



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 743 OF 2012**

**PETER MAINA MWANGI.....PLAINTIFF**

**VERSUS**

**DAQARE TRANSPORTERS LIMITED.....DEFENDANT**

**RULING**

1. The defendant's application seeks the setting aside of the Judgment which the trial court granted on 18<sup>th</sup> February 2015.
2. From the record of the proceedings, the trial went ahead on 3<sup>rd</sup> December 2014, in the absence of the defendant.
3. The defendant has explained that his failure to attend court was not deliberate. His explanation was that both the defendant and their advocate had all along laboured under the mistaken belief that this case was before the Magistrate's Court. Therefore, when the case was not listed in the Cause-list at the Magistrate's courts, the defendant and their advocate had no reason to attend court.
4. The defendant's Managing Director, **ABDI ABSHIR WARSAME**, swore an affidavit in support of this application. He deponed that on 3<sup>rd</sup> December 2014, his advocate informed him that the case was not on the list of cases scheduled for hearing on that day. In view of that information, Mr. Warsame says that he therefore proceeded to handle other businesses for that day.
5. Therefore, Mr. Warsame was surprised to learn, from a close friend, that Judgment had been delivered in this case, and that that had happened at the High Court.
6. Mr. Warsame reiterated that his advocates told him that there had;

*"always been a misconception that the suit was a lower court suit and hence the non-attendance".*

7. The second point that informed the defendant's application was that the pleadings herein had never closed. As far as the defendant was concerned, pleadings would only close after the plaintiff had served his Reply to Defence, pursuant to **Order 7 Rule 17** of the Civil Procedure Rules.
8. Thirdly, the defendant submitted that the case had never been ready for trial, because there had not been compliance with the mandatory pre-trial procedures. In the circumstances, the defendant submitted that that omission alone, was a sufficient basis for setting aside the judgment which arose out from a trial that had been conducted prematurely.
9. The plaintiff responded to the application by pointing out that on 24<sup>th</sup> December 2012 the defendant's advocates, Messrs Onindo & Associates, entered Appearance and also filed a Defence. The defendant also filed a Witness Statement and a List of Witnesses.

10. All those three documents were filed at the High Court of Kenya.
11. A perusal of the court file reveals that the defendant's advocates were duly issued with a receipt, by the High Court, after the court received payment for the Memorandum of Appearance and the Defence.
12. Considering that the Plaintiff clearly indicated that the suit was at the "**HIGH COURT OF KENYA AT NAIROBI, MILIMANI COMMERCIAL AND TAX DIVISION**", I find that the defendant has not given me any reason to explain why they had always deemed this case to have been at the Magistrate's Court.
13. Then, the defendant also filed its defence at the High Court. Having filed the Defence at the High Court, I do not understand how the defendant can thereafter say that it always deemed the case to have been at the Magistrate's Court.
14. In fact, the Defence was not filed in the High Court whilst the defendant had intended to file it at the Magistrate's Court. I so find because the Defence clearly indicates, on the face thereof, that it was for a case that was before the High Court.
15. And the defendant did not challenge the jurisdiction of the court. Instead, in the Defence, there was an express admission of the jurisdiction of the court.
16. Meanwhile, after the defendant had admitted the jurisdiction of the court in the defence which it filed at the High Court, I cannot understand why the defendant would then expect the case to be listed for trial at the Magistrate's Court.
17. As regards the close of pleadings, the defendant relied on the provisions of **Order 7 Rule 17** of the Civil Procedure Rules, which reads as follows;

*"(1) A plaintiff shall be entitled to file a reply within fourteen days after the defence or the last of the defences has been served on him, unless time is extended".*

18. That sub-rule gives to the plaintiff the right to file a reply to the defence. It does not create an obligation for the plaintiff. That means that if no reply to defence was filed by the plaintiff, the plaintiff could not be penalised.
19. Such a position can be contrasted with one in which a defence was not filed within the prescribed time; in which case, the court could enter judgment in default of defence.
20. As the plaintiff is not obliged to file a reply to defence, it cannot be said that before a reply was filed, the pleadings had not closed.
21. **Order 2 Rule 13** of the Civil Procedure Rules makes the position regarding close of pleadings clear: it stipulates as follows;

*"The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with".*

22. It therefore follows that if the plaintiff had not served the defendant with a reply to defence, the pleadings would have closed 14 days after the defence was served.
23. But I also note that the plaintiff insists that the defendant was actually served with a reply to defence on 23<sup>rd</sup> January 2013.
24. Whether or not the defendant was served with a reply to defence, the pleadings would have closed by, at the latest, March 2013.
25. Meanwhile, on the issue of pre-trial procedures, the court records show that on 3<sup>rd</sup> May 2013, the court observed that the defendant had "*partly complied with O.11*". The learned Judge went on to state as follows;

*"It still has to provide a Witness Statement for Mr. Warsame & it has to provide copies of the documents upon which it seeks to rely".*

26. On 3<sup>rd</sup> July 2013 Havelock J. certified the case to be ready for hearing, notwithstanding the failure of the defendant to comply with some of the pre-trial procedures. Therefore, it is evident that the defendant's assertion, concerning the alleged non-compliance with the pre-trial procedures, is not borne out by the facts.

27. In the final analysis, I have also taken into account the fact that before the trial commenced on 3<sup>rd</sup> December 2014, the court directed Mr. Kinuthia, the learned advocate for the plaintiff, to contact the defendant's advocate. That direction was given during the mini-callover which the court conducted at 9.00 a.m. And the case was then set down for hearing at 11.00 a.m.
28. When the case was later called out 11.05 a.m; Mr. Kinuthia informed the court that he had phoned Mr. Onindo, the learned advocate for the defendant, who informed him that he (Mr. Onindo) was in Migori on that morning. Mr. Onindo, reportedly, told Mr. Kinuthia that he had left the case to his brother, to handle.
29. Mr. Onindo did not complain about the absence of the case from the cause-list or about being un-informed of the hearing date.
30. The reason for that is clear, as the Hearing Notice was served upon the firm of Onindo Onindo & Associates, Advocates on 2<sup>nd</sup> October 2014. The said Hearing Notice was duly endorsed and signed by that Law Firm.
31. And the Hearing Notice expressly notified the defendant's advocates that this case had;
- “been fixed for hearing on 3rd day of December 2014, at 9.00 a.m in the forenoon or so soon thereafter in the High Court of Kenya at Nairobi”.*
32. Nothing could have made the position any clearer than that.
33. I therefore find no reason in law or in fact to set aside either the Judgement dated 18<sup>th</sup> February 2015 or the proceedings during the trial on 3<sup>rd</sup> December 2014.
34. Accordingly, the application dated 20<sup>th</sup> February 2015 is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of May 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Kinuthia for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.