately after the matter was mentioned and directions given. The Applicant's counsel avers the failure to attend court was not deliberate and that she had made the effort to be in court but for the traffic. The plaintiff's counsel submitted that the court should endeavour to do substantive justice to the parties and in the circumstances should not visit the mistake of counsel on the Applicant.

The Respondent's submissions while responding to the applicant's submissions have substantively delved at some length on the merits and or otherwise of the originating summons which I think the court would not properly make an adjudication on at this stage. In the present originating summons, it is to be remembered there are several persons who have claimed to represent the estate of **Labule Okello Lutwa** who it is stated is deceased. **Henry Oryem Okello** is one such person and he claims to be the son while **Agnes Wangui Kibugu** is another of the Respondents and claims to have been the wife of **Labule Okello Lutwa** at the time of his death and therefore entitled to be the personal legal representative of his estate. There is yet another person who has appeared and claims to be **Labule Okello Lutwa**, the Defendant herein though he appears to have fizzled out of the proceedings. The various court mentions before the mention of 23rd September 2014 were driven by the court's desire to determine the identity and locus of these persons such that when on 24/6/2014 and 23/9/2014 the other parties other than **Henry Oryem Okello** were absent in court, the court was left with no other option but to issue directions aimed at disposing the originating summons pending before the court and it is in this context that the direction of 23rd September 2014 were issued.

Having perused the application by the applicant and the affidavit in support and in opposition thereto and

the submissions, the issues that stand out for determination are:-

- (1) Whether there is any basis to vary and/or set aside the directions given by the court on 23rd September 2014.
- (2) Who bears the costs for the application.

The court in the case of **Shah –vs- Mbogo & Another (1967) EA 116** set out the principles and/or factors to consider in an application to set aside an *ex parte* judgment or order when the court stated:-

“-----the court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice”.

In the present case although the applicant in the application seeks a stay of the orders made on 23rd September 2014, he in the same application seeks to be granted leave to file a further affidavit and further seeks that the court issue fresh directions on the originating summons. Constructively the applicant is essentially seeking the directions given on 23rd September 2014 to be set aside and on that account and in the interest of doing justice I would grant the Applicant’s oral request to be allowed to amend the Notice of Motion to include a prayer to set aside the directions given on 23rd September 2014 on the basis that the nature and character of the application is not altered in any manner that would prejudice the Respondent.

The Applicant’s counsel submitted that her failure to attend court was not deliberate and that she had made effort to be in court but was prevented to do so by the traffic. The court cannot be oblivious to the fact that on occasions there is unusual traffic on the Nairobi roads and though the Applicant’s counsel has not explained how much time she gave herself to get to court and/or whether there was unusual occurrence that may have worsened the state traffic I am not prepared to hold that the explanation given for the lateness is not reasonable, except I must point out and emphasis that it is the duty of counsel to be in court at the appointed time for his/her client’s matter and I am therefore not giving a licence for counsel to cite traffic as the reason for their non attendance in court at the appointed times. Each case has to be looked at having regard to its peculiar circumstances and facts. The Applicant’s counsel was prior to the mention of 24/6/2014 always in court on time and I feel she ought not be penalized for the one time she happened to be late.

This in the present matter even though I hold the Applicant’s counsel culpable, I nonetheless in the interest of having this suit determined on merits for the interest of the parties I am prepared to exercise my discretion to allow the application. I take comfort for my decision from the observation of **Apaloo JA** (as he then was) in the case of **Philip Chemwolo & Another –vs- Augustine Kubede (1982-88) KAR 103** where he rendered himself thus:-

“Blunder will continue to be made from 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 deciding the rights of the parties and not the purpose of imposing discipline”.

I do not consider that the Respondent will be unduly prejudiced save that the matter will definitely take longer to get determined. The Respondent will get an opportunity, if need be, to respond to any further affidavit that the Applicant may file once leave to file is granted. As the Applicant is responsible for the turn of events in the prosecution of the present matter which no doubt has put the Respondent to considerable expense as the respondent has appeared in court on diverse dates including 24/6/2014, 23/9/2014, 29/10/2014 and 19/1/2015 the applicant would have to bear the Respondent costs occasioned by the instant application.

In the result and for the reasons set out in the ruling I allow the application by the Plaintiff/Applicant dated 13th October 2014 and set aside the directions issued on 23rd September 2014. I grant the Plaintiff/Applicant leave of **14 days** from the date of this ruling to file a further affidavit in response to the Respondent's affidavit dated 27th June 2013. I further direct that this matter be fixed for mention for directions on 14th May 2015. I award the costs of the application which I assess at **Kshs.15,000/-** to the Respondent, **Henry Oryem Okello**, to be paid to his Advocates on or before the next mention date.

Orders accordingly.

Ruling dated, signed and delivered this.....**16th**...Day of...**April**.....2015.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mrs. Kinyanjui..... For the Plaintiff

Mr. Parekh.....for Henry Oryem Okello

Mr. Kibathi for Kimundu for Agnes Wangui Kibugu, for 3rd Respondent