



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL SUIT NO. 648 OF 2005**

**BETWEEN**

**ROYSAMBU DISTRIBUTORS LIMITED .....PLAINTIFF**

**AND**

**KENYA BREWERIES LIMITED .....DEFENDANT**

**RULING**

1. The Plaintiff has moved the court by the Notice of Motion dated 31<sup>st</sup> March 2021 seeking to set aside the judgment delivered by this court on 26<sup>th</sup> March 2021. It is made, *inter alia*, under **Order 12 rule 7** of the **Civil Procedure Rules**. The application is supported by the affidavit of James Maina Muchami, the Plaintiff's director, sworn on 31<sup>st</sup> March 2021. It is opposed by the Defendant's Legal Manager, Eva Kagodu, sworn on 9<sup>th</sup> April 2021. The application was argued by way of written submissions.
2. It is not in dispute that the suit proceeded for hearing on 10<sup>th</sup> February 2021 in the absence of the Plaintiff or his witness. In his deposition, Mr Muchami explains that he intended to attend court personally on the material day as he had instructed his advocate on record to withdraw from acting for him in the matter to allow him to prepare the critical documents to support his case for loss of business amounting to KES. 3,198,150.00, transport, storage and management fee of KES. 1,905,435,00, loss of business of KES. 55,000,000.00 and punitive damages of KES. 65,000,000.00.
3. Mr Muchami further states that on the material day he was unable to participate in the trial owing to the failure by the court to connect him through the link provided on the cause list for the material day. That by the time he was able to connect to the court, the matter had been finalized. He therefore states that the reason for failing to attend court is excusable and that the court ought to set aside the judgment as the Plaintiff has a good claim and defence to the counterclaim which it should be allowed to prosecute once the judgment is set aside.
4. In response to the reasons given by the Plaintiff, Ms Kagodu requests the court to take judicial notice of the fact that the firm of *Wachakana and Company Advocates* applied to cease acting for the Plaintiff on the ground that it did not have instructions to prosecute the matter whereas the Plaintiff's case is that it instructed Mr Wachakana to cease acting for it to enable it prepare for its case. The Defendant points out that given the history of the matter and the past conduct of the Plaintiff in seeking adjournments militates against allowing the application as this would cause it substantial prejudice.
5. Where a party fails to attend court on the date fixed for hearing and the matter proceeds and judgment is entered, the court is empowered, under **Order 12 rule 7** of the **Civil Procedure Rules** to vary or set aside the judgment on application of the party aggrieved on such terms as it considers just. This power is only fettered by the condition that it must be exercised judiciously.
6. According to the court record, this matter was scheduled for hearing on 9<sup>th</sup> February 2021 when the court granted an adjournment upon the request of Mr Wachakana and the matter scheduled for hearing on 10<sup>th</sup> February 2021. On the same day, Mr Wachakana filed a Notice of Motion dated 9<sup>th</sup> February 2021 seeking an order for his firm to be granted leave to withdraw from acting for the Plaintiff on the ground that the firm no longer had instruction to act for the Plaintiff in the matter. When the matter came up for hearing on 10<sup>th</sup> February 2021, I declined to entertain the application and ordered the matter to proceed. Mr Wachakana, who was in court on the material day, decided not to participate in the matter but the matter proceeded regardless.
7. The principles on which the Court acts to set aside an *ex-parte* judgment are now well known and settled. Harris J., in the case of **Shah v Mbogo & Another** [1967] EA 116, 123 summarized them as follows:

***I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting***

*from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the Society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July 8, 1966 and accordingly the motion must be refused.*

8. Mr Wachakana, counsel for the Plaintiff, deponed on oath that he did not have instruction from the Plaintiff hence the application to withdraw from acting for it. For Mr Muchami to state that he instructed the advocate to withdraw from acting so that he could prepare his case is clearly a falsehood and even if it is not, it was an action by the Plaintiff and his advocate intended to mislead the court to grant an adjournment to enable the Plaintiff put its house in order. This is clearly an abuse of the court process.

9. An applicant has a duty to place before the court all the facts and circumstances to enable the court exercise its discretion. Further, an applicant who wishes the court to exercise its discretion on its behalf must be honest, candid and forthright. (see *James Waweru Muturi v Paul Thuo Njambi* NRB CA Civil Application No. 159 of 2017 [2017] eKLR, *Harun Miruka v Jared Otieno Abok & another* KSM Civil Case No. 191 of 1985 [1990] eKLR and *Jacon Joseph Onyango v John Ndungu Mureithi* NKR ELRC Cause No. 229 of 2014 [2016] eKLR).

10. I cannot say that the Plaintiff's failure to attend court was an honest or inadvertent mistake or error. If I were to believe Mr Muchami, it follows that Mr Wachakana misled the court when he stated that he no longer had instructions and wished to withdraw for that reason. And if I were to believe Mr Wachakana, then the inescapable conclusion is that Mr Muchami is lying about his reason for failing to attend court

11. The Plaintiff's application is founded on a pile of falsehoods. I am not inclined to exercise my discretion in their favour given their conduct and the fact that this case has been on the court rolls for a period of 16 years.

12. The Notice of Motion dated 31<sup>st</sup> March 2021 is dismissed with costs to the Defendant.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of APRIL 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Wachakana instructed by Wachakana and Company Advocates for the Plaintiff.

Ms Gatuhi instructed by Ndung'u Njoroge and Kwach Advocates for the Defendant.