



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 62 OF 2011

1. ESTHER WAMAITHA NJIHIA

2. FIRST ASIAN SECURITIES LIMITED

3. SUSAN W. NJENGA PLAINTIFFS

VERSUS

SAFARICOM LIMITED DEFENDANT

R U L I N G

1. The Defendant/Applicant by way of a Notice of Motion dated 10th June 2013 seeks Orders that there be a stay of delivery of the Judgement in this matter and this Court be pleased to review and vacate its Order made on 30th May 2013 to pronounce its judgement on the basis of the evidence on record without hearing the Defendant/Applicant. The Application is brought under the provisions of *Article 159* of the *Constitution*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act*, **Order 12 rule 2 (a)**, **Order 45 rule 1** as well as **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The Application was predicated on the following grounds:

- “i. THAT judgement in this case is scheduled to be delivered on 12th June 2013.**
- ii. THAT this matter came up for hearing on 30 May 2013 for further hearing of the defence case.**
- iii. THAT the Defendant’s advocate had been in court premises at around 10.15 a.m.**
- iv. THAT since the defendant’s advocate had been on medication, augmentine and ascoril, his system had reacted to the said medication.**
- v. THAT he went to the washrooms at the entrance to the court premises at about 10.20 a.m. to answer to a call of nature occasioned by the said disturbance.**
- vi. THAT the Defendant’s advocate instructed his pupil who had accompanied him to court, Ms. Lilian Muki Mbithi to get an advocate to hold brief for him, in case he delayed to come into court on time to proceed with the hearing of the matter.**

vii. **THAT the said Ms. Mbithi was unable to get an advocate to hold brief and informed the court that the advocate was within court premises and would have been ready to proceed with the hearing.**

viii. **THAT the said advocate walked into the court room shortly after the court adjourned and established on perusing the file that the court had made an order to deliver judgment on the basis of the evidence on record.**

ix. **THAT the defendant has not been heard at the trial.**

x. **THAT the defendant's advocate and witnesses were ready and willing to be heard particularly on the said 30 May 2013 and previously on 22 April 2013 and 07 March 2013.**

xi. **THAT failure by the defendant's advocate to respond when the matter was called out was beyond his control, unanticipated and excusable.**

xii. **THAT it is in the wider interests of justice that this application be allowed in order that the Defendants are not condemned unheard.**

xiii. **THAT it is in the interest of justice and fairness that this application be allowed".**

2. The Defendant/Applicant's said Application was supported by the Affidavit of **Albert Simiyu Murambi**, the Advocate on record for the Defendant. It was sworn on 10th June 2013 and set out the facts relating to his absence from Court at the hearing of this suit on 30th May 2013. The deponent explained his absence from the Court room, when the suit was called out for hearing, very much along the lines of the aforesaid grounds in support of the Application. In response, the 3rd Plaintiff, **Susan W. Njenga**, swore a Replying Affidavit on 28th June 2013. She confirmed that she was in court on 30th May 2013 when the matter was called out, her advocate was present and ready to proceed with the Defence case herein but neither the advocate for the Defendant, nor his lady associate, nor his witnesses were in the courtroom. The deponent noted that the advocate for the Defendant together with his lady associate entered the courtroom after the Court had adjourned having issued directions that Judgement in the suit would be delivered on 12th June 2013 at 2:30 PM. The deponent stated that she opposed the stay of the delivery of the Judgement because this matter had taken some time to come for hearing. She maintained that, on many occasions, the delay had been occasioned by the Defendant's failure to file its pleadings within time as well as its negligence/refusal to abide by the Court's directions to file and serve pre-trial documents. She believed that the Court had been lenient with the Defendant as it had been afforded ample time, facilities and opportunity to participate in the hearing of the suit. In her opinion, the application to stay the delivery of the Judgement herein was an afterthought singularly designed to further delay the determination of the suit. She then detailed a number of technical points as advised to her by her advocates on record.
3. The Defendant filed its Submissions in relation to its Application before Court on 10th September 2013. It set out the background and brief facts as to what had transpired before Court on 30th May 2013. The Defendant identified what it considered to be the issues for determination as:

“(a) Whether the Court can grant orders as sought by the Defendant/Applicant.

(b) Whether the Defendant/Applicant is entitled to the orders sought.”

The Defendant then proceeded to quote **Order 45 rule 1** maintaining that it had been agreed and sought review of the Order from the court that had made it on the basis of *inter alia* “any other sufficient reason”. The Defendant cited the Court of Appeal case of **Wangechi Kimita & Anor. v Wahibiru (1982-1988) 1 KAR 977** as cited with approval, again by the Court of Appeal, in **Official Receiver and Provisional Liquidator v Firestone Ltd Civil Appeal No. 172 of 1998**. The

Defendant opined that this Court has discretion to review its Orders if there is sufficient basis shown to do so. It quoted from the authority of **Shah v Mbogo (1967) EA 116** as follows:

“... this discretion is intended so 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 way of evasion or otherwise to obstruct or delay the course of justice”.

4. The Defendant went on to maintain that the Order, being the subject matter of its Application, clearly fell within the ambit of Order 45 rule 1 and thus could be reviewed by this Court. It denied the implication by the 3rd Plaintiff that the Defendant should wait until *ex parte* Judgement was entered before applying for a review. It drew the attention of the Court that the Order that it was requesting to be reviewed was that of this Court made on 30th May 2013. The Court on that date detailed:

“As there is no appearance for the Defendant today, I must assume that it does not wish to defend this suit. Judgement in relation to the evidence so far recorded by Court will be on 12/6/2013 at 2.30 p.m. Costs reserved.”

The Defendant added that the Application had also been brought pursuant to **Order 12 rule 7** of the *Civil Procedure Rules* which allowed this Court a wide discretion to set aside or vary an *ex parte* Judgement or Order as in the present case. Finally in this connection, the Defendant submitted that this Court had inherent jurisdiction under the provisions of **section 3A** of the *Civil Procedure Act* to make Orders in the interests of justice.

5. Moving on to whether the Defendant was entitled to the Orders sought, the Defendant referred the Court to the Ugandan case of **Sodha v Hemraj (1952) Uganda LR Vol.1** cited with approval in the case of **Stephen Ndichu v Monty's Wines and Spirits (2006) eKLR** in which it was held that to deny a party the right to be heard should be the last resort of a Court. The Defendant's advocate had explained in his Supporting Affidavit the reason why he was unable to respond to the matter when it was called for the Defence hearing on 30th May, 2013. It asked the Court to ignore the comments and observations of the 3rd Plaintiff in her Replying Affidavit. The Defendant concluded that this Court is enjoined to exercise its discretion and vacate *ex parte* Orders, such discretion to be exercised to avoid injustice due to inadvertence or excusable mistake or error. If the Court was to render judgement, without hearing the Defendant, it would lead to a grave injustice. The Defendant had a right to be heard and had always been desirous of presenting its case, always bearing in mind that it had its witnesses in court previously both on the 3rd March 2013 as well as the 22nd April 2013. The Defendant went on to say that it was trite law that a litigant should not be punished due to an excusable error or omission on the part of its counsel. To this end, the Defendant referred this Court to the cases of **Roger v Woods (1948) 1 All ER**, **Kenya Railways v National Cereals and Produce Board Civil Appeal No. 62 of 1998**, **Phillip Chemwolo & Anor. v Augustine Kubende (1982-1988) 1 KAR 1036**, **Stephen Ndichu v Monty's Wines & Spirits (supra)** as well as **Hasa Hauliers v Highway Carriers Ltd Civil Appeal No. 46 of 1968**. The Defendant concluded that the inadvertent happening was due to the Defendant's Advocate suffering an adverse reaction to medication and not being in a position to respond to the matter when the case had been called out. It asked this Court to exercise its discretion in favour of the Defendant and to vacate its said Order dated 30th May 2013.
6. In response, the Plaintiffs filed its Submissions on 30th September 2013. They detailed the background to the Application and analysed the grounds in support thereof. Such grounds were basically factual and required sufficient proof before this Court to entitle the Defendant to the Order sought. In the Plaintiffs' view, the deponent to the Supporting Affidavit should have attached more specific detail as regards his medical condition including a copy of the prescription detailed to him and a more specific account of his visit to his doctor. The Plaintiffs noted that the date of such visit to the doctor had not been mentioned, nor had the name of the doctor, neither the illness nor the condition was stated and more particularly, the deponent had failed to exhibit a medical report or a document to show that he was attended to on the day in question. The

- Plaintiffs' submissions continued in this vein noting that the Court, when the matter was called out for hearing on 30th May 2013, was practically empty. It requested this Court to consider the Affidavit evidence of the 3rd Plaintiff as a correct account of what had transpired. The Plaintiffs noted that if the said advocate's pupil had been present, she would have requested the advocates in the preceding matter before Court to hold her brief. The Plaintiffs went on to speculate that if the Defendant's witnesses had been in Court, they could have stood up to indicate that they were in Court as witnesses in the suit. None of this had happened and the Plaintiffs submitted that the factual grounds in support of the Application had turned out to be false and unsupported.
7. As regards the law, the Plaintiffs submitted that the Defendant did not deserve the exercise of the Court's discretion. It maintained that the Defendant had been dragging out the hearing and that the occurrence on the 30th May 2013 was not an isolated event. The Plaintiffs detailed 10 instances where the Defendant or its counsel was unprepared for the hearing on 30th May 2013 noting that the Defendant had failed to file its witness statements, list of documents or statement of issues. In that regard, it submitted that the Defendant could not purport to have been ready to proceed on 30th May 2013. The Plaintiffs pointed to *Article 159 (2) (a) and (b)* of the Constitution which clearly stated that justice should be done to all, irrespective of status, and should not be delayed. They also pointed to **section 1A** of the *Civil Procedure Act* detailing that the overriding objective in all civil matters was to facilitate the just and expeditious resolution of disputes. In the Plaintiffs' view the granting of the Application would not further the overriding objective. Similarly, **section 1B** of the Act placed a duty on a party and its advocate to assist the Court to attain the overriding objective. The Plaintiffs submitted that the Defendant and its advocate had not lived up to such duty. In the Plaintiffs' view the facts that had been advanced, which would enable the Court to determine whether there had been a mistake on the part of the advocate, were false and unsupported. Failure to attend Court on 30th May 2013 was not a mistake of the advocate alone but also of the Defendant. It had no representatives attending Court available to adduce evidence. The Plaintiffs concluded that the purported mistake should be considered in the broader context of the whole proceedings.
 8. The Defendant's Application before this Court dated 10th June 2013 according to its counsel, has been brought primarily under the provisions of **Order 45 rule 1 – Review. Rule 1 (1)** of the said Order reads:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

Similarly, **Order 12 rule 7** under which the Application is also brought before this Court reads:

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

My problem with both these Orders is that they revolve around the definition of the word “order” in the body thereof. Under **section 2** of the *Civil Procedure Act*, “order” is defined as meaning:

“the formal expression of any decision of a court which is not a decree, and includes a rule nisi.”

The whole question would now seem to be whether what I have recorded, as set out above, in terms of the appearance before Court on 30th May 2013, amounted to an “order”. In my opinion, it did not. This Court only assumed that, as there was no appearance on that day for the Defendant, it did not intend to put up any defence to the Plaintiff’s suit. Judgement was then reserved for delivery on the 12th June 2013. I find that such cannot be interpreted as an “order” of this Court. There was no direction given to the parties. As a result, the Defendant’s Notice of Motion cannot succeed under either **Order 12** or **Order 45**. **Order 51 rule 1** is only the general rule that all applications to Court shall be by motion. That leaves the Defendant’s Application to stay the delivery of the Judgement dependent upon the inherent jurisdiction of this Court and the exercise of its discretion.

9. There is abundant authority as to just when and in what circumstances, a court should exercise its discretion. Such, of course, is not limited to any particular application before court. I received some assistance in this regard from the **Haji Ahmed Sheikh** case (supra) cited to me by the Defendant. In that case, **Gachuhi JA** reviewed the cases cited to him and found as follows:

“The powers of the court in dealing with application under order IX rule 10, is to do justice to the parties. In Pithon Waweru Maina v thuku Mugiria, Civil appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, J.J.A. and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in Patel v E.A. Cargo Handling Services Ltd., (1974) E.A. 75 stated at page 1 of his judgment this:

‘There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just’ The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules’.

In the same appeal Kneller, J.A. quoting Harris, J. in Shah v Mbogo and Another, (1967), E.A. 116 at 123 BC on the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex parte stated:

‘The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who had deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice’.

Looking at this, the purpose of the whole object of the application is to get the defence on the record. Thereafter the suit to proceed to hearing on its merit. Whether the defendant will succeed on his defence to the claim or on his counter-claim cannot be adjudicated at the time of the hearing of the application. It will depend on the evidence. Of course the applicant must be penalized in costs for the delay caused by the extension of time”.

10. This Court received further assistance from the Ruling of my learned brother **Azangalala J.** in the **Stephen Ndichu v Monty’s Wines and Spirits** case (again supra). The learned Judge opined as follows:

“The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel –vs- E. A. Cargo Handling Services Ltd (1974) E. A. 75*). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, 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 cause of justice (see *Shah –vs- Mbogo (1969) E. A. 116*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the

plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration –vs- Gasyali (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”

Later in his said Ruling, **Azangalala J.** also visited the position as regards reasons given by party/counsel for failure to attend Court. The learned Judge quoted from the case of **Philip Chemwolo & Anor. v Augustine Kubende** (supra) as per **Apaloo JA** (as he then was) as follows:

“I think a distinguished equity Judge has said:

‘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 the merits’.

I think the broad equity approach to this matter, is that unless there is fraud of 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 for the purpose of imposing discipline.

In Ngome -vs- Plantex Company Limited [1984] KLR 792, Chesoni Ag. J.A. as he then was in allowing an appeal against an order refusing to set aside an exparte order of dismissal of a suit held at page 798 as follows:

‘By dismissing the appellant’s application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion:

..... and as said by Hancox JA in Herman Mugachia, supra, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That, as said by Ainley J (as he then was) in Sodha vs Hemrai [1952] Uganda L.R. Vol. 7 p. 11 should be the last resort of any court”.

11.I have perused the Defence herein which contains two substantial issues for trial. I have also perused the Defendant’s Statement of Issues as well as its extensive List and Bundle of Documents. I have also considered the reasons put forward in the Supporting Affidavit to the Defendant’s Notice of Motion dated 10th June 2013. I do not accept the Plaintiffs’ contention that the said Supporting Affidavit does not contain sufficient detail as to the reasons given why **Mr. Simiyu Murambi** failed to turn up in Court for the hearing of the Defence’s case on 30th May 2013. I accept the reasons as outlined therein as sufficient for me to exercise my discretion in this matter. Admittedly, the authorities, as quoted above, all relate to the setting aside of judgement but, to my mind, I see no reason why the guidelines and principles therein contained should not apply to an application for stay of delivery of judgement. As a result, I allow the Defendant’s Application dated 10th June 2013. As observed by **Gachuhi JA** in the **Haji Ahmed Sheikh** case as above:

“Of course the applicant must be penalised in costs for the delay caused by the extension of time.”

Accordingly, the Plaintiffs will have the costs of the Defendant’s said Application.

DATED and delivered at Nairobi this 25th day of February, 2014.

J. B. HAVELOCK

JUDGE