



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO .MISC CIVIL APPLICATION NO.70 OF 2013

IN THE MATTER OF ADVOCATES REMUNERATION ORDER AND THE ADVOCATES ACT

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENT

IN THE MATTER OF ANTHONY M MULEKYO ADVOCATES

AND

IN THE MATTER OF E.L.C NO. 1188 OF 2007

KENDA INVESTMENTS LTD VS CITY COUNCIL OF NAIROBI AND

CASCADE ENTERPRISES LTD

BETWEEN

ANTHONY M. MULEKYO ADVOCATE.....APPLICANT

=VERSUS=

KENDA INVESTMENTS LIMITEDRESPONDENT

RULING

1. The applicant herein Kenda Investment Limited made an application seeking to set aside the decree passed on 10th April 2017. The decree arose from a judgement entered in favour of the respondent out of a taxation of Client/Advocate bill of costs. The applicant contends that when their advocates were served with a notice of motion dated 29th August 2016, seeking entry of judgement for Kshs.2,604,255.28, their staff did not record the matter in the diary with the result that the advocates were not aware of the application which was to come up for hearing on 10th April 2017 hence the non-attendance.

2. The affidavit in support of the application was sworn by Wanjau Kirima one of the directors of the applicant. The application was also supported by the affidavit of Neville Walusala Amolo an Advocate in the firm of Amolo & Kibanya Advocates who had been instructed to appear for the applicant. Mr Amolo deponed that his firm was served with the application dated 29th August 2016 on 31st January 2017 but

that his office assistant who received it did not diarise it hence the non-attendance. He prayed for setting aside of the judgement because the non-attendance was due to an error.

3. The applicant's application was opposed by the respondent through a replying affidavit by the respondent on 8th June 2017. The respondent contends that the present application is a delaying tactic by the applicant. The respondent had been instructed by the chairman of the applicant Mr G K Kirima who is now deceased to represent the company in ELC No. 1188 of 2007. The deceased as the chairman of the applicant company was well briefed about the case in the Court. However there was a breakdown of communication between the respondent and the deceased chairman as no instructions were coming. The respondent was forced to file a bill of costs which was served upon the applicant.

4. When the applicant's lawyers entered appearance for the applicant, the advocate's bill of cost was served upon the advocates who did not attend court on the date of taxation. The bill was taxed ex-parte and they filed a notice of motion for entry of judgement which was again served but there was no attendance hence the judgement which the applicant now seeks to set aside.

5. In a supplementary affidavit sworn by Wanjau Kirima on 6th July 2017, the deponent doubts whether the late Kirima who was his father is the one who signed the verifying affidavit accompanying the suit that was filed in court. The deponent also doubts why the letters exhibited in the respondent's affidavit were addressed to the chairman rather than the company itself.

6. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions filed herein. I have now to decide whether there are sufficient grounds raised to warrant the setting aside of the judgement which was entered on 10th April 2017. This is an application which calls upon the court to exercise its discretion. In the case **Shah Vs Mbogo & Another (1967) EA 116**, it was held as follows:-

“ the court's discretion to set aside an ex-parte judgement 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”.

7. In exercising its discretion, the court has to look at the conduct of the applicant both before and after the application is made. In the instant case, when the bill of costs was set for hearing on 21st July 2014 Mr Amolo for the respondent appeared and applied for adjournment to enable him go and peruse the original record to see who instructed the respondent as he then said that the two remaining directors of the applicant company were not aware of the matter. An adjournment was granted. When the bill was subsequently set down for hearing, the applicant's lawyers were duly served but never attended court during taxation.

8. After taxation, a ruling was not delivered as first scheduled. A notice for delivery of ruling was duly served upon the applicant's advocate who did not attend court. When the application for entry of judgement was filed, a hearing notice was duly served upon the applicant's advocate but they did not attend court. The applicant's advocates say that it was a mistake of their office assistant who did not diarise the date. Though the applicant's advocate stated that he had annexed copies from his diary and that of his partner, those copies were actually not annexed.

9. I have gone through the court record and notice that on a number of occasions, the applicant's advocates were invited to take suitable dates but they never sent a representative. Wherever ex-parte dates were given, the advocates were served but never attended court. I do not think that all this time, it

was an error on the part of their office staff.

10. At first the applicant's contention is that the respondent had not been retained by the applicant company. The deponent of the supporting affidavit actually stated that he did not know the respondent advocate. When he saw a replying affidavit by the respondent in which a letter authored by himself was annexed, the tune changed and doubts as to the signature of his father came up. The issue of the bill of costs being on the higher side also came up.

11. In **Patel vs E A Cargo Handling Services Ltd (1973) EA 75 at 76 , Duffus P** had the following to say:-

“ 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 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 the merits does not mean in my view a defence that must succeed, it means as Sheridan J put it “ a triable issues” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

12. The applicant had been given an opportunity to participate in the taxation but it did not. When a ruling notice was served upon the applicant's advocates, they did not attend court. When an application for entry of a judgement was served, they again did not attend court. The applicant is now raising the issue of the taxing officer having applied wrong principles in assessing instruction fees. The applicant had the opportunity to raise this issue in a reference if it had bothered to attend taxation and ruling date. The applicant was doubting whether the respondent had been retained and when it occurred that one of the directors of the company had communicated to the respondent not necessary on the specific brief in contention, the applicant started bringing in the issue of signatures. In all fairness, the court will not be doing justice to the parties if this judgement were to be set aside given the circumstances. It will also be a waste of judicial time as it will entail application seeking to set aside the taxed bill, the bill being heard and possibly the issue of retainer coming to this court for determination. I decline to exercise my discretion to set aside the ex-parte judgement. The result hereof is that, I find no merit in the applicant's application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **29th** day of **January, 2018**.

E.O.OBAGA

JUDGE

In the absence of parties who were aware of time and date for delivery of Ruling.

Court Assistant: Hilda

E.O.OBAGA

JUDGE



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