REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO.101 OF 2011

Wachira Karani.....Plaintiff/Respondent

Versus

Bildad Wachira.....Defendant/Applicant

RULING

Before me for determination is a notice of motion dated 4th day of November 2015, filed by the defendant (hereinafter referred to as the applicant) seeking orders *inter alia* that:-

a. *That there be a stay of execution of the judgement herein pending the hearing and determination of this application.*
b. *That the ex-parte hearing and resultant judgement 19.10.2015 be set aside and the matter be heard on merit.*
c. *That costs be provided for.*

The application is expressed under the provisions of Sections **1A, 1B** and **3A** of the Civil Procedure Act,[1] **Order 22** Rule **25** and **Order 12** Rule **7** of the Civil Procedure Rules 2010.

The application is grounded on the grounds stated on the face of the application and the annexed affidavit **C. M. Kingori Advocate.** Essentially the grounds relied upon by the applicant are *inter alia* that:-

i. That hearing proceeded ex parte for non-attendance of the defendant and judgement was entered.

ii. That the hearing date was not served, or the service was improper, defective and concealed.

iii. That the defendant will suffer great prejudice if thejudgement remains and is executed.

Other grounds in support of the application are contained in the three affidavit annexed to the said application sworn by counsel for the applicant who avers *inter alia* that the hearing date was taken ex-parte without being invited, that on 19.10.2015 he was attending other matters in the trial court when he learned judgement in this suit was being delivered, that he complained to counsel for the plaintiff, that upon perusing the court file he confirmed that the matter proceeded *ex-parte* after the court found that he had been duly served, that upon perusing the file he found an affidavit of service by a one **Geofrey Ndegwa Ngahu** purporting to have effected service, that also found was a copy of a hearing notice purportedly bearing his office stamp and allegedly signed by the recipient, that the signature on the

stamp does not belong to any of his members of staff, that it is not for the default of the defendant or himself that there was no appearance.

In opposition to the application, the Plaintiff filed his affidavit sworn on 4.12.2015 in which he avers that the applicants advocate swore an affidavit on contentious matters instead of the client, that the application seeks to obstruct cause of justice and to allow the application would be repugnant to good practice and timely administration of justice, that the hearing notice was duly served, that the applicant is not being honest, that the application is an afterthought, that the applicant was not interested in having the matter heard, no valid ground for stay has been advanced and no sufficient explanation has been offered for failing to attend court.

Both advocates filed written submissions in support of their opposing positions. Mr. Kingori raised a pertinent issue on the receipt allegedly issued in support of the affidavit of service in question and also cited several authorities in support of his application.

Counsel for the Respondent on his part reiterated that the application is based on hearsay and unsubstantiated allegations.

Mulla, *The Code of Civil Procedure*[2] has illuminated the grounds for setting aside an *ex parte* decree and what constitutes sufficient cause for setting aside an *ex parte* judgement/decree. Essentially, setting aside an *ex parte* judgement is a matter of the discretion of the court. In the case of *Esther Wamaitha Njihia & two others vs. Safaricom Ltd*[3] the court citing relevant cases on the issue held *inter alia*:-

*"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.***[4]***) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo***[5]***). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.***[6]***)It also goes without saying that the reason for failure to attend should be considered."*

Counsel for the Respondent referred to the case of *Shah vs Mbogo.***[7]** Also relevant is the case of *Ongom vs Owota*[8] where the court held *inter alia* that the court must be satisfied about one of the two things namely:-

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

It's important for me to mention that in the above case, the court defined what constitutes *sufficient cause* and in this respect the following paragraph is highly relevant to the issues before me:-

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term *"sufficient cause"* mean." The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*[9] discussing what constitutes *sufficient cause* had this to say:-

"It is difficult to attempt to define the meaning of the words ***'sufficient cause'****. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)*

In *Daphene Parry vs Murray Alexander Carson*[10] the court had the following to say:-

'Though the court should no 'doubt' give a liberal interpretation to the words ***'sufficient cause,'*** *its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy. ....."(Emphasis added)*

Examining the provisions relating to setting aside *ex parte* judgements, **Justice Adoyo** of the High Court of Uganda in *Transafrica Assurance Co Ltd vs Lincoln Mujuni*[11]stated that:-

"The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing"

The well established principles of setting aside interlocutory judgements were laid out in the case of *Patel vs East Africa Cargo Handling Services*[12]where **Duffus,V.P.** stated;

"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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated *"sufficient cause"* to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase *"Sufficient cause"* mean. The Supreme Court of India in the case of *Parimal vs Veena* observed that:-

*"****sufficient cause****" is an expression which has been used in large number of statutes. The meaning of the word* ***"sufficient"*** *is* ***"adequate"*** *or* ***"enough"****, in as much as may be necessary to answer the purpose intended. Therefore the word* ***"sufficient"*** *embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a*

curious man. In this context, ***"sufficient cause"*** *means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been* ***"not acting diligently"*** *or* ***"remaining inactive."*** *However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.[13] The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.[14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

The applicant has in my view offered a candid and frank explanation as to why the advocate or the defendant did not attend court. First, the hearing date was taken *ex parte* without inviting them a fact that was not denied. Secondly, the notice served has been disputed in that the signature appearing on the hearing notice is disputed. Thirdly, the receipt in the court file allegedly issued after filing the affidavit of service does not bear the name of the advocate for the Respondent. It bears the applicants advocates name.

Counsel for the Respondent argues that Mr.Kingori has sworn the affidavit instead of his client. I am fully aware of circumstances where an advocate cannot put himself in the position of a party by deposing on matters which should be sworn by the parties. But a close look at the contents of the affidavit reveals that the matters contained in the affidavit are matters within the knowledge of the advocate and not the applicant. Specifically, the matters deposed to relate to the alleged service. These are matters the applicant cannot swear. I find that Mr. Kingori Advocate properly swore the affidavit.

I find that the reason given by the applicant for failing to attend court is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[15] where the court expressed itself as follows:-

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of *Richard Nchapai Leiyanguvs IEBC & 2 others***[16]** proceeded to state as follows:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

The above case was cited with approval by the Court of Appeal in *Harrison Wanjohi Wambugu vs Felista Wairimu Chege***[17]**where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri***[18]** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in *CMC Holdings Ltd vs James Mumo Nzioka***[19]** where it was held *inter alia*:-

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

I also find help in the position held by the court of appeal in the case of *Wenendeya vs Gaboi***[20]** where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

It is also important to mention that the integrity of the service having been questioned, it was necessary for the process server to be availed and shed light on the issue. Counsel for the applicant raised the issue but never applied to cross-examine the process server. Similarly, counsel for the Respondent did not deem it fit to avail him if at all the service was indeed beyond reproach. The court was denied a golden opportunity to interrogate the issue further when the parties opted to dispose the application by way of written submissions.

Section **3A** of the Civil Procedure Act[21] provides that *'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'*

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justiciae,* to have any determination which affects him set aside.

Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla* in *The Code of Civil Procedure*[22]observes that:-

"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ***ex debito justiciae*** *for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act* ***ex debito justiciae****, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[23] The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal* [24]"*has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."* **Lord Cairns** in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

Discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised on application filed by a party. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.[25]

In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by both counsels and the relevant law and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. Accordingly I hereby set aside the *ex parte* judgement delivered on 19th day of October 2015 and all the consequential orders and order that this suit proceeds for hearing afresh as a defended case.

Each party shall bear its own costs for this application.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this **11th** of **March** 2016

John M. Mativo

Judge