THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 1763 OF 1997

FIDELITY COMMERCIAL BANK LTD….PLAINTIFF/RESPONDENT

VERSUS

FOODMAID LIMITED…….....1ST DEFENDANT/APPLICANT

ZARARI A. RAZA……...2ND DEFENDANT/APPLICANT

AND

SERVICE SCOPE E.A LIMITED…….THIRD PARTY/RESPONDENT

RULING

[1] The application for determination is the Notice of Motion dated **1 March 2017.** It was filed by the Defendants pursuant to **Articles 50 (1)** and **159(2) (d)** of the **Constitution of Kenya**, **Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, **Order 51 Rule 1** of the **Civil Procedure Rules**, **Section 146 (4)** of the **Evidence Act** and all other enabling provisions. The Defendant thereby seeks the following orders:-

> **[a] THAT the Third Party's Witnesses, Hussein Ahmed Yusuf (TPW1) and Simon Wachira Munene (TPW2), be re-called for cross-examination by the Defendants' Counsel.**
>
> **[b] THAT the Third Party be granted the right to re-examine its witnesses after cross-examination by the Defendants' Counsel.**
>
> **[c] THAT to facilitate the cross-examination, the Defendants be availed the typed proceedings containing the testimony of Hussein Ahmed Yusuf (TPW1) and Simon Wachira Munene (TPW2).**
>
> **[d] THAT the costs of the application be in the suit.**

[2] The Application is premised on the grounds that due to non-diarization of the matter in Counsel's diary for **2017,** there was no appearance for the Defendants on **30 January 2017** when the case came up for hearing. It was further contended that the non-attendance was therefore not intentional but was due to inadvertence and excusable mistake on the part of Counsel; and that it is necessary for the Defendants to

cross-examine the Third Party's Witnesses so as to avoid injustice being visited upon the Defendants. It was further the contention of the Defendants that no prejudice will be occasioned to the Plaintiff or the Third Party in the event the prayers sought are granted, as what is intended thereby is to pursue justice and fairness to all the parties hereto.

[3] The application is supported by the affidavit of **Cyprian Masafu Wekesa** sworn on **1 March 2017,** in which it was averred that, although the parties mutually agreed on the hearing date of **30 January 2017** when they attended Court on **19 September 2016,** Counsel for the Defendants did not have his **2017** diary. Accordingly the said date was noted in the firm's diary for **2016**, and that when he bought a diary for **2017,** he inadvertently forgot to diarise the said hearing date of **30 January 2017** therein or in the diary of the firm. It was thus averred that due to this mishap, Counsel was not present when the matter proceeded for hearing on the **30 January 2017,** when the Third Party witnesses gave their evidence. It was further averred by Counsel that he only got to learn that the case had proceeded to hearing on **30 January 2017** when he received a letter dated **31 January 2017** from the Plaintiff's Advocates together with a Mention Notice dated **1 February 2017.**

[4] It was the contention of Counsel that his non-attendance as the Advocate for the Defendants on the said hearing date of **30 January 2017** was not intentional, but was due to inadvertence and/or excusable mistake or error of non-diarization. He urged the Court not to visit this mistake or error on his part upon the Defendants; and averred it was critical for the Defendants to cross-examine the Third Party's witnesses so as to avoid injustice being visited upon the Defendants. Counsel further averred that his firm, **Wekesa & Simiyu Advocates**, had all along attended Court sessions and participated in the proceeding on behalf of the Defendants, and that they have never sought to delay or obstruct the course of justice. He further posited that no undue prejudice will be occasioned to either the Plaintiff or Third Party in the event that the prayers sought herein are granted.

[5] In opposition to the application, the Plaintiff filed Grounds of Opposition dated **6 March 2017**. The Plaintiff's posturing is that the application is not only incompetent, bad in law and misconceived, but is also an abuse of the court, granted that it was the indolence of the Defendants that have occasioned the same. It was further reiterated by the Plaintiff that the Defendants' Advocate was in Court on **19 September 2016** when the hearing date of **30 January 2017** was agreed upon; and that despite several futile attempts by **Mr. Kanjama** to reach the Defendants' Advocate via phone on the said hearing date, the said Advocate failed, and/or refused to respond or attend the hearing. It was therefore the Plaintiff's contention that the application is merely intended to frustrate and to delay the course of justice as, prior to the conclusion of the case on **30 January, 2017,** there had been numerous adjournments and deliberate non-attendance by Counsel for the Defendants. It was thus the contention of the Plaintiff that the Defendants have failed to show sufficient cause to warrant the issuance of the orders sought.

[6] On its part, the Third party echoed the Plaintiff's assertion that the application is an abuse of the court process, is an afterthought and is meant to delay the due conclusion of this matter. The Third Party averred that, since the case was filed in **1997**, the Defendants had on numerous occasions sought numerous adjournments thus delaying the conclusion of the matter; and that, any further delays including recalling of the witnesses, would prejudice and cause them an injustice. It was further the contention of the Third Party that there was unreasonable delay in filing the present application. The Third Party reiterated the assertion by the Plaintiff's Advocates that several attempts were made to contact the Defendants' Advocate on the hearing date to no avail. In the circumstances, the Third Party urged the Court to find that the Defendants have failed to show sufficient cause to warrant the orders sought.

[7] The Application was disposed of by way of written as well as oral submissions. The Defendants filed their submissions dated **10 July 2017** on even date. The Respondents did not file written submissions. However, they orally submitted before this Court on **11 July 2017** when the application came up for hearing. In highlighting the submissions, Counsel for the Defendants urged the Court not to visit the mistake of Counsel on the Defendants. He relied on, inter alia, the cases of **Philip Chemwolo & Another vs. Augustine Kubende [1986] eKLR; Paul Asin t/a Asin Supermarket vs. Peter Mukembi [2013] eKLR**; and **Edney Adaka Ismael vs. Equity Bank Limited [2014] eKLR** in support of his submissions, and in urging the Court to allow the application so as to give the Defendants an opportunity to test the

veracity of the evidence of the Third Party for the furtherance of substantive justice.

[8] Mr. Kanjama, Learned Counsel for the Plaintiff, on his part urged the Court to consider the peculiar circumstances of this case, in that it was filed way back in **1997**, and that hearing commenced on **23 May 2012,** a period of more than five years ago. His argument therefore was that, although the Court has discretion to grant the orders sought, it would not be in the interests of justice and fairness to do so herein. According to the Plaintiff, any further delay would be prejudicial to the interests of the parties. He urged for the rejection of the application and for parties to rely on the evidence on record and file their final written submissions to progress the matter to conclusion.

[9] Counsel for the Third Party, **Ms. Gathaara** relied on the Grounds of Opposition filed herein by the Third Party and entirely associated herself with the submissions made on behalf of the Plaintiff. It her submission that the Defendants are to blame for the delay in the finalisation of the matter; and that the Third Party has always been ready to proceed. She also pointed out that one of the witnesses for the Third Party, **Mr. Wachira**, is no longer in the employ of the Third Party and expressed concern that procuring his attendance may not be easy. It was therefore her submission that the Third Party stands to suffer prejudice were the Court to grant the orders sought.

[10] Section 146(4) of the **Evidence Act, Chapter 80 of the Laws of Kenya,** does afford the Court the discretion to entertain the application and grant the orders sought herein, namely, the recall of the two witnesses for the Third Party, for the purpose of cross-examination by Counsel for the Defendants. The provision reads:

> **"The court may in all cases permit a witness to be recalled either for further examination-in chief or for further cross examination, and if it does so, the parties have the right of further cross examination and re-examination respectively."**

[11] Additionally, **Order 18 Rules 10** of the **Civil Procedure Rules** also recognizes that the court may **"...at any stage of the suit..."** recall any witness who has been examined and may put such questions to him as the court thinks fit. Accordingly, the single issue for my determination is whether sufficient cause has been shown by the Defendants to warrant the recall sought. The reason offered as to why Counsel for the Defendants was not in court is attributed to inadvertence, namely that Counsel failed to diarize the matter in his 2017 diary which he acquired after the hearing date was taken and noted in the 2016 diary. There is no evidence to show that this is an idle claim or that Counsel is merely out to delay the disposal of this matter. Accordingly it cannot be said that Counsel for the Defendants intentionally failed to attend the hearing on the material day or that the Defendants herein are out to delay and obstruct justice in this matter. Granted, attempts were made in vain by **Mr. Kanjama** to reach Counsel on the phone on the hearing date, there is no basis for holding that Counsel was negligent or deliberate in avoiding **Mr. Kanjama's** telephone calls.

[12] Accordingly, I would be inclined to excuse the mistake for the sake of substantive justice, as expressed in **Articles 50 (1)** and **159 (2) (d)** of the **Constitution of Kenya**, as well as S**ections 1A, 1B** and **3A** of the **Civil Procedure Act.** Indeed, in the Court of Appeal case of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR**, **Apaloo J.A**. recognized that:

> **“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.**

[13] In the circumstances foregoing, I would allow the Notice of Motion dated **1 March 2017** and grant the orders sought therein, namely:

> **[a] THAT the Third Party's Witnesses, Hussein Ahmed Yusuf (TPW1) and Simon Wachira**

Munene (TPW2), be re-called for cross-examination by the Defendants' Counsel.

[b] THAT the Third Party be at liberty to re-examine its witnesses after cross-examination by the Defendants' Counsel.

[c] THAT to facilitate the cross-examination, the Defendants be availed the typed proceedings containing the testimony of Hussein Ahmed Yusuf (TPW1) and Simon Wachira Munene (TPW2).

[d] THAT the costs of the application be borne by the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH AUGUST, 2017

OLGA SEWE

JUDGE