



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 290 OF 2016

ALYKHAN JAMAL.....PLAINTIFF

-VERSUS-

NIGAR MERALI.....1ST DEFENDANT

WAMBUGU FLATS LIMITED.....2ND DEFENDANT

RULING

[1] The application for my determination herein is the Notice of Motion dated **14 December 2016**. It was filed pursuant to **Articles 48, 50 and 159(2)(d) and (e)** of the **Constitution of Kenya**, **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, and **Order 10 Rule 11** of the **Civil Procedure Rules** for orders that:

[a] Spent

[b] That the Court be pleased to set aside the *ex parte* Judgment entered herein on **21 September 2016** as against the Defendants;

[c] That the costs of this application be in the cause.

[2] The application was grounded on the affidavit of **Mr. Harshil Shah** annexed thereto, sworn on **14 December 2016**, wherein it was conceded by **Mr. Shah** that the Defendant was indeed served with the Plaint and Summons to Enter Appearance on **2 September 2016**; but contended that upon receipt of the documents, the Defendants instructed him to enter appearance on their behalf and deal with the matter to protect their interest accordingly. **Mr. Shah** further averred, pursuant to those instructions, he entered appearance on behalf of the Defendants on **16 September 2016** vide the Memorandum of Appearance dated **14 September 2016**, which was filed within the 15 day period provided for in the summons.

[3] It was further the contention of the Defendants that on the **30 September 2016**, the firm of **Messrs Mohamed Madhani & Company Advocates** filed a Statement of Defence on the Defendant's behalf because **Mr. Shah** was away on leave in the United Kingdom; and that although he had left instructions for the Defence to be filed on his behalf, it was inadvertently filed in the name of the firm. According to **Mr. Shah**, he only came to know about the mix-up on or about **4 October 2016** when he resumed work from leave. Thereafter on **2 November 2016** when this matter came up for mention, he got to learn that

neither the Memorandum of Appearance nor the Statement of Defence was on the court file; and that default judgment had been entered herein against the Defendants. It was thus the contention of **Mr. Shah** that the interlocutory judgment entered herein on **21 September 2016** was irregularly entered since the Defendants had already entered appearance and had 14 more days to file a Defence from the date of appearance.

[4] It was further averred by **Mr. Shah** that, since the Plaintiff had acknowledged the Defendants' Statement of Defence by filing a Reply thereto on **7 December 2016**, no prejudice would be suffered by him should the default judgment be set aside for the matter to proceed for a full hearing *inter partes*. He accordingly urged the Court to set aside the default judgment and thereby provide the Defendants with an opportunity to ventilate their case.

[5] In response to the application, **Ms. Caroline Chirchir, Advocate**, averred, in her affidavit sworn on **22 May 2017**, that the Defendants, having failed to file their Defence within the stipulated time, cannot now complain about the default judgment that was regularly entered herein on **21 September 2016**. She added that the alleged mix-up in the Statement of Defence dated **30 September 2016** which was drawn and filed by the firm of **Mohamed Madhani Advocates** is immaterial and does not serve to explain why the Memorandum of Appearance and Statement of Defence were not on the court record. It was further contended that the firm of **Mohamed Madhani & Company Advocates**, having previously acted for both parties in a transaction in respect of the same subject matter of this dispute, could not choose to act for some of the parties against the other, as they have purported to do herein, as that would amount to conflict of interest. Accordingly, the Plaintiff filed a Notice of Preliminary Objection dated **30 November 2016** challenging the coming on record of the firm of **Mohamed Madhani & Co. Advocates** in the matter aforesaid, without first filing a Notice of Change of Advocates.

[6] **Ms. Chirchir** further deposed that setting aside of the interlocutory judgment would cause the Plaintiff undue hardship as the intention is to merely delay the course of justice. She maintained that the interlocutory judgment was regularly entered and therefore ought not to be set aside; adding that the Defendants have failed to demonstrate that they have a defence on merit to warrant the setting aside of the otherwise regular judgment. She thus urged the Court to dismiss the Defendants' application with costs.

[7] The application was heard on **20 June 2017** and for the Defendants, **Mr. Shah** argued that the Preliminary Objection has been wrongly taken. He relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696** for the proposition that a preliminary objection is a pure point of law which, if raised as such, would bring a case to an end; and therefore should not be raised when the matters have to be proved by way of evidence. It was further **Mr. Shah's** submission that the Judgment of **21 September 2016** was irregular for the reasons that, the Defendants, having filed a Memorandum of Appearance within the 15 days from the date of service of Summons to Enter Appearance, had 14 days to file Defence, of which **30 September 2016** was the last date. According to him the Defence was accordingly timeously filed on the **30 September 2016**, and that the default judgment of **21 September 2016** was therefore prematurely and irregularly entered. He relied on the List and Bundle of Authorities filed herein on **8 March 2017** in support of his submissions.

[8] **Ms. Chirchir** on her part reiterated the averments in her Replying Affidavit and maintained that there is a conflict of interest situation herein affecting the firm of **Mohamed Madhani & Co. Advocates**, who in her submission, are strangers to the suit. She submitted that the default judgment is regular for the reason that that there was neither a Memorandum of Appearance nor Defence on the court file when the application for default judgment was made. She thus urged for the dismissal of the application. She relied on the List and Bundle of Authorities filed herein on **23 May 2017**.

[9] I have carefully considered the Notice of Motion dated **14 December 2016** and the Affidavits filed in respect thereof, as well as the written submissions made herein by learned Counsel. The issues that can be gleaned therefrom are these:

[a] Whether the Preliminary Objection is tenable; and if not,

[b] Whether sufficient cause has been shown for the setting aside of the interlocutory judgment recorded herein on **21 September 2016**.

[10] The law is now well settled that a Preliminary Objection can only be raised if it involves a pure point of law, whose determination would dispose of the entire suit. In **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696**, which is the leading authority on this, it was held thus:

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

[11] In this matter, the Plaintiff filed a Notice of Preliminary Objection dated **30 November 2016**, raising the following two points:

[a] The Defendants' Advocates had previously acted for both the Plaintiff and the Defendant in a sale transaction for the property that is the subject matter of the suit herein and as such there is conflict of interest on the part of the Defendants' Advocates which is an abuse of the court.

[b] In the light of the foregoing, the Defendants' Advocates are potential witnesses in this suit and have a duty to disqualify themselves from acting in the matter.

[12] Clearly therefore, the objection has been taken by the Plaintiff, not in respect of the subject matter herein, but on the propriety of **Mohamed Madhani & Company Advocates** acting herein for the Defendants. Thus, it is easy to see that even if the Court were to agree with the Plaintiff's posturing and disqualify the said firm from acting herein, that finding would not affect the substance of the suit between the parties. Secondly, the question of whether or not there is conflict of interest involving the firm of **Mohamed Madhani & Company Advocates** would require an examination of the instruments in issue to determine the role played by the said firm for a determination to be made either way.

[13] This must be why in the case of **Uhuru Highway Development Ltd vs. Central Bank Ltd [2002] 2 EA 654**, for instance, a substantive application was filed for injunction against the firm of Advocates that had prepared the security documents that was the subject matter of the dispute. Similarly, in the case of **Dr. Ritesh Nandlal Pamnani & Another vs. Dhanwanti Hitendra Hirani & Others HCCC No. 515 of 2011**, the objection was filed by way of Notice of Motion under **Sections 134 and 136** of the **Evidence Act, Chapter 80 of the Laws of Kenya, Sections 1A and 1B** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Rule 9** of the **Advocates (Practice) Rules**.

[14] Accordingly, I am of the view that an objection to an advocate or a firm of advocates appearing in a matter on the ground of conflict of interest can hardly be said to be a proper subject of a preliminary objection, which if raised, would dispose of the suit; and being so minded, I would find and hold that the Plaintiff's Preliminary Objection is clearly untenable and is hereby dismissed. I would, in the same vein, deprecate this increasing practice of litigants raising all manner of preliminary objections, even when this is clearly unwarranted; and in this connection, I find the following expressions of **Sir Charles Newbold, P.** in the **Mukisa Biscuit Co. Case** apt:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

[15] Even assuming that there was sufficient evidence that the said firm acted for the parties herein, it is now trite law that the right of representation by Counsel of own choice is a recognized constitutional right, and that there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. In this regard, I find instructive the holding in **Oriental Commercial Bank Ltd vs. Central Bank of Kenya HCCC No. 76 of 2011** that:

"...it is a party's fundamental and constitutional right to have an advocate of his choice, that that right is to be balanced against the hallowed principle of confidentiality in an advocate-client relationship and more so where an advocate will double up as a witness, that the nature of the confidential or privileged information imparted to the Advocate which may be prejudicial should be disclosed to the court, that there is no general rule that an Advocate cannot act against his client in subsequent litigation, that the test is whether real mischief or real prejudice will in all human probability result if an Advocate is allowed to act, that for a Court to deprive a litigant of his right to representation of his choice there MUST be a clear and valid reason for so doing and finally that each case must turn on its own facts to establish whether real mischief and real prejudice will result."

There being no proof of mischief or real prejudice that will be visited on the Plaintiff herein, it would be my finding, and I so hold, that no sufficient cause has been shown for the disqualification of the firm of **Mohamed Madhani & Co. Advocates** or **Mr. Shah** from acting for the Defendants herein.

[16] The foregoing notwithstanding, the record does confirm that the Defendants were initially represented by **Mr. Harshil Shah**, who admitted to having filed the Memorandum of Appearance dated **14 September 2016**. However, the Defendants' Statement of Defence that was filed on **30 September 2016** was filed by **Mohamed Madhani & Co. Advocates**. It was the same firm that filed the instant Notice of motion, yet there is no indication that there was a Notice of Change of Advocates as required by **Order 9 Rule 5** of the **Civil Procedure Rules**. That is an irregularity that needs to be corrected and I shall shortly give directions in that regard.

[17] The Defendants' application was filed pursuant, inter alia, to **Order 10 Rule 11 of the Civil Procedure Rules**, which provides that:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

It is therefore unquestionable that the Court has unfettered discretion to set aside or vary any default judgment upon such terms as are just on the basis of the evidence placed before the Court, but always bearing in mind that such discretion must be exercised judiciously and in accord with the principle set out in the case of **Mbogo Vs. Shah [1968] EA 93**, namely, that the discretion is intended to be exercised **"...to avoid injustice or hardship resulting from inadvertence 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 course of justice.

[18] Counsel for the parties are in discordance as to whether the default judgment sought to be disturbed is a "regular" or an "irregular" judgment. Counsel for the Plaintiff defended the judgment contending that when it was entered there was no Memorandum of Appearance or Defence on the record. The Defence Counsel, on the other hand, was of the posturing that they had filed their documents well within the stipulated timelines but that the same were not placed on the Court file by the court personnel manning the Registry, a situation for which the Defendants cannot take the flak.

[19] A look at the Memorandum of Appearance does show, from the Court stamp embossed thereon, that it was filed on **16 September 2016**, and therefore that the Defendant had up to and including **30 September 2016** to file a Defence. The default judgment was nevertheless recorded on **21 September, 2016** before the expiry of the stipulated period. When this state of affairs was brought to the attention of the Court on **2 November 2016** an opportunity was given to the Defendants to avail copies of the said documents, which was done. There are copies of the Defence and supporting receipts to support the filing.

Clearly therefore, the Defendants having entered appearance on **16 September 2016**, had 14 more days to file a Defence, which was done on the last day on **30 September 2016**. In the premises, the interlocutory judgment that was entered herein on **21 September 2016** is an irregular judgment; and where that is the case, it is now settled that such a judgment cannot be countenanced but must be set aside *ex debito justitiae*.

[20] In the premises, I am satisfied that sufficient cause has been shown to warrant the setting aside of the ex parte judgment entered herein on **21 September 2016**. Thus, the Applicant's Notice of **Motion dated 14 December 2016** is hereby allowed and orders granted as follows:

- [a] The default judgment entered herein on 21 September 2016 be and is hereby set aside;**
- [b] The matter be proceeded with for hearing and determination on the merits on the basis of the Defence filed herein on 30 September 2016.**
- [c] The firm of Mohamed Madhani & Co. Advocates to regularize their status herein by ensuring compliance with Order 9 Rule 5 of the Civil Procedure Rules within 7 days from the date hereof.**
- [c] The costs of the application to be costs in the cause.**

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

OLGA SEWE

JUDGE