



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 212 OF 2013

JACKLINE WAKESHOCLAIMANT

VERSUS

AROMA CAFERESPONDENT

RULING

INTRODUCTION

The Motion under consideration dated 15/5/2014 filed by the respondent in the main suit (applicant). It seeks the setting aside of the judgment and the proceedings and the Applicant be allowed to defend suit unconditionally. The Motion also seeks that the claimant and her witnesses be recalled and cross-examined by the applicant's counsel. The Motion is supported by the affidavit of Hananel Adini sworn on 15/5/2014.

The gist of the applicant's motion is that the impugned exparte proceedings and judgment were the result of her counsel's negligence and as such the mistake of counsel should not be visited on her. She blames her counsel then on record for failure to notify her of the hearing date and also for his failure to attend court to cross examine the claimant and her witnesses. She also blames the said counsel for failure to apply to rectify the default in good time instead of filing written submissions after the exparte hearing.

The claimant has opposed the Motion by filing a replying affidavit. The gist of the reply is two fold. Firstly the claimant raises a preliminary objection on ground that the Motion was filed by the firm of Mogaka Omwenga & Mabeya Advocates before the applicant obtained the leave of the court to change advocate after judgment. Secondly, the claimant contends that the Motion lacks merits and does not meet the threshold required for this court to exercise discretion in setting aside the exparte judgment.

Both counsel for the two parties filed written submissions with plenty of judicial precedents which the court had the privilege of reading through. The two counsel also made brief oral submissions which were basically to highlight on the said written submissions.

APPLICANT'S SUBMISSIONS

Mr. Mogaka, learned counsel for the applicant prosecuted the Motion . He relied on the supporting affidavit and his written submissions. He submitted that the Motion was necessitated by the applicant's former counsel's failure to advice her to attend court to testify; that, the said former counsel also failed to attend court to cross examine the claimant's witnesses and; that the said counsel never notified the applicant of the said default and never sought any relief to allow the defence to be heard. Instead , Mr.

Mogaka submitted that the former counsel filed written submissions after the close of the exparte hearing.

As a consequence of said former advocates default, the applicant was greatly prejudiced because her rights to be heard was violated by none other than by her own counsel. Mr. Mogaka referred to **C.A.NO. 46 OF 1986 HAJI AHMED SHEIKH t/a HASA HAULIERS -vs- HIGHWAY CARRIERS LTD [1982-88] 1 KAR** page 1184 where the Court of Appeal held that a mistake or negligence of counsel should not be visited on the client. He argued that granting of the Motion would not prejudice the claimant because the decretal sum is securely in the custody of the court.

He further argued that the jurisdiction of the court to set aside exparte judgment is wide under Section 16 and 20 of the Industrial Court Act and the court should not be bound by technicalities. To drive that point home he relied on **C.A. NO. 235 OF 1997, THE OFFICIAL RECEIVER & LIQUIDATOR -vs- FREIGHT FORWARDERS (K) LTD** where the Court of Appeal held that for review to issue a party only needs to prove sufficient reason or cause and not necessarily prove new facts.

As condition for the setting aside the exparte judgment, Mr. Mogaka offered to compensate the claimant with throw away costs and have the decretal sum remain deposited in the court until the hearing and final determination of the suit.

On the issue of the Motion being filed before the applicant obtained leave to change counsel, Mr.. Mogaka relied on **C.A NO. 215 OF 2000, TRUST BANK LTD -vs- AMOLO COMPANY LTD** where the Court of Appeal held that administration of justice require that matters be investigated and decided in the merits and that errors should not necessarily deter a litigant from pursuit of his case. Mr. Mogaka further submitted that a consent for change of advocate was filed in court on 15/5/2014. He concluded by contending that the Motion by the applicant was based on the oxygen principle under Section 1A,1B and Section 3A of the Civil Procedure Act and Section 3A and 3B of the Appellate Jurisdiction Act.

RESPONDENT'S SUBMISSIONS

Mr. Anaya, learned counsel for the claimant opposed the Motion. He relied on the replying affidavit sworn on 20/5/2014 and his written submissions filed on the same date plus the authorities cited. He contended that the Motion is incompetent because it was filed by counsel who was not legally on record. He submitted that Order 9 rule 9 of the Civil Procedure rules required that leave shall be sought first before change of advocate after judgment. According to the counsel, the consent letter between the former and the new counsel was never adopted by the court. He cited :

1. HCC 1349 OF 199 SAKI LTD vs NSSF
2. HCC 155 OF 1996, UASIN GISHU DISTRICT CO-OP AUDITOR -vs- NAOMI WANGECI & 5 OTHERS and
3. KENYA PETROLEUM REFINERIES vs HASSAN NGAO AND 53 OTHERS HCC 455 of 2000 to support his objection.

In addition to the foregoing preliminary objection of point of law, Mr. Anaya submitted that there was no good ground for setting aside judgment. He cited **HCC 1087 of 1965 SHAH -vs- MBOGO AND ANOTHER [1967] EA** page 116 as his authority on this point. According to the counsel the applicant respondent to the claimant's case by written submissions which were considered by the court. He maintained that defence filed raised no triable issues and the counter claim lacked merits as it was held by the court in the impugned judgment.

According to Mr. Anaya, the applicant can claim in another forum for the negligence of her counsel and stop delaying the claimants dues. He concluded by submitting that the applicant was an indolent party who should not get equity. He contended that respondent did not demonstrate that he actively pursued the case after instructing the former counsel. He cited **HCC 43 of 1999 MICHAEL KAMAU GIKUNDI -vs- DAIMA BANK LTD AND ANOTHER** where the court held that the litigants have a duty to follow up on their cases even after instructing counsel to act for them.

ANALYSIS AND DETERMINATION

After careful perusal and consideration of the pleadings, motion, affidavit and the submissions filed plus the oral arguments made, the following issues arise for determination.

- a. **Whether Motion is incompetent for being filed by counsel who was not lawfully on record.**
- b. **Whether the application meets the threshold for the exercise of this court's discretion in setting aside *exparte* judgment.**

Is the Motion Incompetent?

The claimant has contended that the Motion is incompetent because it was filed by a new firm of advocates after judgment before the applicant obtained leave of the court to change Advocates. The applicants on the other hand contends that the Motion is competent because the applicant had filed a consent between the outgoing and the incoming advocates on 15/5/14 the same date the Motion was filed. The question that arises is what does the law say about the change of advocates after judgment.

Order 9 rule 9 provides that no change of advocates after judgment shall “take effect” without an order of the court,

“ (a) upon an application with notice to all the parties, or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”

Order 9 rule 10 allows the application under rule 9 to be combined with other prayers provided that the question of the change of advocate or party intending to act in person shall be determined first.

From the foregoing provisions, it is clear that a party wishing to change an advocate after judgment must first obtain a court order. There are two ways for the party to move the court for the said order, firstly by filing a consent signed between the out going advocate and the proposed incoming advocate, and secondly by filing a formal application with notice to all the other parties to the suit.

In the present case no court order to change Advocates was granted before the filing of the Notice of Motion now before the court. It is also clear from the record that no competent Notice of change of advocate was filed prior to the filing of the said Notice of Motion. It is also clear from the body o the Notice of Motion and the supporting affidavit that there was no prayer for leave to change advocate after judgment. The court therefore finds that the applicant never obtained court order for change of advocate before filing the Motion on 15/5/2014 and no Notice of Change of Advocates was filed.

It is this court's holding that the applicant should have first filed the consent letter between the outgoing advocate and the incoming advocate, then, obtained an order for change of advocate and finally, filed a Notice of change of advocate before bringing the Motion on 15/5/2014. Under Order 9 rule 5 of the Civil Procedure Rules, a party who wishes to change an advocate must file and serve Notice of Change of Advocate. The consequence of the above default was therefore to render the Motion incompetent and it is so ordered.

Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack *locus standi*. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the Motion. The court will not however do that. The reason for the foregoing is two fold. Firstly, there are several judicial pronouncement cited by the claimant which show that court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9.

Secondly the background of this Motion betrays the applicant and entitles the claimant to object to the same. On 26/2/2014, the firm of Mogaka Omwenga and Mabeya Advocates filed a Notice of Change of Advocate purporting to replace the firm of O.M. Robinson and Company Advocates who were on record for the applicant as at the date of the judgment. Simultaneously, the said new law firm filed a Notice of Motion dated the same date, 26/2/2014 under a certificate of urgency. When the said Motion came up for *inter partes* hearing on 9/5/2014 the claimant filed a Preliminary Objection (P.O.) on ground that the Motion contravened Order 9 rule 9 of the Civil procedure Rules. The counsel present in court then, Mr. Mogaka for the applicant and Mr. Otwere for the claimant agreed to have both the P.O. and the Motion dated 26/2/2014 marked as withdrawn in order to pave the way for a competent application to be filed by the applicant after complying with Order 9 rule 9.

Thereafter the applicant filed the consent for change of advocate and the present Motion on 15/5/2014. The current Motion was filed by the same counsel who had filed the incompetent Motion on 26/2/2014. Should the court now deem the current Motion competent just because of the oxygen principle? The answer is no. Two wrongs do not make a right. There can never be a change of advocate without filing and service of Notice of change of Advocate as contemplated under Order 9 rule 5, 6 and 9 of the Civil Procedure Rules. In addition, Order 9 rule 10 require in mandatory terms that the issue of change of Advocate after judgment must be determined first before the court proceeds to entertain any other application by the party wishing to change advocate after judgment. The foregoing was not the case before filing the present Motion.

In view of the foregoing the court will not proceed to deal with the issues of the threshold for setting aside judgment because the Motion has already collapsed.

DISPOSITION

In view of all the findings and reasons stated above, the Motion dated 15/5/2014 is struck out with costs for being incompetent.

Dated, Signed and delivered this 27th June 2014.

O. N. Makau

Judge