REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 276 OF 2008

AWAL LIMITED.....PLAINTIFF

VERSUS

1. HUSSEIN DAIRY LIMITED

2. MAHMOOD K H MINYANJI

3. ESMAIL K H MINYANJI

4. MOOSA K H MIYANJI

5. ESSAK MIYANJI

6. JAFFER K H MINYANJI.....DEFENDANTS

R U L I N G

1. In this suit the plaintiff sued the defendant seeking a liquidated sum of Kshs.12,688,603 on account of the balance of the purchase price of goods sold and delivered by the plaintiff to the 1st defendant and guaranteed by the 2nd to 6th defendants by a written agreement. That suit was filed way back 8/10/2008.

2. When served the defendant did file a statement of defence and a counter claim in which the plaintiffs clan is denied in total with an assertion that all sums due to the plaintiff and which were secured by various log books belonging to the 1st dependant have been paid but the plaintiff had refused to release the securities and instead used the log books and blank transfer terms to secure financial accommodation for Charter House Bank Ltd and thus denied the 1st defendant the deserved and rightful ownership of the motor vehicle thus putting it to loss and damage. In the counter claim the 1st defendant has sought orders of accounts, a declaration as to entitlement to registration of the motor vehicles, a mandatory injunction compelling transfer of the motor vehicle to the 1st defendant and a declaration that the dead of guarantee was illegal and do not confer any right to the plaintiff as against the defendants. That defence was filed on the 3/11/2018. The dates of filling the pleadings are critical to this court to underscore the fact that as at of that date the civil procedure Rules had not been amended to impose a duty on the parties to file and serve witness statements as well as bundles of documents with the pleadings.

3. Upon the promulgation of the civil procedure rules, 2010, it became imperative that the parties file witness statements and documents to be relied upon at trial and therefore the plaintiff did file a bundle of documents on 28/3/2012 and a witness statements on the 27/2/2017.

4. By a ruling dated the 28/3/2013 the court declined to issue orders on requests for particulars sought by the parties and directed that parties do pursue such requests pursuant to the provisions of order 11 of the Civil Procedure Rules 2010. Thereafter the matter came up for a pretrial conference on the 24/9/2013 when the same was adjourned to enable the dependant complete compliance and for the court to acquaint itself with the particulars sought. The court, Kisango J, then apparently perused the file and settled on particulars of the defense to be provided by the defendant. The document is dated 11/2/2014 and was on the 24/2/2014 ordered to be served upon the parties by the court. From that date the file went into slumber till the 8/7/2015 when the court issued a notice to the parties to show cause why the same could not be dismissed for want of prosecution. The parties counsel attend court and satisfied the court against dismissal and matter was fixed for hearing on the 11/11/2015.

5. On 11/11/2015 the matter did not proceed as the plaintiff reminded the court that judge Kasangos directions of 11/2/2014 had not been complied with by the defendant who was yet to provide the particulars of the statement of defence. On that day the court with the participation of the parties gave directions for the timely compliance with court orders of 11/2/2014 and further directed the parties to file compliance documents. In particular the defendant was ordered to supply particulars and file witness statements and documents within 30 days from that date and in default the statement of defence would stand struck out.

6. Those orders were never complied with again but the Plaintiff did cause the matter to be listed for hearing before compliance on the 10/5/2016 when it was again adjourned and was lastly fixed for hearing on the 9/3/2017.

7. Seven day to the scheduled hearing date the defendant now woke up to the realization that their statement of defence stood strike out. The defendants filed a Notice of Motion dated 1/3/2017 and prayed for two substantive orders that the orders of 11/11/2015 be set aside and time be enlarged to enable the statement of particulars dated 23/2/2017 be deemed duly filed and the statement of defence struck out be reinstated. The reason advanced for failure to file the particulars ordered is given to be a failure by on Mr. Kongere Advocate who held brief for Mr. Sitonik on the 11/11/2015 and failed to report that the court had ordered that particulars be furnished within 30 days.

8. The stet then proceeds to assert that no prejudice would be occasioned to the plaintiff as the plaintiff indicated to court its inability to proceed due to lack of particulars on 11/11/2015 and that it only filed its witness statement and supplementary list of documents on 27/2/2017 while the defendant had done so way back on 23/9/2013.

9. That application was opposed by the plaintiff who filed grounds of opposition and list of authorities on 8/3/2017. The gist of resistance to the application was that there had been blatant and unmitigated disobedience to court orders and that no explanation was offered for the undue delay; that the plaintiff has suffered and continue to suffer out of its funds being withheld and kept away from it and that the application lack merit.

10. When the matter came up in court for hearing Mr. Sitonik appeared for the defendant/Applicant while Mr. Taib appeared for the plaintiff/Respondent. Mr. Sitonik in arguing the application beseeched the court to exercise its discretion in favour of the defendants and set aside the orders of 11/11/2015 and to reinstate the defence which it said raised triable issues. He wholly relied on the application and the affidavits in support thereof. The affidavits were sworn by Mr. Sitonik and Mr. Kongere.

11. In his affidavits, beyond saying that the full effects of orders of 11/11/2014 were not brought to his attention by Mr. Kongere, Mr. Sitonik depones that while preparing for the hearing scheduled for the 9/3/2017, he was well abreast of the court orders of 12/4/2014 on which basis it prepared the particulars and only discovered the stringent orders by the court of 11/11/2015 hence the application. Heavy weather has been placed on the alleged default by Mr. Kongere to adequately report to Mr. Sitonik the full effects of the orders of 11/11/2015. One question that begs answer by Mr. Sitonik is why having been all the time aware of orders of 11/2/2014 he did not comply. The answer to that question would assist the court determine whether or not the defendants and their counsel had discharged their duty order section 1A (3)

Civil Procedure Act.

12. However Mr. Sitonik moves a step further and invokes the overriding objectives of the court and asserts that unless the orders are set aside the dispute raised in the defence and counterclaim will remain simmering.

13. Mr. Kongere's affidavit supports Mr. Sitoniks assertion that he did not convey the court order that the particulars be filed within 30 days and in default the defence be struck out. In his view, it is not that it was an error. He says that since he did not have the file he did not understand what orders the court and Mr. Ochieng, who appeared for the plaintiff, were referring to. To him the failure or inadvertence to give the consequences of failure was triggered by the revelation by Mr. Sitonik that he had filed documents and witness statements. For the plaintiff/Respondent, Mr. Taib relied on authorities cited by him and submitted that a party in breach of court orders deserves no discretion by the court.

14. Mr. Taib pointed out that on the 24/2/2014 the defendant were presented in court as evidence that they were aware of the orders of 11/2/2014 but chose not to obey. He pointed out further that the existence of the court order and its disobedience have not been denied. To him the only reason advance is that albeit aware of the court order they were not aware of the consequences. To Mr. Taib that is not a conduct expected of an advocate because it saliently says that court orders without consequences deserve not to be obeyed. He then added that without an explanation, there exist no basis for the court to exercise its discretion in the applicant's favour. Reliance was then placed on the decision by ***Mativo J in Auto selection (K) Ltd vs John Nanasak Faumba [2016] eKLR*** for the proposition that there is need for an explanation for a failure to enable the court exercise its judicial discretion in favour of a party and that even the provisions on the overriding objective of the court is to facilitate the just, expeditious purportionate and affordable resolution of court dispute governed by the Act and not to reward flogrant disobedience to court orders.

15. Equally relied upon was the decision by Mwera J in Mahesh ***Jayantilal Pattni vs Khairoonisa A Mussa [2012] eKLR*** to the effect enlargement of time envisaged under section 95 and Order 50 Rule 6 provide for extension of time limited by the law but not by court orders.

16. Lastly, Mr. Taib cited the decision in ***Anura Perera vs Nation Media Group [2015] eKLR*** for the proposition that it is not enough that a party blames an advocate for all manner of transgression in the conduct of litigation and that courts will readily excuse mistakes of counsel to afford justiciable, expeditious and holistic disposal of a matter but such discretion is by no means automatic. In all the cases the court declined to enlarge time and dismissed the application for reasons that the applicants were less candid with the facts.

17. Noting that the courts discretion is wide and unfettered Mr. Taib submitted that in the event the court deems it fit to grant the application, it should do so on terms that the entire sum claimed is deposited at an escrew account to give impetus to the defendants to move with haste towards

18. In closing submissions Mr. Sitonik submitted that an Order for deposit would require an appropriate application and that any prejudice to the plaintiff can be compensated by an award of costs while that to the Defendant is not because if no setting aside is ordered, the defendant would never get a chance to lead a defence.

19. The foregoing is the summary of materials placed before court to enable it determine the defendants application dated the 1/3/2017. The only issue for determination is whether or not, on the facts disclosed, a cause has been shown to merit this court setting aside its orders of 11/11/2015 by which it ordered the, the Defendant to provide particulars and file statements and documents within 3 days and to enlarge the time for such compliance.

20. The application having invoked inherent powers of the court and the provisions on the overriding objectives of the court, this court must weigh the issues and ask itself what the odds would be in allowing the application as opposed to dismissing it.

21. To start with the reasons advanced by both advocates, Mr. Sitonik and Mr. Kongere cannot be seen as candid nor forthright. Mr. Sitonik says he was all along aware of the order to provide particulars but only chose to do so after the hearing notice was served upon him. He also does not say when he sat to prepare the answer to order for particulars. Now that he was aware of the order, but chose not to comply with it, Mr. Taib cannot be faulted for the submission that the defendants take it that court orders other than those with penal consequences need not be obeyed. That is clearly an approach that must be abhorred and detested by any Court of Law. It flies on the face of the statutory dictate that parties and counsel have a duty to obey all orders and comply with all directions given by the court to enable the court meets its objective of doing substantial justice. Mr. Sitonik should have done better by offering an explanation why he took him some 3 years before complying with Court Orders.

22. How about Mr. Kongere? In the affidavit sworn by this otherwise very candid advocate, Mr. Kongere says that by inadvertence he did not inform Mr. Sitonik of the need to file particulars after Mr. Sitonik informed him that he had filed his documents and witness statements. This I do not take to be true. I doubt it because on the 11/11/2015 when the court made its orders now sought to be set aside, it was Mr. Kongere who corrected Mr. Ochieng on the date judge Kasango made the orders for provision of particulars. I recourded the advocate as saying:-

> **"There are no orders of 19/2/2014. However, there are orders of 11/11/2014. We seek a period of 30 days of supply the particulars and comply with order 11".**

23. I have given the very otherwise lengthy background to underscore the fact that in this matter the advocate have abdicated their duty to everybody the court and the opposite side, not to mention own client by failure to comply with court orders. The effect is that this matter has been delayed unduly. For that reason Mr. Sitonik cannot escape the accusations of indolence or just a design to delay the just and expeditious disposal of this matter.

24. However in this matter, Mr. Sitonik in just a counsel whose interest in the matter may only be limited to his fees. Such feees are due and payable whether the defendants gets a fair hearing or not. They are due and payable once instructions are given and acted upon. The litigation and dispute belong to the defendant and the plaintiff.

25. I have weighed the odds between allowing the application and dismissing it and I find that a mistake whether honest or less honest is a mistake. It should not be the only basis to deny a litigant his day in court. This matter reveals that as much as the plaintiff seeks the 12 million or so shilling plus interests and costs, the defendants are seeking released of documents of title to several motor vehicles that are alleged to be with the plaintiff or its financiers. The natural consequence of disallowing the application is that the defendant will have no right to lead any defence although witness statements and documents have been filed and were filed way before the orders for supply of particulars were issued.

26. That would present a situation where the court is denied a chance to fully and effectually determine the dispute. Should that occur the defendant may not leave the court content of having had their day in court. In the eyes of the public, even the most informed of the facts, no substantial profile shall have been served.

27. It is only for that reason that I would accede to the application and allow it. I would also allow it on the basis that as far as the order of 11/11/2014 has had the defence struck out, the defendant also has a counter claim, which being separate and distinct from the defence remain on record. It would be absurd to leave the counter claim on record and expect evidence to be led on it yet decline to hear the evidence on the defence. This is yet another reason that persuades me to allow the application.

27. Incoming to this conclusion, I have been persuaded by those very eloquent words of Apaloo JA (as we than was) in ***Phillip Chemuuoto vs Augustine Kubebe*** and cited by this court repeatedly including in ***Abdulhakim Abdulla Mohamed vs Kenya Power and Lighting Co. Ltd [2016] eKLR*** for the proposition that there were occurrence of a blunder by an advocate should not be a basis to drive a party from the seat of justice.

28. The application dated 1/3/2017 is allowed but not without terms.

The terms are that:-

i. **The particulars shall be filed and served within 7 days from today.**

ii. **The Advocate for the Defendants shall personally pay to the plaintiffs advocate costs, regarded as thrown away by the delay which I access at Kshs.50,000/= within 7 days from today.**

iii. **Parties shall attend court on 25/4/2017 for a case conference.**

29. It is so ordered.

Dated and delivered at **Mombasa** this **23rd** day of **March 2017**.

P. J. O. OTIENO

JUDGE