



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.458 OF 2017**

**MAWE MBILI LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**STANDARD CHARTERED BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/2<sup>ND</sup> RESPONDENT**

**JFRLD.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**EQUITY BANK KENYA LIMITED.....PROPOSED 3<sup>RD</sup> DEFENDANT/3 RESPONDENT**

**RULING**

(1) Before this Court is the Notice of Motion dated **18<sup>th</sup> July 2018** by which **JFRLD** the 1<sup>st</sup> Defendant/Applicant seeks the following Orders: -

**“a. SPENT**

**b. SPENT**

**c. THAT this Honourable Court do review and/or set aside the Ruling entered on the 18<sup>th</sup> December 2017 and or any all consequential orders thereto.**

**e. THAT the Honourable Court be pleased to grant the Applicant access to the said accounts held by the 2<sup>nd</sup> Respondent to enable him salvage the business of the 1<sup>st</sup> Respondent pending the hearing and determination of the application.**

**f. THAT the Honourable Court be pleased to grant the Applicant access to the said accounts held by the 2<sup>nd</sup> Respondents and proposed 3<sup>rd</sup> Respondent to enable him salvage the business of the 1<sup>st</sup> Respondent pending the hearing and determination of the application.**

**g. THAT costs be in the cause.**

(2) The application was premised upon **Section 1A, 1B, 3A, 3B and 63(e)** of the **Civil Procedure Act Cap 21, laws of Kenya, Article 50(1)** and **1(c)** of the **Constitution of Kenya 2010, Order 1 Rule 10(2), Order 51 Rule 1** and **Order 40 Rules 1,2 and 3, Order 45 Rule 1** of the **Civil Procedure Rules 2010**, and was supported by the Affidavit of even date sworn by the Applicant.

(3) **MAWE MBILI LIMITED** the Plaintiff/Respondent opposed the application by way of the Replying Affidavit dated **2<sup>nd</sup> October 2018**, sworn by **JD** a Director of the Plaintiff Company. The application was canvassed by way of written submissions. The 2<sup>nd</sup> Defendant/Applicant filed his written submissions on **16<sup>th</sup> October 2018** whilst the Plaintiff/Respondent filed its submissions on **2<sup>nd</sup> September 2019**.

**BACKGROUND**

(4) **Mawe Mbili Limited** the Plaintiff Company was incorporated on **13<sup>th</sup> April 2007** under the **Companies Act Cap 480** laws of Kenya. The Applicant and **JD** who at the material time were husband and wife jointly owned 96% of the shares in the company. As part of its operations the company developed a luxurious tented tourist camp in **Elementaita** which was run under the name and style of “**Sleeping**

**Warrior Lodge**” (hereinafter called “**the business**”).

(5) Prior to the year **2013 J** fell ill and this necessitated her travel every six (6) months out of the country for treatment. The Applicant claimed that during that time it was he who developed the business and over saw its day to day running until the year **2014** when the said **J** recovered and returned to the Country.

(6) In order to efficiently operate the affairs of the Company the Applicant and Jacqueline jointly opened bank accounts as follows.

(i) Account held with Standard Bank Limited being **Kshs account No.\*\*\*\*\***.

(ii) Two (2) bank accounts opened with Equity Bank Limited (the proposed 3<sup>rd</sup> Party) being **Kshs Account No.\*\*\*\*\***; and

(iii) USD Account No.\*\*\*\*\*

(7) The Applicant, **Jacqueline** and their daughter **VJDP** were all signatories to the above account. It was agreed between them could that either of them sign to authorize a transaction.

(8) During the period **2014 to 2015** a matrimonial dispute arose between the Applicant and his wife **J** which affected the running of their business. **J** petitioned for Divorce vide **Divorce Cause No.6 of 2015** before the **Naivasha Law Courts**. The Divorce was eventually granted and the marriage dissolved vide a decree absolute issued by the same court on **13<sup>th</sup> September 2018**.

(9) The Applicant avers that as a result of the ongoing Divorce proceedings he was greatly affected and fell ill in the year **2014**. This necessitated his travel abroad for treatment leaving his ex-wife **J** to run the business. The Applicant claims that **J** then blocked him from the management of the Plaintiff Company and proceeded to run the business alone without involving the Applicant.

(10) In the year **2015** having recovered the Applicant returned to Kenya ready to resume his role in the running of the business. However, he claims that at the instigation of **J** he was arrested for the offence of Rape, which again forced him to flee the Country.

(11) The Applicant claims that during his absence **J** continued to run the business without involving him. He claims that the business was run recklessly and inefficiently leaving it unable to pay its liabilities including salaries for its employees. The Applicant further alleges that **J** unlawfully converted proceeds from the business to her own personal use causing the Applicant to lodge complaints with the two Banks which led to the Company accounts being frozen until the issues between them could resolved.

(12) On **17<sup>th</sup> January 2017** the Applicant filed **Insolvency Petition No.3 of 2017** before the High Court in Nairobi seeking the dissolution of **Mawe Mbili Limited** (the Plaintiff Company) on grounds that the Memorandum and Articles of Association of the said company were being violated. The matter was referred to Court Annexed Mediation but this bore no fruit. Eventually the Criminal charges against the Applicant were dropped and he returned to Kenya to take over the management of the business. He discovered that a fire had gutted the entire business and that **J** had abandoned the business leaving it without any management or control. The Applicant decided to renovate the business.

(13) The Applicant claims that when he visited the Bank which held the company accounts he was to his surprise served with orders from the High Court denying him access to the Plaintiffs Company’s accounts. The Applicant is aggrieved that such orders which were adverse to himself as a co-director were issued without his involvement as he was never served with the Notice of Motion dated **12<sup>th</sup> October 2017** seeking said orders.

(14) The Applicant further claims that it came to his knowledge that **J** had withdrawn funds from the account held with **Standard Bank** for her own personal use and that as of **3<sup>rd</sup> July 2018** the balances in the **Standard Bank Account** stood at **Kshs.101,000** in the Kshs Account while the **USD Account** had a balance of only **USD 10,635**. In the Equity Bank account the balance in the Kshs account stood at **Kshs.1,798,465** while the **USD account** had **USD 17,358.00**.

(15) The Applicant in seeking a review of the Court’s Orders of **18<sup>th</sup> December 2017** barring him any access to the accounts of the Plaintiff Company claims that **Jacqueline** clearly misled the court and obtained those orders by failing to disclose to the court the existence of **Insolvency Petition No.3 of 2017** involving the same parties. He further claims that **J** and her Advocate willfully failed to serve him with the court documents relating to the Notice of Motion dated **12<sup>th</sup> October 2017**.

(16) The Plaintiff/Respondent through the Co-director **JD** opposed this Application. The said **J** confirms to the Court that she and the Applicant are now divorced. She states that since the opening of the accounts in question she and her daughter **VD** had been operating the said accounts. She denies that the Applicant operated any of the accounts.

(17) **J** deponed that on the **12<sup>th</sup> August 2015** she attempted to withdraw funds from the Kenya shilling account but was denied access and upon inquiry from Standard Chartered Bank she was informed that the bank had frozen the account on the same date. That she visited Standard Chartered on the same day and spoke to s **Mr Amos Mabele** the bank relationship manager who informed her that the Applicant had presented himself the day before and sought to withdraw all the funds from both accounts held at said Bank.

(18) **J** further deponed that the couple’s daughter **VD** left the country on **14<sup>th</sup> September 2015** to **Madagascar** where she took up employment and permanent residency and that the said **VD** communicated that she no longer wished to be a signatory to the Company accounts.

(19) **J** deponed that from the time the accounts were frozen until sometime in **January 2018** she had been personally financing the daily running and operations of **Mawe Mbili** from her personal accounts as follows:-

(a) 2015 a sum of **Kshs.16,404,040**

(b) 2016 a sum of **Kshs.4,602,555**

(c) 2017 a sum of **Kshs.6,549,054**

**TOTAL** **Kshs.27,555,649/=**

She tells the court that she has never withdrawn any money from the company account for her personal use, unlike the Applicant whom she states that on **3<sup>rd</sup> October 2015** withdrew from the **Equity Bank's Kilimani Branch** a sum of **Kshs.300,000/=** and **USD 2,000** from the company accounts for his personal use.

(20) **J** further states that since **January 2015**, when she took over management of the company, the Applicant had refused to re-enter Kenya due to his arrest warrant for case of malicious damage. Further she avers that her management has been transparent and subject to regular audits.

(21) **J** stated that she filed an application under Certificate to leave the Bank account at Standard Bank unfrozen as funds were required to reconstruct the lodge as well as to pay **PAYEE** and **VAT** due to the Kenya Revenue Authority. That following due process she was on **18<sup>th</sup> December 2017** made the sole signatory to the Accounts held at Standard Bank Limited.

(22) **Jacqueline** avers that since **February 2016** there has been no communication between herself and the Applicant and denies that he has taken over the management of the "**Sleeping Warrior Lodge**". She concludes that the Applicant has come to court with unclean hands as his inability to participate in running the company was a result of his absconding the country on account of the Rape charges which he was facing at the **Naivasha Court** and the resultant Warrants of Arrest hanging over his head.

(23) The Applicant counters that the failure to serve him with court papers was deliberate. That **J's** claim that she required funds to construct the lodge were false as to date no reconstruction has been done despite her having sole access to the company accounts. Further the Applicant alleges that the claim by **J** that funds were required to pay dues to the Kenya Revenue authority is also false as the Plaintiff Company had been exempted from payment of **PAYEE** and **VAT** due to the fire. He insists that **J** obtained orders by deliberating misleading the court. That her bad faith is evidenced by the fact that even after obtaining the said orders **J** has failed to set down the main suit for hearing clearly showing that her main objective was to get sole access to the Company funds by isolating the Plaintiff.

#### **ANALYSIS AND DETERMINATION**

(24) I have carefully considered the submissions filed by both parties in this matter. Prayer (b) of this application sought to have Equity Bank (the proposed Third Party) enjoined to this suit as a Defendant. However, on **12<sup>th</sup> November 2018** Counsel for the Applicant informed the Court that when this prayer was made the Applicant was not aware of the existence of **Miscellaneous No.70 of 2018**. Having become aware of the existence of that matter, Applicant wished to abandon its prayer to enjoin the Equity Bank in the present suit. Accordingly, I will make no orders in respect of Prayer (b) which is now marked as "**abandoned.**"

(25) Having perused the submissions in this matter I note that there are two main issues for determination as follows:-

(i) Should the Court Orders made on **18<sup>th</sup> December 2017** be set aside?

(ii) Should the Applicant be granted access to the Company Bank Accounts?

**(i) Should the Court Orders made on 18<sup>th</sup> December 2017 be set aside?**

(26) On **10<sup>th</sup> November 2017** **Mawe Mbili Limited** (the Plaintiff Company) filed a suit vide the Plaint date **12<sup>th</sup> October 2017** against the Applicant. This suit had been filed at the behest of **JD** in her capacity as Director of the Company and a signatory to the Company accounts held with Standard Bank Limited. The aforementioned Bank had frozen the Plaintiff Company's accounts on grounds that there existed a dispute between the principal shareholders of the company. Contemporaneously with the suit **J** filed an application seeking to restrain the Applicant from accessing the Company Account.

(27) On **15<sup>th</sup> November 2017** Counsel for **J** sought for leave to serve the application upon the Applicant herein by way of "**substituted service.**" It was claimed that the 2<sup>nd</sup> Defendant (the Applicant) herein had been evasive thus service could not be effected in the normal manner. In allowing the application for substituted service **Hon Lady Justice Racheal Ngetich** directed that the application be served by way of **both** an advertisement in a local daily **and** by registered post.

(28) Vide the Affidavit of Service dated **15<sup>th</sup> December 2017** **William M. Mugu** Advocate of the High Court of Kenya deponed inter alia as follows:-

**"2 THAT on 11<sup>th</sup> December 2017 I received Hearing Notice and Summons to Enter Appearance dated 11<sup>th</sup> December 2017**

and 8<sup>th</sup> December 2017 respectively from W.G Wambugu & Co. Advocates with instructions to serve the same upon JFRLD by advertising through the media.

3. THAT on the same day 11<sup>th</sup> December 2017, I proceeded to Nation Newspapers advertisement desk at Nation Centre where I placed the advertisement to appear the following day i.e on 12<sup>th</sup> December 2017.”

(29) The deponent annexed to this Affidavit of Service a copy of the newspaper advert. That advert indicated that the Notice of Motion dated 12<sup>th</sup> October 2017 had been fixed for mention before the Court on 18<sup>th</sup> December 2017.

(30) On 18<sup>th</sup> December 2017 the Applicant did not appear in court nor did his advocate. The Court proceeded to grant prayer (2) and (4) of the said application as follows:-

(1) THAT the 1<sup>st</sup> Respondent be and is hereby ordered to unconditionally lift the freezing order place by itself without any valid court order on Kshs.A/C No.\*\*\*\* and USD A/c No.\*\*\*\*\* held at Standard Chartered Bank Kenya Limited A/Cs name – MAWE MBILI LIMITED and to grant JRD access to the said accounts pending the hearing and determination of this application.

(2) THAT the 2<sup>nd</sup> Respondent be and is hereby restrained whether by himself, his servants, employees, agents and/or otherwise from freezing and accessing the Applicant’s Kshs. A/C No.\*\*\*\* and USD A/c No.\*\*\*\*\* held at Standard Chartered Bank Kenya Limited, Westlands Branch A/Cs name MAWE MBILI LIMITED pending hearing and determination of this suit.

The Applicant is now crying foul saying that he was not served with notice of the application at all. J insists that substituted service was properly effected in accordance with Order 5 of the Civil Procedure Rules 2010.

(31) The Applicant now prays to have the orders made by the Court on 18<sup>th</sup> December 2017 set aside. Order 12 Rule 7 provides as follows:-

**“Setting aside judgment or dismissal**

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

Order 51 Rule 15 provides for the setting aside of orders made ex parte

(32) Case law regarding the question of setting aside judgments or orders are legion. Makau J. in the case of Nixon Murathi Kiratu V Director of Criminal Investigations & 2 others; Mercy Nyakio Mburu & another (Interested Parties)[2019] eKLR, held as follows:-

“12. I am alive to the fact that in exercise of the discretion and in doing substantive justice, the courts have no limits or restrictions on Judges discretion except that it should be based on such forms as may be just because the main concern of the court is to do justice to the parties and that the discretionary powers should be exercised judicially and not arbitrary. The courts hands are never tied as long as the court is acting within the law and not arbitrary. The discretionary power to set aside an ex parte judgment or order does not cease to apply simply because a decree has been extracted. Unfairly obtained ex parte judgment or order should not be allowed to stand once the applicant has demonstrated lack of service or having not been a party to a suit in which adverse orders has been issued without being aware of the matter or being involved.

13. In the case of Wachira Karani Vs Bildad Wachira (2016) eKLR in allowing an application to set aside an ex parte judgment the court held that:-

“The rationale for this rule lies largely on the premise that an ex parte judgment is not a judgment 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.”

14. I find that if the application is not allowed the 1<sup>st</sup> and 2<sup>nd</sup> interested parties shall stand to lose the subject motor vehicle without having been given fair hearing as enshrined in Article 50 of the Constitution of Kenya. If the interested parties are denied an opportunity to be heard justice shall not be done and seen to be done.

15. In the case of the King Vs The General Commissioners for the Purposes of the Income Tax for the District of Kensington [1917] I K.B 486 the Court laid down the legal principle that ex parte applicant must make a full and fair disclosure of all material facts. Warrington LJ had the following to say at page 509:-

“It is perfectly well settled that a person who makes an exparte application to the Court that is to say, in the absence of the person who will be affected by that which the Court to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained.” [own emphasis]

(33) In the case of **Stephen Wanyoike Kinuthia** (Suing on behalf of **John Kinuthia Marega** (deceased) **Vs Kariuki Marega & another** [2018] eKLR, the Court of Appeal held as follows:-

**“Under the original Order 1XB Rule 3 (currently Order 12, rule 2) if on the day fixed for hearing notice was duly served, it may proceed to hear the case ex parte. But if the hearing notice was not duly served or not served in sufficient time, the court may adjourn the hearing. This confirms the firmly settled law, as correctly articulated by the two judges in the court below, that whether to set aside a judgment or review a ruling is a matter of absolute judicial discretion limited only by the justice of the case concerned. Order 1XB rule 8 of the repealed Civil Procedure rules stipulates this principle as follows:-**

**“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”**

**Authorities on the guiding principle are legion with the locus classicus being Shah Vs Mbogo & Another [1966] EA 116 where Harris J explained it 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 a judgment obtained ex-parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the court of justice...”**

**The principle was reiterated by Sir William Duffus, P in Patel Vs E.A Cargo Handling Services Ltd [1974] E.A 75 saying:-**

**“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given by the rules. I agree that where it is a regular judgment as it is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merit. In this respect defence on merit 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 emphasis is on doing justice to the parties in the unique circumstances of each case. When asked by the appellant to review the decision of Muchelule, J that had set aside the ex parte judgment obtained in Kericho High Court, Nyamweya, J expressed satisfaction with the decision of Muchelule, J and concluded that the Judge had judicially exercised his discretion.”**

(34) A close look at the courts orders regarding substituted service issued on **15<sup>th</sup> November 2017** indicate that the Plaintiff (**J**) was directed to serve the 2<sup>nd</sup> Defendant (the Applicant herein) by way of advertisement in a local daily **AND** by way of registered post. The Plaintiff did not fully comply with those directions. They only served by way of advertisement in a local daily. There is no claim much less proof that Notice was served by way of registered post as the court had directed.

(35) The Applicant insists that failure to serve him was deliberate and malicious since **J** being his wife knew his address in France. Although **J** claims to have been unaware of the Applicants registered address, she does in the same breath admit to having been aware that the Applicant was at the material time in France due to the outstanding Warrant against him.

(36) As a wife or ex-wife of the Applicant I have no doubt that **J** knew of an address in France by which Notice could be sent to the Applicant by way of Registered Post. As such I find that being fully aware of the Applicants absence from country, **J** failed to properly serve the Applicant by registered post as the court had directed. She also failed to disclose to the court the fact that the Applicant was out of the Country.

(37) The law is very clear that where a party obtains orders from a court by disguise or by failing to disclose relevant material then orders so obtained are for setting aside.

In **REPUBLIC –VS- KENYA NATIONAL FEDERATION OF CO-OPERATIVES LIMITED Ex parte COMMUNICATION COMMISSION OF KENYA [2005] IKLR**, the Court held:-

**“It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the court being exercised against (a claimant) in relation to the grant of (a remedy).”** [own emphasis]

(38) This was also the position adopted in **Hussein Ali & 4 others Vs Commissioner of Lands, Land Registrar & 7 Others (2013) eKLR**, where it was held that:-

**“It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it.”**

On the basis of the foregoing, I find that there exist sufficient grounds to set aside the Courts Orders made on **18<sup>th</sup> December 2017** and I accordingly review and set aside the said orders.

**(ii) Should the Applicant be granted access to the Bank Accounts**

(39) By prayer (f) of this application the Applicant seeks to be granted access to the Plaintiff Company's bank accounts held to enable him utilize the funds therein salvage the business which was destroyed by fire. The Applicant also averred that there were employees of the business who had not been paid their salaries.

(40) Effectively by this prayer the Applicant is seeking a mandatory injunction. In **KENYA BREWERIES LTD & ANOTHER –VS- WASHINGTON O. OKEYO [2002] eKLR**, the Court of Appeal stated as follows:

**“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Law of England 4<sup>th</sup> Edition paragraph 948 which read:-**

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiffs...a mandatory injunction will be granted on an interlocutory application.”**[own emphasis]

(41) Therefore, in order for the Court to grant a mandatory injunction it must be demonstrated that special circumstances exist. Although the Applicant claims that funds are required to pay the employees of the company he has not tendered any evidence that the employees have not been paid as he claims. On the other hand the Plaintiff Company through its Director **JD** has produced an Affidavit sworn by **PETER KAGORI**, the Chief Accountant of the Company. (Annexure “**JR 14**” at Page 149 to the Replying Affidavit dated **2<sup>nd</sup> October 2018**). In paragraph 6 of that Affidavit it is deponed that all the company employees are paid their salaries promptly. Thus doubt is cast on the Applicants averments.

(42) This court is not inclined to grant the mandatory orders being sought which may effectively determine the entire suit at this interlocutory stage. The question of access to the Company accounts is one which can only be determined after a full hearing. In order to preserve the subject matter of the suit it is my view that neither the Applicant nor **J** should be granted access to the Plaintiff Company's bank accounts pending the hearing and determination of the main suit. I do so order.

**CONCLUSION**

Finally, this application only partially succeeds. This Court makes orders as follows:-

1. **THAT** this court orders dated **15<sup>th</sup> December 2017** be and are hereby set aside forthwith.
2. **THAT** pending the hearing and determination of the main suit neither **JFRLD** (the Applicant herein nor his co-director **JD** are to be granted access to the accounts held by **Mawe Mbili Limited** at Standard Bank of Kenya Ltd.

Each party to bear its own costs for this application.

**Dated in Nairobi this 5<sup>th</sup> day of June 2020.**

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**Justice Maureen A. Odera**